**U.S. Department of Labor**

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

BRB No. 19-0310 BLA

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| WANDA F. BLEVINS<br>(Widow of ROY D. BLEVINS) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| EASTERN ASSOCIATED COAL COMPANY | ) | DATE ISSUED: 02/17/2021 |
| and | ) | |
| 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 and Order Denying Employer's Request for Reconsideration of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Elena S. Goldstein, Deputy Solicitor; 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits and Order Denying Employer's Request for Reconsideration (2017-BLA-05891) of Administrative Law Judge Drew A. Swank[1] (the administrative law judge) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on June 15, 2016.[2]

The administrative law judge determined Eastern Associated Coal Company (Eastern) was the properly identified responsible operator. He also credited the Miner with eighteen years of surface coal mine employment in conditions substantially similar to those in an underground mine and found the Miner was totally disabled at the time of his death. Thus, he found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The

[1] This case was initially assigned to Administrative Law Judge Richard A. Morgan, who scheduled a hearing for March 20, 2018. Notice of Hearing dated January 2, 2018. By Order dated February 12, 2018, Judge Morgan cancelled the hearing on Employer's motion. It was rescheduled for November 8, 2018. Administrative Law Judge Exhibit 1. Due to Judge Morgan's retirement, the case was transferred to Administrative Law Judge Drew A. Swank, who conducted the November 8, 2018 hearing. Hearing Transcript at 6.

[2] Claimant is the widow of the Miner, who died on June 19, 2011. Director's Exhibit 9. The record does not reflect the Miner was found eligible for benefits during his lifetime. Thus, Claimant is not eligible for automatic survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the miner had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA), and the constitutionality and applicability of the Section 411(c)(4) presumption, enacted as part of the ACA. Employer contends the district director, the Department of Labor (DOL) official who processes and issues an initial proposed determination on claims, is an inferior officer not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Further, Employer contends the administrative law judge erred in finding it liable for the payment of benefits. It also asserts the administrative law judge erred in finding Claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, and erred in finding that it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's arguments concerning the Appointments Clause and the constitutionality of the ACA, and 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.[5] 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).

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[4] 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.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; Hearing Tr. at 17.

**Constitutionality of the ACA and the Section 411(c)(4) Presumption**

Citing *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the ACA, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 27-28. Employer alleges that because the United States Department of Justice supported this ruling, DOL must accept the district court's declaration that its ruling invalidated all of the provisions of the ACA, thereby invalidating the Section 411(c)(4) presumption. *Id*. These contentions are without merit.

After the parties filed their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , 2020 WL 981805 (Mar. 2, 2020) (No. 19-1019). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held the ACA amendments to the Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

We also reject Employer's general assertion that "Section 1556 of [the] ACA violates Article II of the United States Constitution," as it failed to provide any specific argument for its constitutional objection. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Employer's Brief at 28.

**Appointments Clause – District Director**

Employer argues for the first time in this appeal that the district director lacked the authority to identify the responsible operator and process this case because she is an "inferior Officer" of the United States not properly appointed pursuant to the Appointments Clause. Employer's Brief at 13. Employer primarily relies on *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), 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. *Id*. at 13-19.

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 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."). *Lucia* was decided over eight months prior to the administrative law judge's Decision and Order Awarding Benefits, yet Employer failed to raise its challenge to the district director's appointment while the case was before the administrative law judge. If raised at that time, the administrative law judge could have addressed Employer's arguments and, if appropriate, taken steps to remand the case – the remedy Employer seeks here. *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, Employer waited to raise the issue until after the administrative law judge issued an adverse decision. Based on these facts, we conclude Employer forfeited its right to challenge the district director's appointment. Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its arguments. *See Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging).

