**U.S. Department of Labor**

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

BRB No. 19-0192 BLA

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| RONALD F. CLOTHIER | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| HERITAGE COAL COMPANY, LLC | ) | |
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| and | ) | |
| | ) | |
| PEABODY ENERGY CORPORATION | ) | DATE ISSUED: 06/30/2020 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher and Tighes Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer/Carrier.[1]

[1] On April 17, 2019, Tighe Estes (Fogle Keller Walker, PLLC) filed the petition for review and brief on behalf on Employer and its carrier (Employer). On June 26, 2019, H. Brett Stonecipher advised the Board that he and Mr. Estes are currently representing Employer through a different law firm.

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

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

GRESH, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2016-BLA-05941) of Administrative Law Judge Timothy J. McGrath rendered on a claim filed on May 21, 2015, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined Employer did not show extraordinary circumstances for the late submission of its liability evidence and that it is the responsible operator. On the merits, the administrative law judge found Claimant established twenty-eight years of underground coal mine employment and is totally disabled. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[2] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the Department of Labor (DOL) district director is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[3] It next contends the administrative law

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[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.

judge erred in finding it liable for the payment of benefits. Additionally, Employer contends he erred in finding the Section 411(c)(4) presumption unrebutted. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's Appointments Clause challenge and to affirm the determination that Employer is liable for benefits.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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, 361-62 (1965). The Board reviews the administrative law judge's evidentiary rulings for an abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

## Appointments Clause

Employer argues for the first time in this appeal that the district director lacked the authority to identify the responsible operator and to 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 3. Employer solely 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 3-9.

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)

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U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that: Claimant established twenty-one years of underground coal mine employment; he is totally disabled; and he invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

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

("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.").

On July 18, 2018, after filing its post-hearing brief, Employer notified the administrative law judge and parties that it was preserving for appellate purposes whether the administrative law judge was authorized to adjudicate the claim pursuant to *Lucia*. On August 23, 2018, the administrative law judge issued an order directing Employer to file a statement within fourteen days indicating whether it sought reassignment of the case pursuant to *Lucia*. The administrative law judge stated that "[i]f a response is not timely filed, *the remedy of reassignment* and a new hearing in this matter will be deemed *waived* and the case will proceed before the undersigned." August 23, 2018 Notice and Order at 2 (emphasis added). On September 5, 2018, Employer initially requested reassignment to a different administrative law judge. However, on September 6, 2018, it filed an amended response stating it "does not acknowledge that an Appointments Clause violation is waivable, as the *Lucia* court did not identify it as being such," but it nevertheless rescinded its request for reassignment and chose to proceed with its case in front of the administrative law judge.

Had Employer raised the *Lucia* argument it now seeks to assert on appeal, the administrative law judge could have addressed it and, if appropriate, taken steps to have the case remanded and reassigned – the remedy Employer seeks here. *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). But instead of responding to the administrative law judge's order, Employer waited to raise the issue until after he issued an adverse decision. Based on these facts, we conclude Employer waived its right to challenge the district director's appointment. *See Glidden Co. v. Zdanok,* 370 U.S. 530, 535 (1962) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"). Consequently, Employer cannot resurrect the argument on appeal. *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012) (distinguishing waivers and forfeitures and observing that "a federal court has the authority to resurrect only forfeited defenses"); *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (failure to timely object to recommendations of magistrate judge when generally ordered to address them "waives appellate review of both factual and legal questions.").

## Responsible Insurance Carrier

Claimant last worked in coal mine employment from 1968 to 1995 or 1996 for Peabody Coal Company (Peabody Coal), a subsidiary of and self-insured for black lung liabilities through Peabody Energy Corporation (Peabody Energy). Peabody changed its name to Heritage Coal Company (Heritage) after Claimant retired. Director's Brief at 3, *citing* Director's Exhibits 3 (Claimant's self-reported employment history), 5 (Peabody Coal/Heritage employment records), and 6 (Claimant's Social Security Administration

earnings records). In 2007, Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot). Director's Exhibit at 22. In 2011, DOL authorized Patriot to self-insure for black lung liabilities, including for claims employees of Peabody Energy subsidiaries filed before Patriot purchased them. *Id*. In 2015, Patriot went bankrupt. Director's Exhibit 17.

