U.S. Department of Labor

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

BRB No. 19-0435 BLA

BOBBY C. KNIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION, c/o UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 12/15/2020
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

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

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

GRESH, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2017-BLA-05742) rendered on a claim filed on July 13, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with "at least [ten], but no more than [thirteen] years" of coal mine employment and thus found he could not invoke the rebuttable 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 administrative law judge found Claimant established legal pneumoconiosis 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 found Claimant totally disabled due to the disease. 20 C.F.R. §718.204(b)(2), (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.[2] It also contends the administrative law judge erred in finding it liable for the payment of benefits, arguing he erred in calculating Claimant's coal mine employment

[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] 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.

and cigarette smoking histories and in finding Claimant totally disabled by legal pneumoconiosis.[3] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenge and to affirm the determination that Employer is liable for benefits.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

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 14-16. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. To merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). Moreover, a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding 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 43.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Employer generally argues district directors are afforded "broad" and "significant discretion" in evaluating which operator is responsible for the payment of benefits, and therefore they are inferior officers subject to the Appointments Clause. Employer's Brief at 14-16. Employer cites the applicable regulations providing that the parties must submit liability evidence while a case is before the district director, and liability evidence cannot be submitted when a case goes before the Office of Administrative Law Judges (OALJ) absent "extraordinary circumstances." *Id*.; *see* 20 C.F.R. §§725.414, 725.456(b)(1). Employer relies solely on *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018),[5] in which the United States Supreme Court held Securities and Exchange Commission administrative law judges are officers who must be appointed in conformance with the Appointments Clause, to support its position. Employer's Brief at 14-16.

Employer makes a conclusory assertion that district directors have the same "authority wielded" by administrative law judges. *Id*. But Employer has not adequately set forth what powers district directors hold, the discretion afforded district directors in identifying the responsible operator for a claim, and how *Lucia* supports its position that district directors are inferior officers. Thus we decline to address this issue. *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

Responsible Insurance Carrier

Claimant last worked in coal mine employment for Peabody Coal Company (Peabody Coal) from November 1971 to April 1984. Director's Brief at 2 n.1, *citing* Director's Exhibits 3 (Claimant's self-reported employment history), 5-6 (Claimant's Social Security Administration earnings records). Peabody Coal was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy Corporation (Peabody Energy). *Id*. Peabody Coal changed its name to Heritage Coal Company (Heritage) after Claimant retired. *Id*. In 2007, Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot). Director's Exhibit 30. In 2011, DOL authorized Patriot to self-insure for black lung liabilities, including for claims that employees of Peabody Energy subsidiaries filed

[5] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

before Patriot purchased them. *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. *Id*.

Employer does not directly challenge its designation as the responsible operator.[6] Rather, it asserts the liability issue "is that of the [responsible] carrier, not of the responsible operator." Employer's Brief at 2. 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 Heritage. *Id*. at 10-14, 21-44; *see* Director's Exhibit 30. Employer also maintains the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer's Brief at 10-14, 21-44.

To support its assertion that Patriot is the liable insurance carrier, Employer submitted documentary evidence to the administrative law judge marked Employer's Liability Exhibits 1 through 7 and deposition testimony from David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation (DCMWC) employees. The administrative law judge excluded the exhibits because he found 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); Dec. 17, 2018 Order on Employer's Request for Leave to Submit Documentary Evidence (Dec. 17, 2018 Order). Subsequently, the administrative law judge also excluded the depositions, agreeing with the Director's argument that Employer failed to establish the testimony is relevant for admissibility purposes. *See* May 16, 2019 Supplemental Order on Employer's Motion to Admit (May 16, 2019 Order). The administrative law judge rejected Employer's argument that Patriot is the liable carrier, and concluded Heritage and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 7-14; Dec. 17, 2018 Order; May 16, 2019 Order.

Employer argues the administrative law judge erred in excluding Employer's Liability Exhibits 1 through 7 and the depositions of the two former DCMWC employees.

[6] Heritage Coal Company (Heritage) qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Heritage; (2) Heritage operated a mine after June 30, 1973; (3) Heritage 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 (5) Heritage 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 Heritage was the last potentially liable operator to employ Claimant as a miner, the administrative law judge designated Heritage as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 9.

