U.S. Department of Labor

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

BRB No. 19-0441 BLA

RUTH GRIFFITH (Widow of CHARLES GRIFFITH) Claimant-Respondent v. EASTERN ASSOCIATED COAL COMPANY, c/o UNDERWRITERS SAFETY & CLAIMS and Self-insured through PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/25/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, 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 Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Jennifer L. Feldman (Elena S. Goldstein, Deputy 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.

Laura Metcoff Klaus, W. William Prochot, and Mark E. Solomons (Greenberg Traurig, LLP), Washington, D.C., as *amicus curiae,* in support of Employer and its Carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-05046) rendered on a survivor's claim filed on December 16, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge accepted the parties' stipulation that the Miner had twenty-one years of qualifying coal mine employment, and found the evidence established he was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant[1] invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause

[1] Claimant is the widow of the Miner, who died on October 29, 2013. Director's Exhibit 10.

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and was totally disabled by a respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

of the Constitution, Art. II § 2, cl. 2.[3] It also contends the district director, the Department of Labor (DOL) official who processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause. It next contends the administrative law judge erred in finding it liable for the payment of benefits. On the merits, Employer contends the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption, because he improperly excluded the medical opinions of Drs. Westerfield and Broudy.[4]

Claimant responds, urging affirmance of the award of benefits. Arch Resources, Incorporated (Arch) filed an *amicus curiae* brief in support of Employer's position regarding its liability for benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to both Employer's and Arch's briefs, urging the Benefits Review Board to reject Employer's Appointments Clause challenges and to affirm the determination that Employer is liable for benefits. Arch has filed a reply brief reiterating its contentions.

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

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[3] 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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 30 U.S.C. §921(c)(4) (2018); Decision and Order at 20.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because 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 5.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause – Administrative Law Judge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer's Brief at 13-15. Employer acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges on December 21, 2017. *Id*. However, Employer contends that, because the administrative law judge was not properly appointed until December 21, 2017,[7] after he issued a Notice of Hearing, his Decision and Order must be vacated and the case remanded for a new hearing before a new administrative law judge. *Id*. The Director responds the issuance of a Notice of Hearing conveys general information, and therefore its issuance does not require reassignment to a new administrative law judge. Director's Brief at 19-20. We agree with the Director's argument.

The administrative law judge issued a Notice of Hearing on December 12, 2017. The issuance of the Notice alone did not involve any consideration of the merits, nor could it color the administrative law judge's consideration of the merits of this case. It simply reiterated the statutory and regulatory requirements governing the hearing procedures.[8] *Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020).

[6] *Lucia* involved an Appointments Clause challenge to the selection 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)).

[7] The Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of all Department of Labor administrative law judges on December 21, 2017. Employer does not argue that the administrative law judge was not properly appointed after his appointment was ratified.

[8] The Notice of Hearing informed the parties of the date for a hearing, set time limits for completion of discovery and submission of evidence, provided general advice to parties proceeding without counsel, and addressed other routine hearing matters. *See* Dec. 12, 2017 Notice of Hearing and Pre-Hearing Order.

Thus, unlike the situation in *Lucia*, in which the judge had presided over a hearing and had issued an initial decision while he was not properly appointed, the issuance of the Notice of Hearing did not affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand, and we decline to remand this case to the Office of Administrative Law Judges for a new hearing before a different, properly appointed administrative law judge. *Noble*, 25 BLR at 1-272.

Appointments Clause – District Director

Employer argues for the first time that the district director lacked the authority to identify the responsible operator and process this case, because she is an "Inferior Officer" of the United States not properly appointed under the Appointments Clause. Employer again relies on *Lucia*. Employer's Brief at 15-20. Arch supports Employer's position in its amicus brief and reply brief. *Amicus Curiae* Brief at 17-18; *Amicus Curiae* Reply Brief at 7-14. The Director responds the district director is not an inferior officer, and Employer's arguments must fail. Director's Response Brief at 12-18.