Employer does not directly challenge its designation as the responsible operator.[6] Rather, it asserts the liability issue "is not one of responsible operator, but one of carrier liability." Employer's Brief at 14. Employer maintains an agreement between Peabody Energy and Patriot released Peabody Energy from liability for the claims of miners who worked for Peabody Coal. *Id*. at 20; *see* Director's Exhibit 20. Employer also maintains DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer submitted Employer's Exhibits 4 through 10 to support its assertions that Patriot is the liable carrier. The administrative law judge excluded Employer's liability evidence because it was 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). Employer argues the administrative law judge erred in excluding its liability evidence, and, therefore, requests the Board remand for the administrative law judge to admit the evidence and reconsider the responsible carrier issue.

With respect to the administrative law judge's finding that Peabody Energy is the responsible carrier, Employer asserts four alleged errors: 1) the administrative law judge erred in rendering his evidentiary ruling excluding the liability evidence in his Decision and Order; 2) the administrative law judge erred in requiring Peabody Energy to establish extraordinary circumstances for admission of its liability evidence because Employer alleges the applicable regulations do not apply to a carrier; 3) in the alternative, he erred in finding extraordinary circumstances not established; and 4) he erred in analyzing carrier liability "like a traditional prior/successor operator situation" and, in doing so, "confused

[6] Heritage Coal Company (Heritage) qualifies as a potentially liable operator because (1) Claimant's disability arose at least in part out of employment with it; (2) Heritage operated a mine after June 30, 1973; (3) Heritage employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Heritage is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Heritage was the last potentially liable operator to employ Claimant as a miner, the administrative law judge designated Heritage as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 14.

the nature of Heritage and Peabody Energy."[7] Employer's Brief at 15. In addition to arguing district directors are inferior officers, Employer alternatively asserts that allowing the district director to make an initial determination of the responsible carrier in instances involving potential Black Lung Disability Trust Fund (Trust Fund) liability violates due process. *Id*. at 14.

In response to Employer's legal arguments on this issue, the Director asserts Peabody Energy was properly designated the responsible carrier because the miner last worked for Heritage when it was self-insured through Peabody Energy and there is no argument it is incapable of paying benefits. Director's Brief at 12. She further maintains the administrative law judge acted permissibly in rendering his evidentiary ruling in his Decision and Order and properly excluded Employer's liability evidence relating to Patriot because it was not timely submitted in accordance with the regulations. *Id*. at 17-21. The Director also urges rejection of Employer's due process arguments. *Id*. at 27-31.

**Relevant Procedural History**

The district director issued a Notice of Claim on August 19, 2015, designating Heritage, self-insured through Patriot, as a "potentially liable operator." Director's Exhibit 15. Following Patriot's bankruptcy, the district director issued a second Notice of Claim on November 20, 2015, designating Heritage as a potentially liable operator, but listing it as self-insured through Peabody Energy. Director's Exhibit 17. The notice gave Employer ninety days to submit evidence disputing its designation as a potential liable operator. *Id*.

On February 29, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) identifying Heritage and Peabody Energy as the responsible operator and responsible carrier. Director's Exhibit 19. In the SSAE, the district director informed Employer it had until March 30, 2016, to submit additional documentary evidence relevant to liability and instructed it to identify any liability witnesses it intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id*. The district director advised that "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, 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).

[7] This argument is moot as the administrative law judge did not render any findings regarding a successor operator relationship in holding Employer liable for benefits and Employer does not cite to pages in the administrative law judge's Decision and Order to support its argument. Decision and Order at 3-9; Director's Brief at 12.