Employer's Brief at 2-6. Therefore it requests the Board remand the case for the administrative law judge to admit the evidence and reconsider the responsible carrier issue. *Id*. Employer also argues the administrative law judge 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 10-44. Employer also asserts that allowing the district director to make an initial determination of the responsible carrier in instances involving potential Black Lung Disability Trust Fund (Trust Fund) liability violates due process. *Id*. at 16-21.

The Director responds that the administrative law judge did not abuse his discretion in excluding the exhibits and depositions. Director's Response at 20-28. She also urges Employer's due process argument be rejected. *Id*. at 14-18. In response to Employer's general factual assertion that Peabody Energy transferred its black lung liabilities to Patriot, the Director states Peabody Energy was never released from liability for claims under the Act. *Id*. at 24-28. Further, she asserts 20 C.F.R. §725.495(a)(4) does not preclude Employer's designation as the responsible operator. *Id*. at 28. In addition, she contends there is no basis for Employer's equitable estoppel argument. *Id*. at 28-31. The Director maintains Peabody Energy was properly designated as the responsible carrier because Claimant last worked for Heritage when it was self-insured through Peabody Energy and there is no argument that it is incapable of paying benefits. *Id*. at 18-20.

Exclusion of Evidence -- Relevant Procedural History

The district director issued a Notice of Claim on July 15, 2016, designating Heritage, self-insured through Peabody Energy, as a "potentially liable operator." Director's Exhibit 18. The notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id*. Employer responded, denied liability, and requested the district director dismiss it, arguing Patriot was the proper responsible carrier. Director's Exhibit 23. Employer did not provide any documentary evidence to support its contention that Patriot, not Peabody Energy, was liable for benefits. Director's Exhibit 23. The district director declined to dismiss Employer and reiterated that Heritage, self-insured through Peabody Energy, was properly designated as a potentially liable operator or carrier. Director's Exhibit 24.

Thereafter the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Heritage and Peabody Energy as the responsible operator and carrier. Director's Exhibit 37. The district director informed Heritage and Peabody Energy that they had until January 15, 2017, to submit additional documentary evidence relevant to liability and should identify any witnesses they intended to rely on if the case was referred to the 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 December 6, 2016, and contested liability. Director's Exhibits 38. Employer also submitted documents to the district director on January 13, 2017, to support its controversion of liability. Director's Exhibit 30. It specifically submitted a 2007 Separation Agreement between Peabody Energy and Patriot; a March 4, 2011 letter from Mr. Breeskin, former director of the DCMWC, to Patriot releasing a letter of credit financed under Peabody's self-insurance program; and the DCMWC's decision authorizing Patriot to self-insure. Director's Exhibit 30. Employer also identified a number of potential liability witnesses, including the two former DCMWC employees, Mr. Breeskin and Mr. Benedict. *Id*. Employer did not request any additional time to submit further liability evidence. After the deadline to submit documentary evidence passed, Employer filed a request for the production of documents with the Director on January 25, 2017, related to Patriot's application for self-insurance, its bankruptcy, and the status of the security deposits it submitted "to cover its liability as a self-insurer." Director's Exhibit 31.

The district director issued a Proposed Decision and Order on February 16, 2017, finding Heritage and Peabody Energy are the responsible operator andcarrier. Director's Exhibit 42. Employer requested a hearing and the case was forwarded to the OALJ on April 19, 2017. Director's Exhibits 41, 50.

After the case was transferred to the OALJ, Employer issued subpoenas for the testimony of the two former DCMWC employees, Mr. Benedict and Mr. Breeskin.[7] June 22, 2018 Subpoena Request. It also submitted documentary evidence marked Employer's Liability Exhibits 1-7. July 25, 2018 Employer's Notice of Submission. The administrative law judge allowed Employer to depose Mr. Benedict and Mr. Breeskin over the Director's objection for discovery purposes.[8] Oct. 9, 2018 Supplemental Order on

[7] Employer also issued subpoenas to DCMWC employee Michael Chance and an unknown witness at "US DOL/OWCP/DCMCW." June 22, 2018 Subpoena Request. The administrative law judge sustained the Director's objections to these subpoenas because Employer did not name these witnesses while the case was before the district director, and Employer did not establish extraordinary circumstances for failing to do so. October 9, 2018 Order.

[8] The administrative law judge noted a deposition may be permitted for discovery if it appears reasonably calculated to lead to the discovery of admissible evidence. Oct. 9, 2018. A discovery deposition is in contrast to a *de bene esse* deposition, which is a deposition taken for the sole purpose of preserving a witness's testimony for use at trial.