**Due Process Challenge**

Employer generally asserts the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, and also administer the Black Lung Disability Trust Fund,[6] creates a conflict of interest that violates its due process right to a fair hearing.[7] Employer's Brief at 19-23. The Director correctly notes, "Congress intended that 'individual coal mine operators rather than the [Trust Fund] bear the liability for claims arising out of such operators' mines to the maximum extent feasible.'" *Id*. at 25, *quoting* S. Rep. No. 209, 95 Cong., 1st. Sess. 9 (1977) *reprinted in* House Comm. On Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979); *see also Old Ben*

[6] We note that district directors are Department of Labor (DOL) officials who process and make initial proposed determinations in claims. *See* 20 C.F.R. §§725.101(a)(16), 725.350(b), 725.351(a). In contrast, the Director, Office of Workers' Compensation Programs (the Director), is a party-in-interest in every federal black lung case and, in a case involving the Black Lung Disability Trust Fund, defends the claim in his fiduciary role as its trustee. *See* 26 U.S.C. §9501(a)(2); 20 C.F.R. §§725.1(e), 725.101(a)(15), 725.360(a)(5).

[7] Employer states that its due process argument is being included "out of an abundance of caution." Employer's Brief at 20. Employer does not explain whether it means to preserve this issue for appeal or have the Board address it. Further, some of Employer's arguments on due process appear to be aimed at showing that district directors exercise significant powers in conjunction with its Appointments Clause challenge, which we have found to be forfeited. *Supra*.

*Coal v. Luker*, 826 F.2d 688, 693 (7th Cir. 1987). The Trust Fund is liable only if no responsible operator is found.

The regulatory requirement that liability evidence be submitted to the district director is not prejudicial to the extent 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 Schedule for the Submission of Additional Evidence (SSAE), an employer has another sixty days to submit evidence. 20 C.F.R. §725.410. Employer may also request extensions of these time frames.[8] Thus, we reject Employer's assertion that it was deprived of due process. Due process requires only that a party be given notice and the opportunity to mount a meaningful defense against a claim. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). As noted, *infra*, Employer had the opportunity to develop and submit all of its liability evidence relevant to the responsible carrier issue while the case was before the district director. Therefore, under the facts of this case Employer has not demonstrated a due process violation.

**Responsible Operator/Insurance Carrier**

The Miner last worked in coal mine employment from 2001 to 2005 for Eastern, a Peabody Energy Corporation (Peabody Energy) subsidiary which was self-insured for black lung liabilities through Peabody Energy.[9] Director's Exhibits 5, 16. In 2007, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). Director's Exhibit 24. In 2011, DOL authorized Patriot to self-insure for black lung liabilities, including claims of employees of Peabody Energy subsidiaries filed before Patriot purchased the subsidiary. *Id*. In 2015, Patriot went bankrupt. Director's Exhibit 15.

Employer does not dispute that it meets the criteria for a potentially liable operator at 20 C.F.R. §725.494.[10] Employer contends this case must be remanded, however,

[8] Moreover, Employer may challenge the denial of any extension request before an administrative law judge, the Board, or a circuit court.

[9] The Miner was employed by Eastern Associated Coal Company (Eastern)/Colony Bay Coal Company (Colony Bay), a joint venture, from 1981 until approximately 2005. Director's Exhibits 3, 16. The Miner's Social Security Earnings record indicates earnings for Colony Bay from 1981 to 2001, and for Eastern from 2001 to 2005. Director's Exhibit 5. Both companies were self-insured through Peabody Energy Corporation (Peabody Energy) when the Miner last worked for them. *See* Director's Exhibit 16.

[10] Eastern qualifies as a potentially liable operator because (1) the Miner's disability arose at least in part out of his employment with it; (2) Eastern operated a mine after June

because the administrative law judge "erred by not addressing [its] argument on jurisdiction" and its "arguments on liability." Employer's Brief at 23-26, *referencing* Employer's Post-Hearing Brief. Employer's contentions have no merit.

On December 18, 2017, when this case was before Administrative Law Judge Richard A. Morgan, Eastern filed a Motion to Dismiss, arguing it and its carrier were not parties to the case because the district director named Colony Bay Coal Company (Colony Bay), not Eastern, as the responsible operator in the Notice of Claim.[11] *Id*. Eastern argued it was not designated as the responsible operator until the district director issued the SSAE, in violation of 20 C.F.R. §725.407. Employer's Motion to Dismiss at 1-2. Employer also maintained that an agreement between Peabody Energy and Patriot released Peabody Energy from liability for the claims of miners who worked for Eastern. *Id*. at 26.