On March 9, 2016, Employer responded to the SSAE, disagreeing with its designation as the responsible operator and with '"special objections" to DOL's regulations on entitlement and liability issues. Director's Exhibits 20, 21. In a letter dated April 7, 2016, Employer asserted that because all of Peabody Energy's liabilities for black lung claims had been transferred to Patriot by contract, the Trust Fund was responsible for paying benefits because of Patriot's bankruptcy. Director's Exhibit 22. Employer stated it would submit the contract between Peabody Energy and Patriot, and also identified a Peabody Energy representative, Robert Fenley, "as an individual who will provide live testimony regarding the relationship between Heritage/Peabody and Patriot." *Id.* Employer further designated as a potential witness the "Secretary of Labor, or its representative who will have current knowledge of the Patriot bankruptcy, self-insurance and status of surrendered bonds. *Id.* Employer requested a thirty-day extension to "submit initial evidence." *Id.*

Employer filed a notice on April 13, 2016, expressing its intent to depose Claimant. Director's Exhibit 26. In a separate letter also dated April 13, 2016, Employer requested an extension of time to obtain Dr. Selby's medical report. Director's Exhibit 29.

On June 3, 2016, the district director issued a Proposed Decision and Order, awarding benefits and finding Heritage Coal/Peabody Energy is the responsible operator/carrier. Director's Exhibit 27. The district director noted Employer failed to timely submit any evidence relevant to its liability. *Id.* In a letter dated July 1, 2016, Employer requested the proposed decision and order awarding benefits be vacated because the Director had not responded to its two earlier requests for extensions of time to submit its medical evidence. Director's Exhibit 28. Employer also requested another extension of time to submit Dr. Selby's report. *Id*. In the alternative, Employer requested a formal hearing on the issues of the responsible operator and Claimant's entitlement to benefits. *Id.* On October 27, 2016, the district director forwarded the case to the OALJ for a formal hearing and the Trust Fund began paying Claimant interim benefits. Director's Exhibit 31.

After the case was assigned to the administrative law judge, Employer filed its first discovery request, seeking from the Director documents related to Patriot's application for self-insurance, its bankruptcy, and the status of the security deposits submitted in conjunction with its self-insurance. Employer's January 17, 2017 Request for Production of Documents.

Employer also moved to dismiss Peabody Energy as the carrier, asserting Patriot is the correct self-insured responsible operator and the Trust Fund, which retained funds as part of Patriot's bankruptcy to pay black lung claims, is liable for payment of benefits. Employer's January 27, 2017 Motion to Dismiss at 2. Employer again cited the separation

agreement and Patriot's self-insurance authorization as proof Patriot is the liable carrier.[8] *Id*. at 2-3.

The Director objected to the admission of Employer's liability evidence because it was not submitted to the district director. February 3, 2017 Response to Motion to Dismiss at 1. The Director, however, argued that Peabody Energy retained secondary liability for benefits regardless of the separation agreement or Patriot's self-insurance authorization. *Id*. at 2.

Following a series of telephone conferences between the administrative law judge and the parties, it was agreed the case would be bifurcated and he set an October 25, 2017 deadline to complete discovery on the responsible carrier issue. Decision and Order at 6. The Director forwarded documents to Employer on March 10, 2017. On October 24, 2017, Employer submitted additional liability evidence[9] and requested an extension of the discovery period in order to obtain a copy of "any and all indemnity bonds" Patriot may have executed with DOL or, in the absence of its production, to depose several DOL employees who may be able to "address the specific language of that document." Employer's Motion for Extension of Time of Discovery Period at 2, 5. According to Employer, the indemnity bond "controls liability when a company becomes bankrupt and

[8] Employer, for the first time, submitted to the Office of Administrative Law Judges (OALJ) copies of the separation agreement (Employer's Exhibit 4), the March 4, 2011 Steven Breeskin letter and Patriot's self-insurance authorization (Employer's Exhibit 5). These exhibits were initially referenced as Employer's Exhibits 1 and 2 in Employer's Motion to Dismiss but Employer's Exhibits 4 and 5 in Employer's post-hearing brief. Moreover, the administrative law judge admitted medical evidence submitted as Employer's Exhibits 1-3.