Director's Objection to Employer's Request for Subpoenas (Oct. 9, 2018 Order). He excluded Employer's Liability Exhibits 1-7, however, because he found Employer did not submit them to the district director or establish extraordinary circumstances for failing to do so.[9] December 17, 2018 Order; *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).[10] *Id*.

After obtaining deposition testimony from Mr. Benedict and Mr. Breeskin, Employer moved to admit their discovery deposition transcripts into the record. Feb. 27, 2019 Employer's Motion to Admit Depositions. The administrative law judge ultimately

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See Manley v. AmBase Corp., 337 F.3d 237, 247 (2d Cir. 2003), *citing* Black's Law Dictionary 408 (7th ed. 1999).

[9] The documentary evidence pertaining to liability that Employer submitted before the administrative law judge included Employer's Liability Exhibit 1, Patriot's authorization to self-insure, and Employer's Liability Exhibit 2, the March 4, 2011 letter from Mr. Breeskin to Patriot, both of which had been submitted to the district director and admitted by the administrative law judge as Director's Exhibit 30. Although the administrative law judge stated he was excluding Employer's Liability Exhibits 1 and 2, he noted they are duplicative of evidence contained in Director's Exhibit 30. He explained he was not excluding Director's Exhibit 30. *Id*. Thus although these two documents were not admitted as Employer's Liability Exhibits 1 and 2, they were admitted as Director's Exhibit 30.

Further, Employer submitted for the first time Employer's Liability Exhibit 3, a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's Liability Exhibit 4, 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 Liability Exhibit 5, 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 Liability Exhibit 6, documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Black Lung Disability Trust Fund; and Employer's Liability Exhibit 7, Peabody's Indemnity Bond.

[10] In a May 16, 2019 Order, the administrative law judge rejected Employer's additional argument that it did not have to establish extraordinary circumstances for the submission of evidence relevant to the carrier's liability, and reiterated his exclusion of Employer's Liability Exhibits 1-7.

agreed with the Director's argument that Employer failed to establish that their testimony was relevant for admissibility purposes.[11] May 16, 2019 Order.

Applicability of Extraordinary Circumstances Requirement

Employer initially argues that the administrative law judge erred in excluding Employer's Liability Exhibits 1-7 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). Employer's Brief at 2-5. We disagree.

A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. 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 administrative law judge properly found the regulations require that, absent extraordinary circumstances, liability evidence pertaining to the responsible carrier must be timely submitted to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. at 79,989; December 17, 2018 Order; May 16, 2019 Order.

Employer next argues the administrative law judge 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 2-5. Because an administrative law judge 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 administrative law judge's disposition of a procedural or evidentiary issue must establish the administrative law judge's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer asserts "extraordinary circumstances" exist because the Director was in possession of the liability evidence but did not provide it to Employer. Employer's Brief at 2-5. Employer's contention has no merit. As discussed above, Employer requested the relevant documents after the deadline to submit additional evidence to the district director relevant to its liability. Director's Exhibits 31, 37. Before that deadline, Employer did not request an extension of time from the district director. The Director has no duty to produce

[11] The administrative law judge explained he permitted their discovery depositions to go forward over the Director's objections because they could potentially produce evidence relevant to Employer's liability, but noted "relevancy for discovery purposes is broader than that for admissibility." May 16, 2019 Order at 5.

documents Employer requested after the deadline for submitting liability evidence.[12] Moreover, it is Employer's responsibility, not the Director's, to submit any documentation relevant to its liability by the deadline set forth in the SSAE.

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 administrative law judge to first determine that it "actually obtained the exhibit." Employer's Brief at 4-5. But *Howard* does not support Employer's argument. In *Howard*, the United States Court of Appeals for the Fourth Circuit held the administrative law judge misapplied the "extraordinary circumstances" standard of 20 C.F.R. §725.456(d) (2000) by excluding petitioner's medical exhibits based only on finding they had been "in existence," without making a further finding that petitioner had "obtained" the documents while the case was before the district director. *Howard*, 94 Fed App'x at 174. Under the factual circumstances presented in *Howard*, the court held the proper inquiry was whether the petitioner had established good cause for admission of the exhibits, not extraordinary circumstances. *Id*. However, the since-repealed regulation at issue in *Howard* stated the administrative law judge could not admit into the record documentary evidence a party obtained, but did not submit, while the case was before the district director in the absence of extraordinary circumstances. 20 C.F.R. § 725.456(d) (2000). That regulation did not apply to liability evidence.

