U.S. Department of Labor

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

BRB No. 20-0567 BLA

FREDDIE LUTTRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 4/27/2022
	)	
PEABODY ENERGY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

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

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits (2018-BLA-05624) rendered on a claim filed on October 4, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had nine years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal pneumoconiosis[2] in the form of chronic obstructive pulmonary disease (COPD) significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.202(a). He further accepted the parties' stipulation that Claimant is totally disabled by a respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), found that Claimant's total disability is due to legal pneumoconiosis, and awarded benefits. 20 C.F.R. §718.204(c).

On appeal, Employer contends Department of Labor (DOL) district directors, including the district director who processed this case, are inferior officers who were not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[3] It also contends the ALJ erred in excluding certain liability evidence and

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

[2] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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

finding it liable for benefits in this claim. On the merits, it argues the ALJ erred in finding Claimant totally disabled by legal pneumoconiosis.[4] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response.

The Benefits Review 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

Employer argues for the first time that the district director lacked the authority to identify the responsible operator and process this case because he is an "inferior officer" of the United States not properly appointed under the Appointments Clause. Employer's Brief at 14-16, 46-52. Employer relies on *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), in which the United States Supreme Court held ALJs employed by the Securities and Exchange Commission are officers who must be appointed in conformance with the Appointments Clause. *Id.*

The Appointments Clause issue is "non-jurisdictional" and subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to

> [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.

[4] We affirm, as unchallenged on appeal, the ALJ's findings of nine years of coal mine employment and that Claimant is totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 27.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 28 at 2.

the constitutional validity of the appointment of an officer who adjudicates [a 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.").

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.'" *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581 (6th Cir. 2021), *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."[6] 20

[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," and an ALJ may "in his or her discretion, either remand the case to the district

C.F.R. §725.463(b). Absent this exception, the failure to contest an issue before the district director constitutes forfeiture of the issue. *See Johnson v. Royal Coal Co.*, 326 F.3d 421, 425 (4th Cir. 2003) (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 Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962).

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.

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 February 22, 2018, Employer responded by rejecting the district director's findings, requesting a hearing before an ALJ, contesting its designation as the responsible operator and carrier, and contesting Claimant's entitlement to benefits. Director's Exhibits 61, 67, 68. Employer did not, however, identify the district director's authority to process claims as a contested issue the ALJ must resolve. Director's Exhibits 67, 68, 76.

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. 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.

Consequently, we conclude Employer forfeited its right to challenge the district director's authority to identify the responsible operator and process this case. Because this

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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).

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 contend before us that it was.[7] *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 76. 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.

Responsible Insurance Carrier

Claimant last worked in coal mine employment for Peabody Coal Company (Peabody Coal) from 1973 through 1981. Director's Exhibits 4, 6-7; Claimant's Exhibit 6 at 8; Hearing Transcript at 26. Peabody Coal was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy Corporation (Peabody Energy). Employer's Statement to ALJ Addressing Liability Issue; Director's Exhibit 41. Peabody Coal changed its name to Heritage Coal Company (Heritage) after Claimant retired. Director's Exhibit 41. In 2007, Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot). *Id.* In 2011, the DOL authorized Patriot to self-insure for black lung liabilities, including for claims that employees of Peabody Energy subsidiaries filed before Patriot purchased those subsidiaries. *Id.* This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15 million. *Id.* In 2015, Patriot went bankrupt. *See* Employer's Brief at 12; Decision and Order at 29 n.4.

Employer does not directly challenge its designation as the responsible operator.[8] Rather, it asserts "the liability issue is that of the carrier, not of the responsible operator."

[7] Employer implies it raised the issue regarding the district director's authority before the ALJ and the ALJ did not adequately address its argument. Employer's Brief at 14-16. While Employer preserved the issue as to the ALJ's appointment, nowhere did it challenge the district director's authority. *See* Employer's Notice that it is Preserving an Issue Whether the ALJ is Properly Appointed as Required Under the Appointments Clause of the US Constitution; Joint Prehearing Statement at 4; Pretrial Conf. Transcript at 15; Decision and Order at 28.

[8] Peabody Coal Company (Peabody Coal) qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Peabody Coal; (2) Peabody Coal operated a mine after June 30, 1973; (3) Peabody Coal employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and

Employer's Brief at 6. Employer maintains that a private contract between Peabody Energy and Patriot (Separation Agreement) released Peabody Energy from liability for the claims of miners who worked for Peabody Coal. Employer's Brief at 21-24; *see* Director's Exhibit 41. Employer also maintains the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer's Brief at 23-24.