[9] Employer submitted additional liability evidence: Employer's Exhibit 6 - a November 23, 2010 letter from Steven Breeskin, returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 7 - an undated letter from Michael Chance regarding Patriot's self-insurance reauthorization audit requiring retroactive coverage for all claims through July 1, 1973; Employer's Exhibit 8 - a March 4, 2011 letter from Steven Breeskin releasing Bank of America from liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance because DOL had either lost or destroyed it; Employer's Exhibit 9 - documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Black Lung Disability Trust Fund; and Employer's Exhibit 10 - a Peabody Energy Indemnity Bond.

is authorized to self-insure" and is "crucial" to the determination of whether Peabody Energy is liable for benefits. *Id*. at 2.

On December 5, 2017, the administrative law judge denied Employer's motion to extend discovery. After reviewing various exhibits containing communications between DOL and Patriot, the administrative law judge accepted the Director's explanation that no such indemnity agreement exists and that DOL did not accept Patriot's proposal to replace the $15 million in Treasury deposits with an indemnity bond. The administrative law judge stated:

> Rather, DOL retained the Treasury deposits and transferred them to the Federal Black Lung Trust Fund following Patriot's bankruptcy. I am persuaded by the Director's contention that Patriot's security remained in the form of Treasury deposits from the time it was initially authorized to self-insure in 2011 through its bankruptcy in 2015 as DOL never accepted an indemnity bond as a replacement. Therefore, I find any discovery related to an alleged indemnity bond irrelevant and unnecessary to the resolution of the responsible carrier issue.

December 5, 2017 Order Denying Employer's Motion to Extend Discovery Period and Setting Briefing Deadline at 3; *see* Director's November 17, 2017 Response to Employer's Motion of Extension of Discovery Period and Director's March 30, 2017 Response to Submission of Documents (including Proof of Claim filed in Patriot Bankruptcy, Declaration of Michael Chance).

Four months after the close of discovery, Employer filed a motion to compel the Director to respond to interrogatories and enter stipulations regarding how Patriot's $15 million security deposit was spent. The administrative law judge denied Employer's motion because it had failed to raise the issue during the year-long discovery period and therefore deemed the issue waived. March 26, 2018 Order at 2.

Following submission of the parties' briefs, the administrative law judge issued his Decision and Order Awarding Benefits on December 28, 2018. He noted that the identification of the responsible operator or carrier must be made before the district director transfers the case to the OALJ. *Id*. at 7. He further noted the regulations require that absent extraordinary circumstances, all liability evidence must be submitted to the district director. *Id.*; *see* 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Thus, he excluded Employer's Exhibits 4 through 10 because "they do not aid the resolution of the responsible operator issue" and because "Employer/Carrier presented no argument that its failure to comply with the regulations should be excused due to extraordinary circumstances." Decision and Order at 8. He also found Employer

"presented no evidence that it does not have 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 miner." *Id*. at 8, *citing* 20 C.F.R. §725.495(c). The administrative law judge therefore determined Peabody Coal and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 8.

**Timing of Evidentiary Ruling**

Employer asserts the administrative law judge erred in excluding its liability evidence in his Decision and Order. Employer's Brief at 15-16, *citing L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc). We disagree.

The Benefits Review Board Review held in *Preston* that, "[c]onsistent with principles of fairness and administrative efficiency," an administrative law judge should issue evidentiary rulings on the admissibility of medical evidence prior to issuance of a decision so the parties have the opportunity to conform their evidence to the evidentiary limitations and make good cause arguments for the admission of evidence. *Id*. In this case, unlike *Preston*, the only restriction on the admissibility of Employer's liability evidence is whether it has been timely submitted. 20 C.F.R. §725.414(d), 725.456(b)(1). It is of no consequence the administrative law judge excluded Employer's liability evidence in his Decision and Order since the timing of his evidentiary ruling would not change the fact Employer's liability evidence was not submitted before the district director. Moreover, Employer was on notice that the Director challenged the admission of its liability evidence but it did not make an argument during the discovery process or in its post-hearing brief that extraordinary circumstances existed. Because the facts of this case satisfy the standard for fairness and administrative efficiency outlined in *Preston*, we reject Employer's contention of error. *Preston* at 24 BLR at 1-55.