Judge Morgan addressed these issues in his February 14, 2018 Order. After reviewing the procedural history of the claim, Judge Morgan noted Employer did not raise these issues until nearly two months after the district director issued the Proposed Decision and Order.[12] He found, "At no point has Peabody [Energy] denied that both Colony Bay

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30, 1973; (3) Eastern employed the Miner for a cumulative period of at least one year; (4) the Miner's employment included at least one working day after December 31, 1969; and (5) Eastern is capable of assuming liability for the payment of benefits through Peabody Energy's self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ the Miner as a miner, Judge Morgan found Eastern is the responsible operator and Peabody Energy is the responsible carrier. Judge Morgan's February 14, 2017 Order at 6.

[11] The July 19, 2016 Notice of Claim designated Colony Bay, self-insured through Peabody Energy, as the potentially liable operator. Director's Exhibit 13. Underwriters Safety & Claims (Underwriters) responded as the third-party administrator referencing "Colony Bay Coal/Patriot Coal/Peabody Energy." Director's Exhibit 15. On November 28, 2016, the district director, noting Eastern and Colony Bay were engaged in a joint venture, contacted Underwriters to inquire whether a new Notice of Claim should be issued to acknowledge the Miner's last coal mine employer was Eastern. Underwriters assured the district director "it would be okay to issue the SSAE [Schedule for Submission of Additional Evidence] to EACC [Eastern]/Colony Bay." Director's Exhibit 27. On November 29, 2016, the district director issued the SSAE, which designated Eastern, self-insured through Peabody Energy, as the responsible operator. Director's Exhibit 16.

[12] The district director issued a Proposed Decision and Order on February 28, 2017. Claimant requested a hearing on March 20, 2017. By letter to the district director dated

and Eastern were former subsidiaries for which it had been the self-insurer, nor has it contested the [M]iner's employment for these companies." Judge Morgan's February 14, 2018 Order at 5. Judge Morgan therefore rejected Employer's argument that Peabody Energy was not a party to the case, finding it had sufficient notice of the claim through its third-party administrator, Underwriters Safety & Claims (Underwriters), and the ability to defend the claim. *Id.*, *citing Lockhart*, 137 F.3d at 799.

With respect to Peabody Energy's liability, Judge Morgan found "Employer has not denied Peabody Energy was the parent company of Eastern and was authorized to self-insure its liability prior to the date of the separation agreement between Peabody [Energy] and Patriot." Judge Morgan's February 14, 2017 Order at 7. He also found Employer "failed to meet its burden under §725.495(c) of proving . . . 'it does not possess sufficient assets to secure the payment of benefits in accordance with [20 C.F.R.] §725.606 or . . . that it is not the potentially liable operator that most recently employed the [M]iner.'" Judge Morgan's February 14, 2017 Order at 10, *citing* 20 C.F.R. §725.495(c). Judge Morgan therefore determined Peabody Energy satisfies the criteria for a potentially liable operator and retained liability despite Patriot being its successor.[13] *Id*. He also rejected Employer's arguments that the status of bonds paid by Peabody Energy and Patriot required transfer of liability to the Trust Fund. *Id*.

As Judge Morgan exhaustively addressed Employer's liability arguments in his Order denying Employer's motion to dismiss, those findings constitute law of the case, and there was no requirement for Judge Swank to revisit the issue. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) ("As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.")

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April 19, 2017, Employer contested jurisdiction and liability, attaching copies of the separation agreement between Peabody Energy and Patriot, and the DOL decision granting Patriot the authority to act as a self-insurer. Director's Exhibits 19, 23, 24.