To support its assertion that Patriot is the liable insurance carrier, Employer submitted documentary evidence to the ALJ that was later identified as Employer's Exhibits 12 through 18. August 9, 2018 Submission of Documentation by Employer (Employer Submission); December 20, 2018 Omnibus Evidentiary Order (Dec. 20, 2018 Order) at 2. Employer also sought subpoenas to obtain deposition testimony from David Benedict, Steven Breeskin, and Michael Chance, former and current DOL Division of Coal Mine Workers' Compensation (DCMWC) employees, as well as an "unknown DOL employee." Hearing Transcript at 5; Motion for Extension. The ALJ excluded the exhibits because he found they were not submitted to the district director and Employer did not establish extraordinary circumstances for failing to submit them. *See* 20 C.F.R. §725.456(b)(1); Dec. 20, 2018 Order at 2. The ALJ also denied as untimely Employer's request for subpoenas for the DCMWC employees' deposition testimony. Dec. 20, 2018 Order at 3. The ALJ further rejected Employer's argument that Patriot is the liable carrier, and concluded Peabody Coal and Peabody Energy were the correctly designated responsible operator and carrier, respectively. Decision and Order at 30-32.

Employer argues the ALJ erred in excluding Employer's Exhibits 12 through 18 and not allowing the depositions of the former DCMWC employees.[9] Employer's Brief at 3-7. Employer also argues the ALJ erred in finding it liable for benefits because: (1) the DOL released Peabody Energy from liability; (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; and (3) the Director is equitably estopped from imposing liability on Peabody Energy. Employer's Brief at 10-14, 21-40, 43-45. Employer further asserts that allowing the district director to make an initial determination of the responsible

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(5) Peabody Coal 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). Because Peabody Coal was the last potentially liable operator to employ Claimant as a miner, the ALJ designated Peabody Coal as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 30-31.

[9] While Employer sought deposition testimony from Messrs. Breeskin, Benedict, and Chance and from an unknown DOL employee, on appeal Employer addresses only the ALJ's denial of subpoenas for Messrs. Breeskin and Benedict. Employer's Brief at 3.

carrier in instances involving potential Black Lung Disability Trust Fund (Trust Fund) liability violates due process. *Id.* at 16-21.

Exclusion of Evidence

The district director issued a Notice of Claim on October 7, 2016, designating Peabody Coal, self-insured through Peabody Energy,[10] as a "potentially liable operator." Director's Exhibit 37. The notice gave Employer ninety days to submit evidence disputing its designation. *Id.* Employer responded, denied liability, and requested it be dismissed, arguing Patriot was the proper responsible carrier. Director's Exhibit 35. Employer did not provide any documentary evidence to support its contention that Patriot, not Peabody Energy, was liable for benefits. *Id.* The district director declined to dismiss Employer. Director's Exhibit 36.

Thereafter, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Peabody Coal, self-insured through Peabody Energy, as the responsible operator and carrier. Director's Exhibit 45. The district director indicated Employer had until March 5, 2017 to submit additional documentary evidence relevant to liability and to identify any witnesses it intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id.* The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the [OALJ]." *Id.* at 3, *citing* 20 C.F.R. §725.456(b)(1).

Employer responded to the SSAE on February 3, 2017, and contested liability. Director's Exhibit 41. At the same time, it submitted documents to support its controversion of liability, including a 2007 Separation Agreement between Peabody Energy and Patriot; a March 4, 2011 letter from Mr. Breeskin to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program; and the DCMWC's decision authorizing Patriot to self-insure. *Id.* Employer also identified potential liability

[10] The Notice of Claim, as well as other documentation issued by the district director, identifies Peabody Coal as the responsible carrier. Director's Exhibits 37, 45, 61. However, it is evident from the record that Peabody Energy was the self-insurer for Peabody Coal at the time of Claimant's employment with Peabody Coal and Peabody Energy has actively participated in this litigation. Director's Exhibit 41; Employer's Statement to ALJ Addressing Liability Issue; Employer's Brief. To avoid confusion, we will refer to Peabody Energy as the responsible carrier notwithstanding how the district director identified it.

witnesses, including Messrs. Breeskin and Benedict. *Id.* Employer did not request an extension to submit additional liability evidence.