**Applicability of Extraordinary Circumstances Requirement**

Employer argues evidence pertaining to a carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1). 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 therefore specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its liability for the payment of benefits. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. Because the district director must 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 the responsible carrier must be timely submitted to the district director. 20 C.F.R. §725.456(b)(1).

Employer also asserts that because the Director is a "party" to the claim, it need only show good cause for failing to timely exchange its evidence. Employer's Brief at 19, *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 C.F.R. §725.456(b)(3) addresses how to handle certain types of documentary evidence, the applicable regulation for 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).

Citing *Howard v. Valley Camp Coal Co.*, 94 Fed. App'x 170 (4th Cir. 2004), Employer also asserts it did not have to show extraordinary circumstances, only good cause, for the late submission of its evidence. Employer's Brief at 19-20. In *Howard*, the United States Court of Appeals for the Fourth Circuit held the administrative law judge misapplied the "extraordinary circumstances" standard of 20 C.F.R. §725.456(d) (2000) in excluding petitioner's medical exhibits based only on a finding they had been "in existence," without making a further finding that petitioner had "obtained" the documents while the case was before the district director. *Howard*, 94 Fed App'x at 174. Under the factual circumstances presented in *Howard*, the court held the proper inquiry was whether the petitioner had established good cause for admission of the exhibits, not extraordinary circumstances. *Id*. Employer similarly asserts that it was not required to show extraordinary circumstances, only good cause, because the documents it seeks to admit into evidence were not in its possession "during the pendency of the proceedings before the [d]istrict [d]irector." Employer's Brief at 19. We disagree.

As the Director notes, the since-repealed regulation at issue in *Howard* stated the administrative law judge could not admit into the record documentary evidence a party obtained, but did not submit, while the case was before the district director in the absence of extraordinary circumstances. 20 C.F.R. § 725.456(d) (2000); Director's Brief at []. That regulation did not apply to liability evidence. In contrast, the applicable regulation regarding liability evidence at 20 C.F.R. §725.465(b)(1) requires the administrative law judge to reject liability evidence when not submitted first to the district director without

regard to when it was obtained, unless extraordinary circumstances are established.[10] Director's Brief at 16.

**Whether Employer Established Extraordinary Circumstances**

We also reject Employer's contention it established extraordinary circumstances to warrant admitting its untimely liability evidence into the record. Employer's Brief at 20-21. 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 the disposition of an 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 contends the administrative law judge abused his discretion in finding extraordinary circumstances do not exist because the documents it seeks to have admitted were in DOL's possession and it "encountered 'particular difficulty obtaining the necessary evidence.'"[11] Employer's Brief at 21, *quoting* 65 Fed. Reg. at 79989 (DOL recognized extraordinary circumstances may be shown where an employer encounters "particular difficulty obtaining the necessary evidence."). Employer does not explain this contention. The mere fact certain documents were in DOL's possession does not show extraordinary circumstances or that Employer was constrained from timely obtaining them. Indeed, DOL provided Employer with "approximately 800 pages of documents" related to Patriot's self-insurance authorization and bankruptcy when Employer finally requested them after the case was transferred to the OALJ. Director's Brief at 18. As the Director notes, "[t]he documentation that [Employer] requested had existed for years" and "even though the Director produced documents on March 10, 2017, Employer did not attempt to submit several of them to the [administrative law judge] for over seven more months" on October 24, 2017. *Id*.

Further, we reject Employer's contention the Director should have voluntarily submitted the documentation into the record to support Employer's position. Employer's Brief at 21. It is Employer's responsibility, not the Director's, to seek and submit any

[10] Moreover, *Howard v. Valley Camp Coal Co.*, 94 Fed. App'x 170 (4th Cir. 2004) is not binding here as it is an unpublished decision and the Sixth Circuit Court of Appeals has jurisdiction in this case.