In contrast, the applicable regulation regarding liability evidence at 20 C.F.R. §725.465(b)(1) requires the administrative law judge 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.[13] Based on these facts, we hold the administrative law judge 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; December 17, 2018 Order.

[12] Employer offers no explanation in this appeal why it did not file a request for the production of documents before the January 15, 2017 deadline. We see no reason why Employer's inaction at the district director level now justifies a finding of "extraordinary circumstances." 20 C.F.R §725.465(b)(1); *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc).

[13] Moreover, *Howard v. Valley Camp Coal Co.*, 94 F. App'x 170 (4th Cir. 2004) is not binding precedent here as it is an unpublished decision from the United States Court of Appeals for the Fourth Circuit. The Sixth Circuit has jurisdiction in this case.

Benedict and Breeskin Depositions

Employer contends the administrative law judge erred in excluding the discovery deposition transcripts of Mr. Benedict and Mr. Breeskin. Employer's Brief at 5-6. We disagree. After Employer obtained their deposition testimony, it moved to admit their depositions into the record. March 1, 2019 Motion to Admit. The Director objected, arguing the transcripts were irrelevant to the issue of whether Heritage and Peabody Energy are the responsible operator and carrier for this claim. March 15, 2019 Director Objection to Motion to Admit the Depositions. Although Employer responded to the Director's objection to this evidence,[14] it did not assert the testimony was relevant for admissibility purposes. April 15, 2019 Reply to the Director's Objection to Admitting Depositions.

In addressing this issue, the administrative law judge explained that while he permitted the depositions to proceed because they could potentially produce testimony relevant to Employer's liability,[15] "relevancy for discovery purposes is broader than that for admissibility." May 16, 2019 Order at 5. As Employer did not assert that the deposition testimony of Mr. Benedict and Mr. Breeskin are relevant for admissibility purposes, the administrative law judge found it did not meet its burden to admit this evidence, and he excluded it. *Id*.

Employer contends that it submitted a "Liability Brief" after the Director's objection to admitting these depositions in which it set forth why the deposition testimony from Mr. Benedict and Mr. Breeskin is relevant for admissibility purposes. Employer's Brief at 5-6. It argues the administrative law judge erred by failing to consider this pleading. *Id*.

Contrary to Employer's argument, the administrative law judge recognized that on April 22, 2019, Employer "filed its closing written argument on liability – Employer's

[14] Employer again argued the carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1) with respect to documentary evidence, and that district directors are inferior officers. April 15, 2019 Reply to the Director's Objection to Admitting Depositions.

[15] The administrative law judge allowed Employer to proceed with the discovery depositions because he found the deposition testimony of Mr. Benedict and Mr. Breeskin may be "germane" to Employer's "plausible" defenses that the DOL released Peabody Energy from its liability under the Act, and Peabody Energy reasonably relied to its detriment on the DOL's release of its liability. October 9, 2018 Order at 3-10. He found "implausible," however, Employer's defense that the Director cannot attempt to place liability on Peabody Energy until the funds from the Patriot bond for self-insurance have been exhausted pursuant to 20 C.F.R. §725.494(e)(2), and the related defense that 20 C.F.R. § 725.495(a)(4) precludes liability being placed on Peabody Energy. *Id.*

Brief (Liability)." May 16, 2019 Order at 5 n.13. But he found Employer still did not "address the issue of admissibility of the depositions and exhibits" in this pleading. *Id*. He further noted Employer did not request this pleading "be considered on the issue of admissibility of such evidence." *Id*. Finally, he found the pleading was not timely submitted "for consideration on the issue of admissibility. (The Brief was not filed within 14 days (plus 3 days for service by mail) of the service of Director's Objection)." *Id*.; *see* 29 C.F.R. §§18.32(c), 18.33(d). Thus the administrative law judge declined to consider the pleading with respect to the admissibility of the depositions of Mr. Benedict and Mr. Breeskin. May 16, 2019 Order at 5 n.13. Employer does not set forth how the administrative law judge's disposition of this procedural issue constitutes an abuse of discretion. *See Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113. Thus we decline to disturb his exclusion of the discovery depositions of Mr. Benedict and Mr. Breeskin.

Due Process Challenge

Employer next 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. To the extent Employer's due process challenge is raised in the context of whether the district director must be constitutionally appointed, it is inadequately briefed as discussed above.