The district director issued a Proposed Decision and Order on February 22, 2018, finding Peabody Coal and Peabody Energy are the responsible operator and carrier, respectively. Director's Exhibit 61. Employer requested a hearing, and the case was forwarded to the OALJ on April 4, 2018. Director's Exhibits 68, 76.

After the case was transferred to the OALJ, Employer submitted Employer's Exhibits 12 through 18. Employer Submission; Dec. 20, 2018 Order at 2. At the hearing, Employer requested subpoenas be issued for the testimony of the former DCMWC employees. Hearing Transcript at 5. The ALJ declined to issue the subpoenas, finding they were untimely requested. Dec. 20, 2018 Order. He further excluded Employer's Exhibits 12 through 18 because Employer did not submit them to the district director or establish extraordinary circumstances for failing to do so.[11] Dec. 20, 2018 Order; *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).

Documentary Evidence

Employer argues the ALJ erred in excluding Employer's Exhibits 12 through 18 because evidence pertaining to the carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1), as it applies only to evidence pertaining to the responsible operator's liability. Employer's Brief at 6-7. We disagree.

[11] The documentary evidence pertaining to liability that Employer submitted before the ALJ included Employer's Exhibit 12, Patriot's authorization to self-insure, and Employer's Exhibit 13, the March 4, 2011 letter from Mr. Breeskin to Patriot, both of which had been submitted to the district director and had been admitted by the ALJ as Director's Exhibit 41. Thus, these two documents were admitted and considered by the ALJ. *See* Decision and Order at 31; Director's Exhibit 41. Employer submitted for the first time before the ALJ Employer's Exhibit 14, a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 15, an undated letter from Mr. Chance regarding Patriot's self-insurance reauthorization audit requiring retroactive coverage for all claims through July 1, 1973; Employer's Exhibit 16, a March 4, 2011 indemnity agreement releasing Bank of America from liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance because the DOL had either lost or destroyed it; Employer's Exhibit 17, documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Black Lung Disability Trust Fund; and Employer's Exhibit 18, Peabody Energy's indemnity bond.

A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, 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 resolve identifying the responsible operator or carrier before a case is referred to the OALJ, the ALJ properly found the regulations require that, absent extraordinary circumstances, liability evidence pertaining to the responsible carrier must be timely submitted to the district director.[12] 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. at 79,989; Dec. 20, 2018 Order.

Employer next argues the ALJ erred in finding it failed to establish extraordinary circumstances for not submitting this liability evidence when the case was before the district director. Employer's Brief at 5-6. Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Relying on *Howard v. Valley Camp Coal Co*., 94 F. App'x 170 (4th Cir. 2004), Employer argues that determining whether extraordinary circumstances exist requires the ALJ to first determine that it "actually obtained" the documents while the claim was before the district director because such documents are subject to a more lenient admission standard. Employer's Brief at 5-6. But *Howard*, even if it applied, does not support Employer's argument because it addresses a provision of a since-amended regulation that applied to *documentary* evidence and not the *liability* evidence at issue here.[13] 20 C.F.R. §725.456(d) (2000); 94 F. App'x at 173-74.

[12] We note that the process before the district director to determine whether an operator is the responsible operator includes its capability to assume liability for the payment of benefits. 20 C.F.R. §725.408(a)(2)(v). This implicates the carrier of insurance for the payment of benefits as the existence of insurance is an important consideration in determining the operator's ability to assume liability.

[13] In *Howard*, under the specific language of a provision addressing documentary evidence, the court held the standard for the late admission for medical records a party obtained, but did not submit, before the district director was good cause, not extraordinary circumstances. 94 F. App'x at 173-74. The regulation by its plain terms did not apply to liability evidence and thus is irrelevant here. 20 C.F.R. §725.456(d) (2000). Regardless,

In contrast, the applicable regulation regarding liability evidence at 20 C.F.R. §725.456(b)(1) without exception requires the ALJ to reject liability evidence when it is not first submitted to the district director without regard to when it was obtained unless extraordinary circumstances are established. Based on these facts, we hold the ALJ did not abuse his discretion in finding Employer failed to establish extraordinary circumstances to justify the late admission of its liability evidence. *Blake*, 24 BLR at 1-113; Dec. 20, 2018 Order.