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 a year prior to the administrative law judge's Decision and Order Awarding Benefits and Employer specifically preserved the issue of the validity of the administrative law judge's appointment.[9] However, Employer failed to raise its challenge to the district director's appointment while the case was before the administrative law judge. At that time, the administrative law judge could have addressed Employer's arguments and, if appropriate, taken steps to have the case remanded - the remedy it seeks here. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], F.3d , No. 20-3329, 2021 WL 386555, slip. op. at 6 (6th Cir. Feb. 4, 2021); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019); *see also Fleming v. USDA*, F.3d

[9] Employer submitted a Notice of Preserved Issue on July 2, 2018, arguing the ratification of the administrative law judge's appointment on December 21, 2017 was not sufficient to "remedy the error" in his appointment as he had already issued the Notice of Hearing and Prehearing Order on December 12, 2017. But Employer's Notice solely discussed the administrative law judge's appointment, and did not mention the district director.

, No. 17-1246, 2021 WL 560743 (D.C. Cir. Feb. 16, 2021). Instead, Employer waited to raise the issue 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 forfeited arguments. *See Davis*, No. 20-3329, 2021 WL 386555, slip op. at 12-13; *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging).

Responsible Insurance Carrier

The Miner last worked in coal mine employment for Eastern Associated Coal, LLC (Eastern), a subsidiary of Peabody Energy Corporation (Peabody) in 1993. Director's Exhibits 5, 7. In 2007, Peabody sold Eastern to Patriot Coal Corporation (Patriot). Director's Exhibit 29. In 2011, the DOL authorized Patriot to self-insure for black lung liabilities, including for claims that employees of Peabody subsidiaries filed 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. Director's Exhibit 25.

Employer does not directly challenge its designation as the responsible operator.[10] Rather, it asserts the liability issue is not one of the responsible operator, but rather that of "which party should have liability for that [r]esponsible [o]perator." Employer's Brief at 21. Employer maintains that a private contract between Peabody and Patriot (Separation Agreement) released Peabody from liability for the claims of miners who worked for Eastern. *Id*. at 20-42; *see* Director's Exhibit 29. Employer also maintains the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer's Brief at 26-42.

[10] Eastern Associated Coal, LLC (Eastern) qualifies as a potentially liable operator because it is undisputed that: (1) the Miner's disability arose at least in part out of employment with Eastern; (2) Eastern operated a mine after June 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 Corporation's (Peabody) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ the Miner, the administrative law judge designated Eastern as the responsible operator and Peabody as the responsible carrier. Decision and Order at 5.

To support its assertion that Patriot is the liable carrier, Employer submitted documentary evidence to the administrative law judge marked Employer's Exhibits 1 through 7.[11] The administrative law judge excluded Exhibits 3 through 7[12] 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); Sept. 28, 2018 Order Excluding Employer's Exhibits (Sept. 28, 2018 Order). The administrative law judge subsequently rejected Employer's argument that Patriot is the liable carrier, and concluded Eastern and Peabody were correctly designated the responsible operator and carrier, respectively. Decision and Order at 4-10.

Employer and Arch argue the administrative law judge erred in excluding Employer's Exhibits 3 through 7. Employer's Brief at 20-26; *Amicus Curiae* Brief at 6-9. Therefore Employer requests the Board remand the case for the administrative law judge to admit the evidence and reconsider the responsible carrier issue. Employer's Brief at 20-26. Employer also argues the administrative law judge erred in finding it liable for benefits because: (1) the DOL released Peabody from liability; (2) 20 C.F.R. §725.495(a)(4) precludes Peabody's liability; and (3) the Director is equitably estopped from imposing liability on Peabody. Employer's Brief at 26-42. Employer also asserts that its due process

[11] The documentary evidence pertaining to liability that Employer submitted before the administrative law judge included Employer's Exhibit 1, Patriot's authorization to self-insure, and Employer's Exhibit 2, the March 4, 2011 letter from Mr. Breeskin to Patriot, both of which had been submitted to the district director and were admitted by the administrative law judge as Director's Exhibit 29.

Further, Employer submitted for the first time Employer's Exhibit 3, a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's 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 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's self-insurance because the DOL had either lost or destroyed it; Employer's 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 Exhibit 7, Peabody's Indemnity Bond.