Moreover, 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 has 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.[16] 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 responsible operator and carrier issues while the case was before the district director. Employer therefore has not demonstrated a due process violation.[17] *Id.*

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

[17] Employer states that it wants to "preserve" its arguments that the administrative law judge'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 40-42. Employer does not ask the Board

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.[18] Employer's Brief at 21-25, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibit 30. 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 21-25. 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 administrative law judge rejected this argument. He first found the language of the letter of credit unambiguous and, based on its "clear language," does not "[purport] to limit or release Employer's or [Peabody Energy's] potential liability under the Act."[19] Oct. 9, 2018 Order at 8-9. Employer does not specifically challenge this factual finding. Thus it is affirmed. *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).

Further, the administrative law judge 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 11-12; Oct. 9, 2018 Order at 8-9. As the administrative law judge 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

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to address these issues, but only wishes to note that it is exhausting the administrative process. *Id*.

[18] Employer also cites an indemnity agreement the DOL entered into with Bank of America contained in Employer's Exhibit 5 and the depositions of Mr. Benedict and Mr. Breeskin to support its arguments. Employer's Brief at 21-25. As discussed above, however, this evidence was excluded from the record.

[19] The administrative law judge found the release of the letter of credit was to Patriot, not Heritage or Peabody Energy, as it states: "In recognition of Patriot's authority to act as a self-insurer we have released the $13,000,000 letter of credit you financed under the Peabody Energy self-insurance program." Oct. 9, 2018 Order at 8-9, *quoting* Director's Exhibit 30.

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." 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 25-26. Before the administrative law judge, and now before the Board, Employer has failed to cite any authority "expressly allowing the [DOL] to release a designated responsible operator from liability as opposed to releasing its posted security."[20] Decision and Order at 11-12; Oct. 9, 2018 Order at 8-9. Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.

Equitable Estoppel

Employer argues that under the doctrine of equitable estoppel, it should be relieved of liability. To invoke equitable estoppel, Employer must show that both 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.

[20] 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 24-25. Employer specifically states "Peabody Energy was previously an entity authorized to self-insure its obligations under the Act. Its obligations were secured via an indemnity bond and a letter of credit in the amount of $13,000,000.00." Employer's Brief at 24. 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 allege the DOL also released the indemnity bond that Peabody Energy posted.

Employer again alleges that the Director released Peabody Energy from liability "without securing proper funding by Patriot" and that this constitutes affirmative misconduct. Employer's Brief at 32. 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 administrative law judge properly rejected this argument." Decision and Order at 13 (finding Employer "failed to demonstrate the Director released Peabody from liability."); *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

The administrative law judge also rationally found "there is inadequate evidence in the record that Peabody reasonably relied upon the actions of the Department to take any particular course of action to its detriment," as Employer did not identify "any evidentiary support in the record for this assertion." *Id*.; *see Premo*, 599 F.3d at 547; *Lawson*, 739 F.3d at 322-23.

Finally, as the Director correctly asserts, Employer does not allege the DOL acted either intentionally or recklessly. Director's Brief at 30-31; *see 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 administrative law judge's rejection of Employer's equitable estoppel argument.

20 C.F.R. § 725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[21] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability. Employer's Brief at 10-14, 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

[21] 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.

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 Black Lung Disability Trust Fund. 20 C.F.R. § 725.495(a)(4).

Employer argues that Patriot is not a potentially liability operator because of its bankruptcy. Employer's Brief at 10-14, 25-29; 20 C.F.R §725.494(e). Insofar as the DOL authorized Patriot to self-insure, Employer argues Heritage and Peabody Energy cannot be named as the responsible operator and carrier pursuant to 20 C.F.R. §725.495(a)(4). *Id*.

As the administrative law judge correctly found, however, Patriot never employed Claimant and thus 20 C.F.R. §725.495(a)(4) is inapplicable.[22] Decision and Order at 12-13; Oct. 9, 2018 Order at 8-9. He found the evidence establishes Claimant was employed by "Heritage, a mine operator, for a year or more; was not employed by any other coal mine operator for a year or more after Heritage; and Heritage was self-insured through [Peabody Energy] during the relevant time period." Decision and Order at 8-9. Employer identifies no error in these findings. *Cox*, 791 F.2d at 446-47; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). The administrative law judge also correctly found Employer did not present any "evidence that Peabody is unable to assume liability in the event [Claimant] is found to be eligible for benefits." Decision and Order at 8-9; 20 C.F.R. §§725.494(e), 725.495(a)(3). We therefore affirm the administrative law judge's finding Employer liable for benefits.