Subpoenas for Breeskin and Benedict Depositions

Employer contends the ALJ abused his discretion by denying subpoenas for the deposition testimony of Mr. Breeskin and Mr. Benedict as the ALJ had already held the record open until after the date of the scheduled depositions for the submission of other evidence. Employer's Brief at 3. It further argues the ALJ treated the requested testimony differently than the other evidence in this claim that was allowed post-hearing. *Id.* at 4. We disagree.

In finding Employer's request for the subpoenas untimely, the ALJ considered the notice provided in his pre-hearing order that post-hearing submissions were highly discouraged and would not be admitted absent "extraordinary circumstances." Dec. 20, 2018 Order at 3; Notice of Assignment, Hearing, and Pre-Hearing Order (Pre-hearing Order) at 2, 7. The ALJ also indicated discovery was to end twenty-five days prior to the hearing; yet Employer did not submit its request for the subpoenas until the day of the hearing. Dec. 20, 2018 Order at 3; Pre-hearing Order at 3. The ALJ further found that the witnesses were known well before the hearing date, as evidenced by their scheduled depositions in other cases; thus, the subpoenas could have been timely requested. Dec. 20, 2018 Order at 3. Therefore, the ALJ found Employer did not make any showing to excuse the untimely subpoena request. *Id.*

Employer argues the ALJ disparately treated the post-hearing evidence without adequate basis, apparently referring to the ALJ's allowance of the post-hearing deposition of Dr. Selby. Employer's Brief at 3-4; Hearing Transcript at 7-8. Dr. Selby's deposition had been originally scheduled prior to the hearing; however, the physician canceled just days before the deposition. Hearing Transcript at 7. None of the parties objected to this post-hearing evidence and the ALJ allowed Employer to obtain and submit Dr. Selby's deposition post-hearing. *Id.* at 8. In contrast, the subpoenas for the testimony of Messrs.

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it is not binding precedent as an unpublished decision from the United States Court of Appeals for the Fourth Circuit. The Sixth Circuit has jurisdiction in this case.

Breeskin and Benedict were not filed until the day of the hearing and the Director objected to their issuance. Hearing Transcript at 5, 9-10; Dec. 20, 2018 Order at 3.

Given the ALJ's pre-hearing order and his findings that Employer was aware of the witnesses well before the hearing date and provided no excuse for untimely requesting the subpoenas, we see no abuse of discretion in the ALJ's ruling. *Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113. Further, we decline to hold the ALJ abused his discretion in allowing the unopposed and previously-noticed post-hearing deposition of Dr. Selby while not issuing the opposed subpoenas for post-hearing depositions of Messrs. Breeskin and Benedict.[14] *Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113.

Due Process Challenge

Employer generally asserts that 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 16-21.

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.[15] 20 C.F.R. §725.423. In this case, Employer was timely put on notice of its liability and had the opportunity to submit its liability evidence relevant to the

[14] Employer also argues that it "properly preserved" its right to depose these individuals under 20 C.F.R. §725.457(c)(1) by informing the district director they would be liability witnesses and their depositions should have been admitted once taken and offered to the ALJ because the testimony was relevant to its theory of the case. Employer's Brief at 4-5. However, whether Employer provided proper notice of liability witnesses to the district director is not relevant to whether it timely pursued their testimony before the ALJ. Further, the relevancy of their testimony is not at issue given the ALJ declined to issue subpoenas for the testimony because the request was untimely and extraordinary circumstances were not shown.

[15] Moreover, Employer may challenge the denial of any extension request before an ALJ, the Board, or a circuit court. *See, e.g.*, *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018).

responsible operator and carrier issues while the case was before the district director. Employer therefore has not demonstrated a due process violation.[16] *Id.*

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.[17] Employer's Brief at 21-24, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibit 41. 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 21-24. 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.*

The ALJ rejected this argument. He first found the language of the letter of credit "at most" demonstrates that Patriot's self-insurance application had been approved, but "does not establish that the [DOL] would not seek payment from Peabody [Energy]." Decision and Order at 31. Employer does not specifically challenge this factual finding. Thus, it is affirmed. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

He further found that the process by which Patriot was self-insured and the process leading to that approval, including the acceptance of the application and the DOL's determination of security, "do not alter the fact that Peabody [Energy] is primarily liable for the payment of any benefits." Decision and Order at 31-32.