[12] The administrative law judge accurately noted that Employer's Exhibits 1 and 2 were submitted before the district director and were already admitted into evidence as Director's Exhibit 29. Sept. 28, 2018 Order Excluding Employer's Exhibits. He therefore did not readmit them as Employer's Exhibits 1 and 2. *Id.*

rights were violated by the close of discovery and the Director's self-interest in determining the responsible operator and carrier in this instance. *Id*. at 40, 45-47.

The Director responds that the administrative law judge did not abuse his discretion in excluding the exhibits. Director's Response at 21-26. He also urges the Board to reject Employer's due process argument. *Id*. at 26-27. In response to Employer's general factual assertion that Peabody transferred its black lung liabilities to Patriot, the Director states Peabody was never released from liability for claims under the Act. *Id*. at 29-31. Further, he asserts 20 C.F.R. §725.495(a)(4) does not preclude Employer's designation as the responsible operator. *Id*. at 31-32. In addition, he contends there is no basis for Employer's equitable estoppel argument. *Id*. at 33-35. The Director maintains Peabody was properly designated as the responsible carrier because the Miner last worked for Eastern when it was self-insured through Peabody.[13] *Id*. at 36.

Exclusion of Evidence -- Relevant Procedural History

The district director issued a Notice of Claim on July 6, 2016, designating Eastern, self-insured through Peabody, as a "potentially liable operator." Director's Exhibit 26. This 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 28. Employer did not provide any documentary evidence to support its contention that Patriot, not Peabody, was liable for benefits. *Id*.

Thereafter the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern and Peabody as the responsible operator/carrier. Director's Exhibit 31. The district director informed Eastern and Peabody that they had until December 10, 2016, 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

[13] Arch also argues the administrative law judge's reading of 20 C.F.R. §725.456(b)(1) violates the Administrative Procedure Act. *Amicus Curiae* Brief at 9-17. The Director responds that this argument exceeds the scope of a proper *amicus curiae* brief as it was not raised by Employer. Director's Response Brief at 25. Arch replies that the Board "must" address this argument, and asks that it do so as the argument is purely legal and the Director had time to respond to its argument. *Amicus Curiae* Reply Brief at 14-15. Contrary to Arch's arguments, the Board may but is not required to address such arguments. *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Snyder v. Phelps*, 580 F.3d 206, 216-217 (4th Cir. 2009). As it was not properly raised, we decline to address Arch's argument.

Office of Administrative Law Judges (OALJ). *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3, *citing* 20 C.F.R. §725.456(b)(1).

Employer responded to the SSAE on November 18, 2016, and contested liability. Director's Exhibit 34. Employer also submitted documents to the district director on December 5, 2016, to support its controversion of liability. Director's Exhibit 29. It specifically submitted a 2007 Separation Agreement between Peabody and Patriot; a March 4, 2011 letter from Mr. Breeskin, former director of the Division of Coal Mine Workers' Compensation (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 29; Employer's Exhibits 1, 2. The Director subsequently granted four of Employer's requests for additional time to submit evidence, extending the original sixty-day deadline by 191 days until June 19, 2017.[14] Director's Exhibits 36, 38, 41, 43. However, the district director denied a fifth request for an extension of time and a request for reconsideration from Employer as untimely. Director's Exhibit 45, 47.

The district director issued a Proposed Decision and Order on August 7, 2017, finding Eastern and Peabody are the responsible operator and carrier. Director's Exhibit 48. Employer requested a hearing and the case was forwarded to the OALJ on September 18, 2017. Director's Exhibits 54, 57.

After the case was transferred to the OALJ, Employer filed documentary evidence marked Employer's Exhibits 1 through 7, identified above, pertaining to the responsible operator issue. December 1, 2017 Employer's Notice of Filing. The administrative law judge excluded Exhibits 3 through 7 because he found Employer did not submit them to the district director or establish extraordinary circumstances for failing to do so. Sept. 28, 2018 Order; *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).

[14] Each of Employer's requests for extension of time indicated that the request was made for the purposes of obtaining medical evidence. Director's Exhibits 35, 37, 40, 42, 45. However, the Director generally extended the deadline to submit evidence rather than limiting Employer's submission to specific types of evidence. Director's Exhibits 36, 38, 41, 43. Employer's last request for an extension of time, which was denied, was for additional time to obtain an x-ray reading from Dr. Meyer and an autopsy slide review by Dr. Caffrey. Director's Exhibit 44.