[13] Judge Morgan determined the separation agreement between Peabody Energy and Patriot, in which Peabody Energy transferred certain assets and liabilities of Peabody Energy, including Colony Bay and Eastern, to Patriot supports that Patriot was a successor operator to Eastern. Judge Morgan's February 14, 2017 Order at 7. The Director states that "resort to the successor-operator rules was wholly unnecessary," but any error in applying the successor-operator rules is harmless. Director's Brief at 12-13, *citing* 30 U.S.C. §932(i)(2); 20 C.F.R. §725.492. We agree. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

(quoting *Arizona v. California*, 460 U. S. 605, 618 (1983) (dictum)); *Messenger v. Anderson*, 225 U.S. 436 (1912) ("law of the case" doctrine "expresses the practice of courts generally to refuse to reopen what has been decided"); Director's Brief at 11. Though unnecessary, Judge Swank nevertheless agreed with Judge Morgan's determination that Employer is the properly designated responsible operator. Decision and Order at 4. As the issues were addressed through Judge Morgan's Order, and Employer raises no other arguments, we affirm the administrative law judge's finding Employer is liable for benefits.

**Invocation of the Section 411(c)(4) Presumption**

**Length of Qualifying Coal Mine Employment**

Because the Miner had a totally disabling respiratory impairment,[14] Claimant is entitled to the Section 411(c)(4) presumption of death due to pneumoconiosis if the Miner had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i). Employer argues the administrative law judge erred in finding the Miner's coal mine employment occurred in conditions substantially similar to those in an underground mine. Employer's Brief at 26-27. We agree with Employer's contention.

Conditions at a surface coal mine are "substantially similar" to those in underground coal mine employment if the Miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). The Board will uphold the administrative law judge's determination on the length of coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence in the record. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge initially noted the parties agreed the Miner worked eighteen years in the coal mining industry. Decision and Order at 3. He found the Miner last worked in 2005 as a "driller operator," and all of his coal mining work was above

[14] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner was totally disabled. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-10.

ground.[15] Decision and Order at 4, *referencing* Director's Exhibits 3, 4. The administrative law judge correctly noted, "The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal mine dust while working there." Decision and Order at 6, *quoting* 20 C.F.R. §718.305(b)(2). In determining whether Claimant met the requirements necessary to invoke the presumption, the administrative law judge concluded:

> While the [M]iner's work was all above-ground, the undersigned finds that it was . . . equivalent to below-ground coal mining based upon the evidence contained in the record and the expert opinion of Dr. Broudy who opined that the [M]iner's '. . . history of [coal mine dust] exposure was sufficient to cause pneumoconiosis . . . .'

Decision and Order at 6, *quoting* Employer's Exhibit 10 at 3. The administrative law judge provided no other discussion on this issue.

We agree with Employer that Dr. Broudy's opinion that the Miner's length of coal mine dust exposure was sufficient to cause pneumoconiosis alone does not establish the Miner was regularly exposed to coal mine dust throughout his eighteen years of surface employment for purposes of invoking the Section 411(c)(4) presumption.[16] *See* 20 C.F.R. §718.305(b)(2); Employer's Brief at 27. While an administrative law judge is granted broad discretion in evaluating the credibility of the evidence, *see Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986), the administrative law judge has not adequately explained his determination that the Miner had at least fifteen years of regular coal mine dust exposure and, therefore, his finding does not comport with the Administrative Procedure Act.[17] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v.*

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[15] Claimant completed a CM-911a Employment History form, indicating the Miner worked on the "surface" as a driller from "[19]80 to [20]05" for "Colony Bay/Eastern." Director's Exhibits 3, 4.

[16] In reviewing the Miner's medical records, Dr. Broudy noted "there was a[n] eighteen-year history of coal mining, stopping in 2005." Employer's Exhibit 10 at 1.