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[16] Employer states that it wants to "preserve" its arguments that the ALJ's decision to cut off discovery and the Director's failure to maintain proper records violate its due process rights, because "[m]any of the arguments [it] made . . . are not yet ripe for inclusion." Employer's Brief at 41-42. Employer does not ask the Board to address these issues, but only wishes to note that it is exhausting the administrative process. *Id.*

[17] Employer also cites an indemnity agreement the DOL entered into with Bank of America contained in Employer's Exhibit 16, and the depositions of Messrs. Benedict and Breeskin to support its arguments. Employer's Brief at 22-24. As discussed above, however, the ALJ excluded this evidence from the record.

The Act and the regulations require an operator to "secure the payment of benefits by (1) qualifying as a self-insurer . . . or (2) insuring and keeping insured [with a commercial carrier] the payment of such benefits . . . ." 30 U.S.C. §933(a), as implemented by 20 C.F.R. §726.110. To qualify as a self-insurer, operators must "execute and file with the Office [of Workers' Compensation Programs (OWCP)] an agreement and undertaking . . . 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). An operator is also required to "provide security in a form approved by the [OWCP] . . . and in an amount established by the [OWCP]." 20 C.F.R. §726.110(a)(3). These provisions establish an operator's liability stems from its obligation to pay federal black lung benefits, not whether it has complied with the requirements that it provide security for the payment of benefits.

Employer has failed to cite any authority that allows the DOL to release a designated responsible operator from liability as opposed to releasing its posted security. Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit absolves Peabody Energy of liability.

Equitable Estoppel

Employer argues that under the doctrine of equitable estoppel, it should be relieved of liability. Employer's Brief at 29-40, 43-45. To invoke equitable estoppel, Employer must show both the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *Premo v. United States*, 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 United States 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 DOL released Peabody Energy from liability "without securing proper funding by Patriot" and that this constitutes affirmative misconduct. Employer's Brief at 32-36. As discussed above, however, Employer identifies no admissible evidence establishing the DOL released Peabody Energy from liability or made a representation of such a release with respect to Peabody's liability. Thus, the ALJ properly rejected this argument. Decision and Order at 31 (Employer's assertion that the DOL released Peabody Energy from liability is "unfounded"); *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

The ALJ also found no "alleged actions taken by the [DOL] that would constitute affirmative misconduct," as Employer's allegations of the DOL's conduct do not rise to the level of "misrepresentation or concealment" or actions that could "cause an egregiously unfair result." Decision and Order at 32, *citing GAO v. GAO Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983). The ALJ's determination that the Director's alleged failure to secure proper funding by Patriot does not constitute affirmative misconduct is rational and within his function as the fact-finder. *Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116. Because Employer failed to establish the necessary elements, we affirm the ALJ's rejection of its equitable estoppel argument.

20 C.F.R. §725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[18] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability. Employer's Brief at 25-29. 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 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 that Patriot is not a potentially liable operator because of its bankruptcy. Employer's Brief at 27; *see* 20 C.F.R §725.494(e). Insofar as the DOL authorized Patriot to self-insure, Employer argues Peabody Coal and Peabody Energy

[18] 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, 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.

cannot be named as the responsible operator and carrier pursuant to 20 C.F.R. §725.495(a)(4). Employer's Brief at 27-29.

The ALJ correctly found, however, Patriot never employed Claimant, as he retired from Peabody Coal in 1981, twenty-six years before Patriot came into being; thus, 20 C.F.R. §725.495(a)(4) does not apply. Decision and Order at 32. Rather, the ALJ found Employer met the requirements for liability under the Act: Peabody Coal employed Claimant for a year or more, Claimant was not employed by any other coal mine operator after Peabody Coal, and Peabody Coal was self-insured through Peabody Energy during the relevant time. Decision and Order at 31. Employer identifies no error in these findings. *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 argue or present any evidence that Peabody Energy is unable to assume liability in the event Claimant is found to be eligible for benefits. Decision and Order at 31; 20 C.F.R. §§725.494(e), 725.495(a)(3). We therefore affirm the ALJ's finding Employer liable for benefits.[19]

Part 718 Entitlement

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

To establish legal pneumoconiosis,[20] Claimant must demonstrate that he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States

[19] Employer notes that it preserves the issue of whether the DOL's Black Lung Benefits Act Bulletin No. 16-01 violates the Administrative Procedure Act, but it does not ask the Board to address the issue. Employer's Brief at 43. Bulletin No. 16-01, which the Director of the Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, issued on November 12, 2015, instructed district directors to name Peabody Energy the responsible operator in claims involving Patriot. *Id.*

[20] The ALJ found Claimant did not establish clinical pneumoconiosis. Decision and Order at 25.