Applicability of Extraordinary Circumstances Requirement

Employer initially argues the administrative law judge erred in excluding Employer's Liability Exhibits 3-7 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 20-22. 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.[15] 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. Because the district director must identify the responsible operator or carrier before a case is referred to the OALJ, the administrative law judge properly found the regulations require that, absent extraordinary circumstances, liability evidence pertaining to identification of 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; Sept. 28, 2018 Order.

Employer also asserts that because the Director is a "party" to the claim and "did not voluntarily share" the documentary evidence in question with Employer, it need only show "good cause" for the admission of the evidence. Employer's Brief at 23, *citing* 20 C.F.R. §725.456(b)(3) (if a party does not demonstrate good cause for failing to exchange documentary evidence, including medical reports, twenty days prior to the hearing, the administrative law judge must either exclude the evidence or remand the case to the district director for consideration of that evidence). Contrary to Employer's contention, while 20

[15] Employer also argues the Director previously routinely allowed carriers to present coverage evidence before the administrative law judge that was not submitted before the district director, and asserts that his extension of the rules at 20 C.F.R. §725.456(b)(1) to carriers is an improper attempt to amend the regulations without proper notice and comment. Employer's Brief at 21-22. In support of its argument that the Director has changed his position, Employer cites three unpublished Orders of Remand from the Office of Administrative Law Judges. *Id.* However, none of the Final Orders associated with these cases contain information as to why the cases were remanded, nor do they indicate that the Director allowed the parties to submit evidence relevant to carrier liability. *Looney v. Empire Mining, Inc.*, OALJ No. 2017-BLA-05250) (Apr. 11, 2018) (Order)(unpub.); *Deel v. Deel Bros. Coal Co.*, OALJ Nos. 2017-BLA-05262, 2017-BLA-05877 (Apr. 10, 2018) (Order)(unpub); *Elkins v. Alfred & Creed Coal Co.*, OALJ No. 2014-BLA-05285 (Feb. 14, 2017) (Order) (unpub.). Consequently we reject this argument.

C.F.R. §725.456(b)(3) addresses the admission of other types of documentary evidence not exchanged before the twenty-day deadline, the applicable regulation for the admission of liability evidence is 20 C.F.R. §725.456(b)(1), which states: "Documentary evidence pertaining to the liability of a potential liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record *in the absence of extraordinary circumstances*." 20 C.F.R. §725.456(b)(1) (emphasis added).

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 24-26. 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 pursuant to its January 18, 2017 discovery request. Employer's Brief at 24-26. Employer's contention has no merit. The administrative law judge found "[t]he events surrounding the discovery process at the [d]istrict [d]irector level in this case are murky." Sept. 28, 2018 Order at 7. He further noted: the request is not contained in the Director's Exhibits; the Director denies receiving it; Employer's copy is unsigned; and Employer submitted no proof it was mailed. *Id*. Consequently, the administrative law judge found that Employer failed to timely submit a discovery request to the district director. *Id*. at 8. Moreover, he found Employer received Employer's Exhibits 3-7 in another case on March 10, 2017 and expressly agreed that a single exchange of documents in one case would satisfy all outstanding requests in other parallel cases. *Id*. Employer challenges none of these determinations, and we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because the Director extended the deadline to submit both liability and medical evidence until June 19, 2017, pursuant to Employer's four separate requests, and Employer still did not submit the evidence it had received three months earlier, the administrative law judge found the evidence demonstrates only "Employer's ordinary untimeliness and not extraordinary circumstances."[16] Sept. 28, 2018 Order at 8. We find no error in the

[16] Employer contends it filed a fifth request for an extension of time before the district director, which was erroneously denied as untimely. Employer's Brief at 25. However, the district director received Employer's letter dated June 19, 2017, requesting a fifth extension of time to file evidence, on June 23, 2017. Director's Exhibit 44. The

administrative law judge's determination. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting), *aff'd*, 251 F. App'x 229, 236 (4th Cir. 2007). 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; Sept. 28, 2018 Order.