[17] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

*Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge must explain how the evidence establishes the Miner was regularly exposed to coal mine dust. Because we are unable to discern the basis for the administrative law judge's finding, we vacate his determination that all of the Miner's coal mine employment constituted qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305; *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014). Thus we vacate his finding Claimant invoked the Section 411(c)(4) presumption and also vacate the award of benefits.[18]

On remand, the administrative law judge must consider all relevant evidence and render findings as to the nature of the Miner's coal mine employment in accordance with our instructions above. *See Wojtowicz*, 12 BLR at 1-165; *see also* 5 U.S.C. §557(c)(3). If Claimant establishes fifteen years of qualifying coal mine employment on remand, she will invoke the Section 411(c)(4) presumption and the administrative law judge must determine whether Employer rebutted it. Alternatively, if Claimant is unable to establish fifteen years of qualifying coal mine employment, the administrative law judge must address whether she established all the elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[18] Because we have vacated the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's arguments pertaining to the administrative law judge's findings regarding its failure to rebut the presumption. Employer's Brief at 28-36.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Employer's Request for Reconsideration are affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to reject Employer's challenges to the constitutionality of the Affordable Care Act (ACA), and the applicability of the Section 411(c)(4) presumption, enacted as part of the ACA. I also concur with their decisions to affirm the administrative law judge's liability determination and vacate and remand his finding Claimant established fifteen years of qualifying coal mine employment. I write separately, however, to express my view that, even if Employer had preserved the argument, *Lucia v. 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 'important functions' such as determining proof allowed in the record, conducting conferences, and issuing decisions which can become final in awarding or denying benefits." Employer's Brief at 14-15 (citation omitted). It also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id*. at 14, citation omitted. Finally, it alleges the district director's role as "final decision-maker" generally "creates an Appointments Clause issue." *Id*. at 16. 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 18-19.

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 19. 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*. Moreover, the regulations cabin their ability to identify a responsible operator and determine entitlement -- subject to de novo appellate review -- eliminating any remaining Appointments Clause issues. Like the vast majority of federal employees, district directors thus are not members of the very small subset of inferior officers who must be appointed by the head of an agency. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 & n.9 (2010) (noting that in 1879 about 90% of federal employees were lesser functionaries and the percentage of those functionaries has dramatically increased over time).[19]

[19] 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

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 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.[20]

*First*, black lung district directors never conduct formal hearings. Thus, as the Director notes, the paramount factor the *Lucia* Court found to justify officer status, the authority to hold an adversarial hearing, "is simply missing from the district director's portfolio." Director's Brief at 22. 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. 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

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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).

[20] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 20 n.14.

"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 the Office of Administrative Law Judges (OALJ), and noting they "shall be placed in the record at the hearing subject to the objection of any party"). Fundamentally, parties are not required to submit medical evidence to the district director; they may submit it to the 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 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).[21]

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"

[21] The district director can sanction in one narrow circumstance: when a party fails to comply with the medical information disclosure requirements. 20 C.F.R. § 725.413(e). But any sanction imposed by a district director is subject to review by an 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 Office of Administrative Law Judges mandates the requirement. 20 C.F.R. § 725.413(c).

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 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 appeal a final Board order to a U.S. court of appeals) (citations omitted).

*First,* district directors lack independent discretion in designating responsible operators given the comprehensive regulatory scheme. Evidence relevant to a responsible operator designation must be initially submitted to the district director to streamline administrative proceedings by restricting the district director's authority. 65 Fed. Reg. at 79,990. As the Director notes, "the district director gets only one chance at identifying the liable operator; the goal of the rule is to allow the district director to make the most informed choice possible, but also to limit the district director's discretion." Director's Brief at 23. 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.[22]

*Second*, the district director's ability to resolve either responsible operator status or entitlement issues with finality depends largely on the power to persuade rather than on any programmatic authority. The district director issues a Proposed Decision and Order (PDO) purporting to resolve all claim issues, but that decision does not become effective if any party timely requests a hearing or revision. 20 C.F.R. § 725.419(d). And, most fundamentally, the district director's PDO findings do not constrain 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, had Employer preserved 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

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[22] Moreover, as the Director notes:

> The rule that prohibits ALJs from dismissing the named operator without the Director's consent, 20 C.F.R. § 725.465(c), does not expand the district director's power in any way. The rule is intended to prevent a premature dismissal of the named operator; it does not give the district director "veto power over an ALJ's decision" but "simply protects the interests of the 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 23 n.16.