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).

[22] Employer also argues the Director failed to comply with its duty to monitor Patriot's financial health. Employer's Brief at 29-30. 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.

To establish legal pneumoconiosis, 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); *see Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (a miner will be deemed to have a lung impairment "significantly related to" coal mine dust exposure, and thus legal pneumoconiosis, "by showing that his disease was caused 'in part' by coal mine employment").

Drs. Chavda and Krefft diagnosed legal pneumoconiosis in the form of COPD caused by a combination of cigarette smoking and coal mine dust exposure. Director's Exhibit 10; Claimant's Exhibit 10. Drs. Selby and Tuteur opined Claimant has COPD due to cigarette smoking, but unrelated to coal mine dust exposure and thus does not have legal pneumoconiosis. Employer's Exhibits 4, 11-13.

The administrative law judge found Dr. Chavda's opinion well-reasoned and documented because it is "supported by the evidence available to him at the time he performed his examination and is consistent with subsequently developed medical evidence in the record." Decision and Order at 26-27. He found Dr. Krefft's opinion well-reasoned and documented because it is "supported by the evidence she reviewed," is "consistent with the medical evidence in the record," and "consistent with the regulations." *Id*. at 27-28. In contrast, he found Dr. Selby's opinion inadequately explained and "inconsistent with the plain language of the regulations" that "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" constitutes legal pneumoconiosis. Decision and Order at 29; *see* 20 C.F.R. §718.201(b). He discredited Dr. Tuteur's opinion because the doctor "relies heavily on general statistics" and provides explanations inconsistent with the preamble to the 2001 revised regulations. Decision and Order at 31.

Employer does not specifically challenge the administrative law judge's credibility findings with respect to Drs. Selby and Tuteur. Thus we affirm the administrative law judge's rejection of their opinions. *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; 20 C.F.R. §718.201(b); Decision and Order at 29-31.

With respect to Dr. Chavda, Employer generally argues the administrative law judge should have discredited his opinion as based on inaccurate cigarette smoking and coal mine employment histories. Employer's Brief at 6-9. We find no merit in Employer's argument.

Although the administrative law judge did not render a specific cigarette smoking pack-year finding, he adequately discussed and resolved the conflicting evidence on this

issue.[23] Decision and Order at 4-6. He concluded Claimant "is a bad historian with regard to his smoking history. The accounts of Claimant's smoking vary widely among his testimony, physician reports, and his treatment records." *Id*. at 6. Notwithstanding this conflicting evidence, he rationally found, based on the varying reported smoking histories, Claimant has "a very heavy smoking history." Decision and Order at 6; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

In weighing Dr. Chavda's opinion, the administrative law judge recognized the doctor "reported that Claimant smoked [one to one and one-half] packs per day from 1962 to 2012, finally stopping in 2012, which is consistent with [the] finding of a heavy smoking history." Decision and Order at 26. Moreover, with respect to the length of Claimant's coal mine employment, the administrative law judge found Dr. Chavda "considered a 12 year history of coal mine employment, similar to the 10 years stipulated to by the parties."[24] *Id*. Contrary to Employer's contention, we see no error in the administrative law judge's determination that Dr. Chavda relied on accurate coal mine dust and cigarette smoking exposure histories when diagnosing legal pneumoconiosis. *See Jericol Mining, Inc. v.*

[23] As the administrative law judge summarized, Claimant testified at the hearing that "he started smoking when he was [fourteen or fifteen] years old" and "smoked on average [three to four] packs per week for about [forty] years." Decision and Order at 4; *see* Hearing Tr. at 22. Claimant conceded, however, "his smoking habit was 'probably close to a pack a day a lot of time'" and he "quit smoking around age [seventy]." Decision and Order at 4, *quoting* Hearing Tr. at 22. Moreover, Claimant indicated he "quit several times over the years. [He would] quit for four or five years, then [smoke] for a year, then [quit] for another seven or eight years, then [smoke] for two years." Hearing Tr. at 22. Thus he smoked "on and off all [his] life." *Id*. He estimated that his temporary smoking cessations totaled "probably more than" thirty years. Decision and Order at 4, *quoting* Employer's Exhibit 10 at 13. The administrative law judge further noted Claimant's medical records listed smoking histories that varied from one to three packs a day from thirty-five to sixty years. Decision and Order at 4-6.