Due Process Challenge

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, 44-46. Employer does not ask the Board to address these issues, but only wishes to note that it is exhausting the administrative process. *Id*.

Letter of Credit

Employer maintains the March 4, 2011 letter from Mr. Breeskin to Patriot releasing a letter of credit financed under Peabody's self-insurance program absolves Peabody from potential liability under the Act. Employer's Brief at 27-29, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibit 29. 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 28. 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

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district director rejected the request as untimely as the request must be filed prior to the expiration of time. Director's Exhibit 45, *citing* 20 C.F.R. §725.423. On July 26, 2017, Employer requested reconsideration, contending that the filing date is the postmarked date and not the received date. Director's Exhibit 46. The district director denied the request on August 3, 2017. Director's Exhibit 47. Similarly, the administrative law judge found the submission untimely as it was not filed "prior to the expiration" of the deadline to submit evidence as required by 20 C.F.R. §725.423. Sept. 28, 2018 Order; Director's Exhibit 45. Employer cites no authority for its position that the extension of time was erroneously denied as untimely, and thus we reject it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

under Peabody Energy's self-insurance program," Employer argues the DOL released Peabody's liability. *Id.*

The administrative law judge rejected this argument. He found that "[n]othing in the language of this letter or any other admitted documents shows that 'it is an agreement by the Department of Labor to not seek payment from Peabody.'" Decision and Order at 8. 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*, 6 BLR at 1-711.

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 the subsequent release of the security absolves it from liability. Decision and Order at 8. The Act and the regulations require an operator to "secure the payment of benefits by (1) qualifying as a self-insurer . . . or (2) insuring and keeping insured [with a commercial carrier] the payment of such benefits . . . ." 30 U.S.C. § 933(a), as implemented by 20 C.F.R. §726.110. To qualify as a self-insurer, operators must "execute and file with the Office [of Workers' Compensation Programs (OWCP)] an agreement and undertaking . . . in which the applicant shall agree . . . [t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-Miners." 20 C.F.R. §726.110(a)(1). An operator is also required to "provide security in a form approved by the [OWCP] . . . and in an amount established by the [OWCP]." 20 C.F.R. §726.110(a)(3). These provisions establish an operator's liability stems from its obligation to pay federal black lung benefits, rather than whether it has complied with the requirements that it provide security for the payment of benefits.

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 29-31. 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.[17] Decision and Order at

[17] 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 29. 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 29. 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.

8. Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody 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 both that 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." *U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116.

Employer again alleges the Director released Peabody from liability "without securing proper funding by Patriot" and that this constitutes affirmative misconduct. Employer's Brief at 34-35. As discussed above, however, Employer identifies no evidence establishing the DOL released Peabody 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 9-10; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Finally, as the Director correctly asserts, Employer does not allege the DOL acted either intentionally or recklessly. Director's Brief at 35; *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),[18] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody of liability. Employer's Brief at 29-32. This argument has no merit.

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§726.104(b)(3). Employer does not allege the DOL also released the indemnity bond that Peabody posted.

[18] Under 20 C.F.R. §725.495(a)(4):

If the operator that most recently employed a miner may not be considered a potentially liable operator pursuant to 20 C.F.R §725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). An operator is not a potentially liable operator if it is incapable of assuming its liability for the payment of benefits. 20 C.F.R §725.494(e). If the most recent operator was authorized to self-insure and no longer possesses sufficient funds to pay benefits, however, 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 liable operator because of its bankruptcy. Employer's Brief at 26; 20 C.F.R §725.494(e). Insofar as the DOL authorized Patriot to self-insure, Employer argues Eastern and Peabody cannot be named as the responsible operator and carrier pursuant to 20 C.F.R. §725.495(a)(4). Employer's Brief at 29-32.

As the administrative law judge correctly found, however, Patriot never employed the Miner, as he retired fourteen years before Patriot came into being, and thus 20 C.F.R. §725.495(a)(4) cannot apply by its unambiguous language.[19] Decision and Order at 9. Rather, he found Employer met the requirements for liability under the Act: Eastern, a mine operator, employed the Miner for a year or more; he was not employed by any other coal mine operator after Eastern; and Eastern was self-insured through Peabody during the relevant time period. Decision and Order at 4-10. Employer identifies no error in these findings. *Cox v. Director,*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). The administrative law judge also correctly found Employer did not present any evidence that Peabody is unable to

> 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.