[11] Although Employer made no argument before the administrative law judge that extraordinary circumstances warrant admission of its untimely submitted liability evidence, we nonetheless consider Employer's contentions in this appeal and reject them.

documentation relevant to its liability by the deadline set forth in the SSAE. *See* 20 C.F.R. §§725.410, 725.412(a), 725.456(b)(1). Based on these facts, 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.[12] *Blake*, 24 BLR at 1-113.

**Due Process Challenge**

Employer generally asserts the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing.[13] Employer's Brief at 9-14. To the extent Employer's due process challenge is raised in the context of whether the district director must be constitutionally appointed, it has been waived. *See supra* p. 4; Employer's Brief at 3.

Moreover, due process requires only that a party be given notice and the opportunity to respond. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 7E9, 807 (4th Cir. 1998). The regulations provide that an employer who receives a Notice of Claim has ninety days to present evidence regarding its status as a potentially liable operator. 20 C.F.R. §725.408. After issuance of the SSAE, an employer has another sixty days to submit evidence. 20 C.F.R. §725.410. An employer may also request extensions of these time limits.[14] In this case, Employer was timely put on notice of its liability and had the

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

[13] Employer states that it wants to "preserve" its due process arguments because "many of the due process issues are not ripe for review until the appellate level" and includes them in this appeal out of "an abundance of caution." Employer's Brief at 14. Employer does not explain whether it means to preserve this issue for appeal before the United States Court of Appeals for the Sixth Circuit or have the Board address it. Further, some of Employer's arguments on due process appear to be aimed at showing the district director exercises significant powers in conjunction with its Appointments Clause challenge, which we have found to be waived. *Supra* p. 4.

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

opportunity submit its liability evidence relevant to the responsible operator and carrier issues while the case was before the district director, but failed to do so. Employer therefore has not demonstrated a due process violation. *Id.*

**The Responsible Operator and Carrier Regulations**

Having failed to establish error with respect to its evidentiary and due process arguments, Employer's sole remaining contention is that the administrative law judge erred in finding it liable for benefits. We disagree.

The administrative law judge accurately found Employer "presented no evidence that it does not have 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 miner." Decision and Order at 8, *citing* 20 C.F.R. §725.495(c). We therefore affirm the administrative law judge's finding Employer is liable for benefits.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[15] or by establishing that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

**Legal Pneumoconiosis**

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§ 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). Employer asserts the administrative law judge mischaracterized Dr. Selby's

[15] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

opinion as "hostile" to the Act and erred in finding it insufficient to disprove legal pneumoconiosis. We disagree.

Dr. Selby diagnosed an obstructive respiratory impairment caused by asthma and emphysema caused by smoking. Employer's Exhibits 1-3. He opined Claimant's asthma was not "permanently" aggravated by coal mine dust exposure because the disease and symptoms only manifested about ten years after he left his coal mine employment. Employer's Exhibit 1 at 4; Employer's Exhibit 3 at 13, 34-35. Contrary to Employer's contention, the administrative law judge did not reject Dr. Selby's opinion as hostile to the Act but permissibly found it "at odds with the concept recognized by the [DOL] that pneumoconiosis is 'a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.'"[16] Decision and Order at 23; *quoting* 20 C.F.R. § 718.201(c); *see* 65 Fed. Reg. 79,971-72 (Dec. 20, 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Further, as the administrative law judge noted, Dr. Selby testified asthma is a reversible respiratory impairment; "[a]ny dust can cause [] asthma to be worse during that time, but it does not cause a permanency." Employer's Exhibit 3 at 34. However, Dr. Selby also "undercut this proposition by noting asthma can frequently cause a nonreversible [fixed] part of pulmonary impairment." Decision and Order at 23; *see* Employer's Exhibit 3 at 37-38. The administrative law judge permissibly found that while Dr. Selby described how cigarette smoking can cause an asthmatic condition to become a more permanent respiratory impairment, he "does not at all explain why Claimant's twenty-eight years of continuous coal mine dust exposure did not cause a permanent obstructive feature in the form of asthma." Decision and Order at 23; *see Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Additionally, we see no error in the administrative law judge's finding that Dr. Selby did not rationally explain why Claimant's emphysema is due entirely to smoking. Decision and Order at 24. The administrative law judge accurately found Dr. Selby bases his opinion on the statistical probability that "heavy cigarette smoking" is "extremely common to cause