Court of Appeals for the Sixth Circuit has held that a miner can satisfy this burden by showing that the disease was caused "in part" by coal dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a de minimis contribution' and instead 'a contributing cause of some discernible consequence.'").

Drs. Chavda, Baker, and Sood diagnosed legal pneumoconiosis in the form of COPD and emphysema caused by a combination of cigarette smoking and coal mine dust exposure. Director's Exhibits 16, 21, 31; Claimant's Exhibit 7. Dr. Selby opined Claimant has asthma and emphysema unrelated to coal mine dust exposure and thus does not have legal pneumoconiosis. Director's Exhibit 28; Employer's Exhibit 5.

The ALJ found Drs. Chavda's and Baker's opinions well-documented because both administered testing, accounted for Claimant's work, medical, and smoking histories, and are qualified to render opinions on the issues in this case. Decision and Order at 25. He further found their opinions well-reasoned as consistent with their underlying documentation, as well as with the studies found credible by the Department and cited in the preamble to the 2001 amended regulations which recognize the additive risks of smoking and coal mine dust exposure. Decision and Order at 25-26, *citing Brandywine Explosives & Supply v. Director* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015). He also found Dr. Sood's opinions to be well-documented and reasoned, for although Dr. Sood did not examine Claimant, he reviewed "sufficient medical data" and presented a "very detailed and comprehensive report" better supported by the scientific literature, including studies cited in the preamble, than that of Dr. Selby. *Id.* at 26.

In contrast, the ALJ found Dr. Selby's opinions less persuasive for several reasons. Decision and Order 26-27. He discounted Dr. Selby's opinion that Claimant's emphysema is a bullous type of emphysema that is unrelated to coal mine dust exposure because he found that Dr. Sood provided a "more detailed" explanation based on medical literature for why Claimant's emphysema was related to coal mine dust exposure. Decision and Order at 26. The ALJ also found Dr. Selby's reliance on a post-bronchodilator response misplaced, as he did not adequately explain why the irreversible portion of Claimant's impairment is not related to coal mine dust exposure. Decision and Order at 26-27. Additionally, he found Dr. Selby's opinion that coal mine dust exposure does not cause asthma to be inconsistent with the preamble. Decision and Order at 27. Finally, the ALJ discredited Dr. Selby's opinion that Claimant's asthma was unrelated to coal mine dust exposure as inconsistent with the DOL's recognition of pneumoconiosis as a progressive disease. Decision and Order at 27.

Employer argues the ALJ erred in finding Dr. Selby's opinion that coal mine dust exposure does not cause asthma to be inconsistent with the preamble. Employer's Brief at 7-9. We need not resolve this issue, because Employer does not challenge the ALJ's other reasons for discrediting Dr. Selby's opinion.

The ALJ correctly indicated that even accepting Dr. Selby's opinion that asthma is not caused by coal mine dust exposure, the question remains whether Claimant's asthma was significantly related to, or substantially aggravated by, his coal mine dust exposure. Decision and Order at 27; 20 C.F.R. §718.201(b). Dr. Selby acknowledged that coal mine dust can aggravate asthma, but indicated it would not have done so in this case because Claimant's asthma arose many years after his coal mine dust exposure ended. Decision and Order at 27; Employer's Exhibit 5 at 30-31. The ALJ permissibly found Dr. Selby's opinion to be inconsistent with the DOL's recognition that coal mine dust-induced diseases maybe progressive in nature. Decision and Order at 27; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); 20 C.F.R. §718.201(c) (recognizing pneumoconiosis can be a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure). Moreover, Employer does not challenge this credibility determination. *See Skrack*, 6 BLR at 1-711.

Nor does Employer specifically challenge the ALJ's other two reasons for according less weight to Dr. Selby's opinion: the physician unpersuasively relied on the partial reversibility of Claimant's impairment and his opinion regarding the etiology of Claimant's emphysema was outweighed by a better-explained and supported opinion from Dr. Sood. Thus, we also affirm the ALJ's rejection of Dr. Selby's opinion on those bases. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Skrack*, 6 BLR at 1-711; Decision and Order at 26-27.