[19] 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, we need not address its argument.

assume liability in the event Claimant is found to be eligible for benefits. Decision and Order at 5; 20 C.F.R. §§725.494(e), 725.495(a)(3).

Employer's argument that the administrative law judge was required to find DOL exhausted Patriot's bond in paying awards of benefits before Peabody could be held liable is also without merit. Employer's Brief at 26-27. The administrative law judge correctly determined the argument presumes that Patriot is the responsible carrier in this claim. Decision and Order at 6. The administrative law judge permissibly determined that Employer's contention is misplaced as the issue before him involved the identification of the financially solvent potentially liable operator to last employ the Miner. 20 C.F.R. §§ 725.494(e), 725.495(a)(1); Decision and Order at 6-7. As previously indicated, the administrative law judge permissibly found Eastern/Peabody satisfied those criteria. Decision and Order at 6. We therefore affirm the administrative law judge's finding Employer liable for benefits.

Evidentiary Challenge

Employer also contends the administrative law judge erred in excluding the medical opinions of Drs. Westerfield and Broudy. Employer's Brief at 42-44. We disagree.

Documentary evidence, including medical reports, not submitted to the district director may be received in evidence, subject to the objection of any party, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. 20 C.F.R. §725.456(b)(2). Evidence not exchanged within the twenty-day time frame may still be admitted at the hearing with the written consent of the parties, or on the record at the hearing, or upon a showing of good cause. 20 C.F.R. §725.456(b)(3). If the parties do not waive the twenty-day requirement or good cause is not shown, the administrative law judge must either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence. 20 C.F.R. §725.456(b)(3).

On March 9, 2018, twenty days before the hearing, Employer submitted a Motion for Extension of Time until forty-five days after the hearing to submit its affirmative

medical evidence.[20] Employer requested additional time to obtain a review of the autopsy slides and two medical reports reviewing the entire record.[21]

At the hearing, Employer explained that it still had not been able to obtain the autopsy slides, and therefore asked for post-hearing time to have Dr. Caffrey review them. Hearing Transcript at 14-16. Employer also asked for post-hearing time to submit medical reports from Drs. Broudy and Westerfield. Employer stated it did not develop medical reports prior to the hearing as it would rather have its experts review the entire record at one time rather than submitting a supplemental report containing their later review of Dr. Caffrey's report. *Id*. at 14-15; *see* 20 C.F.R. §725.414(a)(1)(providing for the admission of "[s]upplemental medical reports prepared by the same physician" to "be considered part of the physician's original medical report"). The administrative law judge found that good cause existed for the admission of Dr. Caffrey's review of the autopsy slides, but found that Employer did not establish good cause for the post-hearing submission of the reports of Drs. Broudy and Westerfield. *Id.* at 16; *See* Sept. 28, 2018 Order at 9 ("Employer made no reasonable explanation at the hearing for additional time to submit any medical evidence in this matter").

On appeal, Employer contends the administrative law judge erred in not admitting the reports of Drs. Broudy and Westerfield, asserting the same reasons that support a finding of "good cause" for the admittance of Drs. Caffrey's autopsy slide review compel

[20] Employer also asked for additional time to submit, as its affirmative evidence, Dr. Meyer's interpretations of x-rays dated October 10, 2013 and November 1, 2011 and a CT scan dated May 17, 2013. Employer's March 9, 2018 Motion. At the March 29, 2018 hearing, Employer stated the films were received in January of 2018 and had been forwarded to Dr. Meyer for review and asked for additional time to receive his interpretations of the films. Hearing Transcript at 14. The administrative law judge found that Employer did not establish good cause for this submission. *Id*. at 16. Subsequently, on July 2, 2018, Employer filed a Notice of Filing asking for admittance of Dr. Tarver's June 1, 2018 review of the October 10, 2013 and November 1, 2011 x-rays and the May 17, 2013 CT scan. As Employer offered no explanation for this submission, the administrative law judge excluded the evidence. Sept. 28, 2018 Order. We affirm that ruling as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[21] Employer requested five extensions of time to submit evidence before the district director, beginning on December 5, 2016, for the purposes of obtaining the autopsy slides and x-ray evidence for review, and for those reports to be reviewed by its physicians. Director's Exhibits 35, 37, 40, 42, 45.

the same result for the admittance of Drs. Broudy's and Westerfield's reports. Employer's Brief at 42-44. We disagree.