[16] The administrative law judge also specifically noted that Claimant testified he began to experience symptoms of wheezing, cough, and sputum production and began sleeping on two pillows at night when he worked in the mines. Decision and Order at 23; Hearing Transcript at 25-27. The administrative law judge permissibly found Claimant's testimony undercuts Dr. Selby's opinion that Claimant's asthma is not legal pneumoconiosis because his respiratory symptoms and impairment did not begin until after he left the mines. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 23; Employer's Exhibits 1, 3.

emphysema," whereas non-smoking coal miners rarely develop the disease "to this degree." Employer's Exhibit 2 at 10; Employer's Exhibit 3 at 4; *see* Decision and Order at 24. The administrative law judge permissibly held Dr. Selby's rationale inconsistent with DOL's position that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction" and that the effects of smoking and coal mine dust exposure are additive. Decision and Order at 24, *quoting* 65 Fed. Reg. 79,940; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He also permissibly found Dr. Selby's reliance on statistical averages fails to account for the particulars of Claimant's case. *See* 65 Fed. Reg. at 79,941 (statistical averaging can hide the effect of coal mine dust exposure in individual miners); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 24.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Employer did not disprove legal pneumoconiosis based on Dr. Selby's opinion. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

**Disability Causation**

The administrative law judge next addressed whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited Dr. Selby's opinion on the cause of Claimant's total disability because Dr. Selby did not diagnose legal pneumoconiosis, contrary to the administrative law judge's determination that Employer failed to disprove the disease. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 25. Thus, we affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing Claimant's respiratory disability was unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25.

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

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to affirm the administrative law judge's liability determination and the award of benefits. I write separately, however, to express my view that, 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 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 5. It also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id*. at 5-6. . Finally, it alleges the district director's role as "final decision-maker" generally creates "an Appointments Clause issue." *Id*. at 6. 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 6-9.

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 22. 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).[17]

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.[18]

*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 24. Indeed, the remedy the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed administrative

[17] 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).

[18] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 23 n.15.

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).[19]

Unlike DOL administrative law judges, the four factors the *Lucia* Court identified under the "unadorned authority test" (taken "straight from *Freytag's* list") thus establish district directors are not "near-carbon copies" of SEC judges: their "point for point" application does not come close to establishing "equivalent duties and powers" in "conducting adversarial inquiries." *Lucia,* 138 S.Ct. at 2053 (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)). DOL administrative law judges possess nearly identical authority as SEC administrative law judges. By design, district directors do not. On its face, *Lucia* therefore does not establish district directors as among the small category of inferior officers. *Id.* at 2052 (holding no reason existed to go beyond *Freytag's* "unadorned authority test" to determine officer status because SEC ALJs hold formal authority nearly identical to *Freytag's* STJs).

Employer's remaining argument the claim-processing duties of designating a responsible operator and making preliminary entitlement findings transform district directors into inferior officers similarly is without merit. Regulations constrain district directors' ability to issue binding decisions on those issues, subject to layers of review, further restricting their authority far below that of administrative law judges conducting adversarial hearings. *See, e.g.*, *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018) (noting responsible operators may contest their designation before the district director, request de novo review at a formal hearing in front of an administrative law judge, appeal a final administrative law judge's decision to the Board, and a final Board order to a U.S. court of appeals) (citations omitted).

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

[19] 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).

Brief at 25. 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.[20]

*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

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[20] 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 25 n.17.

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