Moreover, Employer does not specifically challenge the ALJ's credibility findings with respect to Drs. Chavda, Baker, and Sood; thus, we affirm the ALJ's decision to credit their opinions that Claimant has legal pneumoconiosis. *Adams*, 694 F.3d at 801-02; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.201(b); Decision and Order at 27. Therefore, we also affirm his finding that Claimant established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 597-98; Decision and Order at 27.

Finally, as Employer raises no specific allegations of error regarding disability causation, other than to assert Claimant does not have legal pneumoconiosis, we affirm the ALJ's finding that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 28.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to affirm the ALJ's liability determination and the award of benefits. I write separately, however, to express my view that on the merits Employer has not established that black lung district directors are inferior officers subject to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.[21]

[21] While my colleagues are correct that Employer did not comply with mandatory claims-processing regulations in pursuing its appeal, no party has raised its noncompliance at any time during this litigation, in contrast to the ALJ Appointments Clause cases my colleagues cite in which the Director universally raised to the Board the failure to preserve the issue below. By finding the issue precluded on their own accord, my colleagues thus improperly treat compliance with mandatory claims-processing rules as a jurisdictional requirement for this single issue. *See, e.g., Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846 (claims processing-rules are not jurisdictional, so they "must be timely raised to come into play."); *George v. Youngstown State Univ.*, 966 F.3d 446, 469 (6th Cir. 2020) (collecting cases and noting that circuit precedent "prohibits sua sponte enforcement of [administrative exhaustion requirements]" in the face of defendants' "forfeiture for failure to raise the defense.") (citations omitted). The result is the uneven application of the black lung mandatory claims-processing regulations that the Sixth Circuit has repeatedly warned against. *Joseph Forrester Trucking v. Director, OWCP*, 987 F.3d 581, 589 (6th Cir. 2021) ("And even when duly enacted, the Department may not apply its regulations in an unreasonable or arbitrary manner, for example, by selectively enforcing the regulations");

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 48. Employer also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id.* at 49. 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 asserts the case must be remanded and reassigned to a properly appointed official. Employer's Brief at 50-52.[22]

But a more accurate examination of their authority reveals district directors perform routine administrative functions. They do not have "significant adjudicative" capacity, possessing none of the four powers *Lucia* held make ALJs akin to federal district court judges. 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).[23]

Island Creek Coal Co. v. Bryan, 937 F.3d 738, 747 (6th Cir. 2019) ("And the agency must not misinterpret the regulation or apply it in an arbitrary manner (by, for example, enforcing it against some parties but not others).").

[22] At times Employer includes claims examiners as inferior officers in its argument, and at others it alleges its argument only applies if the record is not reopened for the submission of documentary evidence. Employer's Brief at 14-16. Neither assertion changes anything: 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 v. Comm'r*, 501 U.S. 868 (1991)). Employer simply has not -- and cannot -- establish that either position it identifies holds such authority. *Id.*

[23] Notably, the distinction in authority possessed by district directors and ALJs is by design. When Congress incorporated the administrative scheme of the Longshore and

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.

First, black lung district directors never conduct formal hearings. Thus, the paramount factor the *Lucia* Court found to justify officer status, the authority to hold a hearing, is missing from the district director's arsenal. 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 adversarial hearings no fewer than five times. Indeed, 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.

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 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

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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).

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 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 the claimant 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 federal district court. 20 C.F.R. §725.351(c).[24]

Unlike DOL 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. 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 as among the small category of inferior officers under existing law. *Id.* at 2052 (holding no reason existed to

[24] 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 transferred to the OALJ mandates the requirement. 20 C.F.R. §725.413(c).

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 claim-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 14-16, 49-51. 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 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. The district director gets one chance at identifying the liable operator and if the district director chooses incorrectly, 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 the district director lacks significant independent authority in claims processing relevant to the responsible operator designation.[25]

[25] Moreover, 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 Trust Fund, and ensures that the Director, as a party

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, Inc.*, 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 -- subject to de novo review by an ALJ and further review by the Board and the federal courts of appeals -- independently transform them. I therefore would find on the merits 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).

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to the litigation, receives a complete adjudication of his interests." 65 Fed. Reg. 79,920, 80,005 (Dec. 20, 2000).

JONATHAN ROLFE
Administrative Appeals Judge