It was Employer's burden to demonstrate good cause. *Dempsey,* 23 BLR at 1-62. Employer alleges it was not able to obtain a review of the autopsy slides because of difficulties in obtaining them. Hearing Transcript at 14. Regardless, it chose not to have Drs. Broudy and Westerfield review the existing objective testing, autopsy report, and medical opinions in the meantime because it did not want to have to obtain supplemental reports. *Id*. On the facts and arguments presented, we detect no abuse of discretion in the administrative law judge's determination that Employer's tactical decision to delay developing any medical report evidence failed to establish good cause for the post-hearing submission of Drs. Broudy's and Westerfield's medical reports. *Dempsey*, 23 BLR at 1-63 (holding the administrative law judge exercises broad discretion to handle procedural matters); 20 C.F.R. §725.456(b).

Entitlement to Benefits

The administrative law judge found that Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, and that Employer did not rebut it. Decision and Order at 11-24. Employer contends the reports of Drs. Broudy and Westerfield should have been admitted post-hearing, and that the reports would have addressed the existence of pneumoconiosis and death causation. Employer's Brief at 44. Employer therefore asks that the award of benefits be vacated and the case be remanded to the administrative law judge so that Employer can obtain these reports and for the administrative law judge to reconsider whether it rebutted the presumption. *Id*. In light of our affirmance of the administrative law judge's exclusion of the reports of Drs. Broudy and Westerfield, and Employer's failure to further challenge the administrative law judge's weighing of the evidence, we affirm the determination that Employer did not rebut the presumption and affirm the award of benefits.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
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, 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 and Amicus in their opening briefs argue district directors are similar to the SEC administrative law judges *Lucia* held are inferior officers because they "exercise 'significant discretion' in carrying out 'important functions' such as determining the proof allowed in the record, conducting conferences, and issuing decisions which can become final in awarding or denying benefits." Employer's Brief at 16; Amicus Brief at 17-18. Employer also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." Employer's Brief at 16-17. Finally, it alleges the district director's role as "final decision-maker" generally creates "an Appointments Clause issue." *Id*. at 17. From this, Employer and Amicus conclude *Lucia* establishes district directors as inferior officers subject to the Appointments Clause, and they assert the case must be remanded and reassigned to a properly appointed district director. Employer Brief at 20; Amicus Brief at 18.

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 12. 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. 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).[22]

Two features determine officer status under the Appointments Clause: holding a continuing position established by law and exercising "significant authority" pursuant to it. *Lucia,* 138 S.Ct. at 2051 (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). After noting they hold continuing positions, the *Lucia* Court identified four powers agency 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.[23]

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[22] 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).

[23] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 14 n.7.

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 15. 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 "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 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 the claimant 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).[24]

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 their face, *Lucia* and *Freytag* therefore do not establish district directors as among the small category of inferior officers. *Id.* at 2052 (holding no reason existed to go beyond *Freytag's* "unadorned authority test" to determine officer status because SEC ALJs hold formal authority nearly identical to *Freytag's* STJs).

Employer's and Amicus's remaining argument the claim-processing duties of designating a responsible operator and making preliminary entitlement findings transform district directors into inferior officers similarly is without merit. Regulations control district directors' ability to issue binding decisions on those issues, subject to layers of agency review, further restricting their authority far below that of 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

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

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 16. If the district director chooses incorrectly, the Trust Fund must pay any benefits awarded in the claim. *Id*.

Moreover, specific rules govern which operators may be considered as potentially liable and ultimately designated as the responsible operator. 20 C.F.R. §§ 725.494, 725.495. The program rules require that various types of liability evidence must be submitted at specific times and during a defined period. *See, e.g.*, 20 C.F.R. § 725.408(b) (evidence relating to status as a potentially liable operator must be submitted within 90 days after receiving the Notice of Claim); 20 C.F.R. § 725.410 (evidence that another operator may be liable must be submitted within 60 days of the Schedule for the Submission of Additional Evidence with 30 additional days for submission of rebuttal evidence). These programmatic constraints show the district director lacks significant independent authority in claims processing relevant to the responsible operator designation.[25]

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).