[24] Employer argues the administrative law judge erred by finding Claimant had "at least [ten], but no more than [thirteen] years" of coal mine employment. Decision and Order at 6-7; *see* Employer's Brief at 7-8. Rather than finding a range of years, it asserts he should have rendered a "specific factual finding" on this issue and weighed the medical opinions in light of that finding. Employer's Brief at 7-8. The administrative law judge, however, found that Dr. Chavda's assumption of twelve years of coal mine employment was "similar to the 10 years stipulated to by the parties." Decision and Order at 26. In light of this permissible credibility finding, Employer fails to explain how the "error to which [it] points could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

*Napi*er, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185. Moreover, the administrative law judge permissibly found Dr. Chavda's opinion well-reasoned and documented on the issue of legal pneumoconiosis. *Napi*er, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Thus, we affirm the administrative law judge's finding that Claimant established legal pneumoconiosis.[25] 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 597-98. As Employer raises no specific allegations of error regarding disability causation, other than to assert Claimant does not have legal pneumoconiosis, we affirm the administrative law judge'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 43-35.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to affirm the administrative law judge's liability determination and the award of benefits. I write separately, however, to express my view that whether or not Employer briefed its constitutional challenge adequately enough to require our response is immaterial because the only authority it cites, *Lucia v.*

[25] Because Claimant established legal pneumoconiosis through Dr. Chavda's opinion, we need not address whether the administrative law judge erred in also crediting Dr. Krefft's opinion on legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 27-28.

SEC, 585 U.S. , 138 S.Ct. 2044 (2018), does not establish 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 (SEC) administrative law judges *Lucia* held are inferior officers because they exercise "significant discretion in carrying out the important function relating to responsible operator designation." Employer's Brief at 14-16. It specifically cites the requirement that all documentary evidence pertaining to liability be submitted to the district director absent extraordinary circumstances, along with the bar on administrative law judge's power to dismiss an operator without the consent of the Director. *Id*. From this, it 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 16.

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 9. They do not have "significant adjudicative" capacity, possessing none of the four powers *Lucia* held make administrative law judges akin to federal district court judges. *Id*. at 9-11. 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).[26]

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

[26] Notably, the distinction in authority possessed by district directors and administrative law judges 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 administrative law judges. 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 administrative law judges. *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).

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 administrative law judges 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.[27]

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 portfolio." Director's Brief at 11. Indeed, the remedy the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed administrative law judge -- 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. *Lucia,* 138 S.Ct. at 2053. Similarly, unlike administrative law judges, district directors do not "administer oaths." *See, e.g.,* 20 C.F.R. § 725.351(a), (b) (differentiating between authorities of district directors and administrative law judges).

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 administrative law judge's continuing oversight. 20 C.F.R. § 725.421(b) (specifying documents that must be transmitted to 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 administrative law judge 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 administrative law judge 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

[27] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 10 n.4.

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 administrative law judges. *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 administrative law judge. 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).[28]

Unlike DOL administrative law judges, 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 administrative law judges possess nearly identical authority as SEC administrative law judges. By design, district directors do not. On its face, *Lucia* therefore does 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 constrain district

[28] 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 administrative law judge, 20 C.F.R. § 725.413(e)(4), and the possibility parties receive medical information before the claim is transferred to the OALJs mandates the requirement. 20 C.F.R. § 725.413(c).

directors' ability to issue binding decisions on those issues, subject to layers of review, further restricting their authority far below that of administrative law judges 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 administrative law judge, appeal a final administrative law judge'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. 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 12. 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 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.[29]

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[29] 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 Trust Fund, and ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests." 65 Fed. Reg. 80005 (Dec. 20, 2000).

Director's Brief at 12 n. 6.

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 administrative law judge oversight in any way: *they review all issues de novo*. 20 C.F.R. § 725.455(a).

District directors do not have formal adjudicative authority anywhere near that of DOL or SEC administrative law judges (by design) under *Lucia's* significant authority test. 138 S.Ct. at 2053. *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 administrative law judge and further review by the Board and the federal courts of appeals -- independently transforms them. Accordingly, whether or not Employer adequately briefed its Appointments Clause argument, I would find district directors are not inferior officers but "part of the broad swath of 'lesser functionaries' in the Government's workforce." *Id.* at 2051 (citation omitted).

JONATHAN ROLFE
Administrative Appeals Judge