Amicus, like employer, did not in its opening brief point to any authority other than *Freytag* and *Lucia* to argue district directors are inferior officers. In its reply brief, however, it cites a number of cases to try to establish district directors possess "significant authority" that, unlike *Freytag* and *Lucia*, do not strictly arise in an agency adjudicatory context. But, other than merely listing the disparate positions at issue, Amicus does not

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[25] 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 16-17 n.9.

attempt to show (nor could it show) how any of the far-flung positions are relevant to the limited agency adjudicatory authority district directors hold. To the extent the authority Amicus cited for the first time in its reply is properly before us, a cursory review easily distinguishes it.

Intercollegiate Broad. Sys., Inc. v Copyright Royalty Judges, 684 F.3d 1332 (D.C. Cir. 2012) concerned whether officials with rate-making authority to set the terms for billions of dollars of exchange for musical works in traditional media and on streaming services such as iTunes and Amazon -- "without any effective means of control" -- were principal officers who must be appointed by the President with Senate confirmation, or inferior officers to be appointed by a head of a department. 684 F.3d at 1337. The government readily conceded their unrestrained rate-making authority easily established them as inferior officers, and the D.C. Circuit held that, because the rate determinations were not "reversible or correctable" by any other agency authority, they further qualified as principal officers. *Id.* at 1340. The case has no relevance here, where agency regulations control the responsible operator designation, and where a district director's determinations are subject to de novo agency review by an administrative law judge, further agency appellate review at the Board, and subsequent appeal to Article III courts.

Morrison v Olson, 487 U.S. 654 (1988) also examined the line between principal and inferior officers, rather than the boundary between inferior officers and lesser functionaries at issue in this case. Unlike *Copyright Royalty Judges*, the Supreme Court there held that the more strictly constrained powers of an independent counsel appointed under the Ethics in Government Act made them inferior officers. But, even within those boundaries, Amicus does not attempt to show how the statutory delegated grant of the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" in prosecuting "federal officials" of "serious federal crimes" could ever compare to the authority to initially determine a responsible operator. 487 U.S. at 662. It simply does not.

Ex Parte Hennen, 13 Pet. 225 (1839) (district court clerk), *Ex Parte Siebald*, 100 U.S. 371 (1880) (election supervisors), *United States v. Eaton*, 169 U.S. 331 (1898) (vice consul of Siam) and *Go Bart Importing Co. v. U.S.*, 282 U.S. 344 (1931) (United States

commissioner in district court proceedings) were all issued long before *Freytag* and *Buckley*. They contain no "significant authority" analysis as established in those cases nor do the positions at issue contain any apparent similarity with district directors to permit meaningful comparison to the agency adjudicatory authority district directors possess. Instead, as both Employer and Amicus recognized in their opening briefs, *Freytag* and *Lucia* -- which do examine adjudicatory power within administrative agencies -- control this case. Employer Brief at 20; Amicus Brief at 18. And as the Director established in his opposition, the notion they establish district directors as inferior officers with powers akin to a federal district court judge's simply "is a bridge too far." Director's Brief at 13.[26]

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 and Amicus have 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 transform 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

[26] Amicus's argument that the "short time limit" and consequences of 20 C.F.R. § 725.456(b)(1) convey significant authority to district directors is utterly belied by the facts of this case: Employer received four separate extensions to submit liability evidence, Director's Exhibits 30, 36-38, 40-43; a fifth extension was denied only because it was untimely filed, Director's Exhibits 44-47; Employer received the documents it wishes to submit two months prior to the deadline, Employer's Brief at 5; the district director did not issue the Proposed Decision and Order until four months after that deadline and Employer still made no attempt to submit them, Director's Exhibit 48; and Employer is pursuing layers of agency review to overturn the district director's initial determination. Those facts say much more about the Employer's lack of diligence than they do the district director's authority.