U.S. Department of Labor

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

BRB No. 19-0520 BLA

DALLAS W. McCOY Claimant-Respondent v. EASTERN ASSOCIATED COAL, LLC and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/31/2021 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.

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

Cynthia Liao (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.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2017-BLA-06207) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on November 7, 2014.[1]

The administrative law judge found Employer is the responsible operator. He also found Claimant established twenty-two years of coal mine employment and complicated pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.203(b), 718.304. He therefore found Claimant established a change in an applicable condition of entitlement by invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3),[2] and awarded benefits. 20 C.F.R. §§718.304, 725.309(c).

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 of the Constitution, Art. II § 2, cl. 2.[3] It also contends the duties performed by the district

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[1] The district director denied Claimant's prior claims because he did not establish any element of entitlement. Director's Exhibits 1, 2.

[2] The Act establishes an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[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

director, the Department of Labor (DOL) official who initially processes claims, create an inherent conflict of interest that violates its due process and renders him an inferior officer who was not appointed in a manner consistent with the Appointments Clause. It finally contends the administrative law judge erred in finding it liable for the payment of benefits.[4]

Claimant and the Director, Office of Workers' Compensation Programs (the Director), urge the Benefits Review Board to reject Employer's conflict and Appointment Clause challenges. The Director also contends the administrative law judge properly determined Employer is responsible for payment of benefits.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965). The Board reviews an administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

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*,

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> 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, the administrative law judge's findings that Claimant invoked the irrebuttable presumption and is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; Decision and Order at 3; Hearing Transcript at 32-33.

585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer's Brief at 7-11 (unpaginated). Employer acknowledges the Secretary of Labor as a Head of a Department under the Appointments Clause ratified the prior appointments of all sitting DOL administrative law judges on December 21, 2017. *Id.* However, Employer contends that, because the administrative law judge issued a "Notice of Hearing and Prehearing Order" prior to ratification,[7] his Decision and Order must be vacated and the case remanded for a new hearing before a different administrative law judge.[8] *Id.*

In response, the Director contends 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 22-23. We agree with the Director's argument.

The administrative law judge issued a Notice of Hearing on December 12, 2017. His issuance of the Notice alone involved no consideration of the merits, nor could it color his consideration of the merits of this case. It simply reiterated the statutory and regulatory requirements governing the hearing procedures.[9] *Noble v. B & W Res., Inc.,* 25 BLR 1-

[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] Employer does not argue that the administrative law judge's appointment remained improper after the Secretary ratified it, only that he impermissibly took action prior to ratification.

[8] 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 because he had already issued the Notice of Hearing on December 12, 2017. The administrative law judge denied Employer's request for reassignment of the case to a different administrative law judge, noting he had not issued any order pertaining to a contested issue prior to his ratification. *See* July 27, 2018 Order.

[9] 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* December 12, 2017 Notice of Hearing and Pre-Hearing Order.

267, 1-271-72 (2020). Employer characterizes certain directives in the Notice as non-ministerial, but it does not explain how they would be expected to color the administrative law judge's post-ratification consideration of the case, thus requiring a new hearing before a different administrative law judge. *Id*.

Unlike the situation in *Lucia*, in which the judge had presided over a hearing and 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. We thus decline to remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. *Noble*, 25 BLR at 1-272.

Appointments Clause – District Director

Employer argues the district director lacked authority to identify the responsible operator and process this case because the district director is an "inferior officer" not properly appointed pursuant to the Appointments Clause. Employer's Brief at 7 (unpaginated).

The Appointments Clause issue is "non-jurisdictional" and thus is subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture."). *Lucia* was decided over one year prior to the administrative law judge's Decision and Order, but Employer failed to raise its challenge to the district director's appointment while the case was before the administrative law judge.[10]

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 , No. 17-1246, 2021 WL

[10] Employer's July 2, 2018 Notice of Preserved Issue solely discussed the administrative law judge's appointment, and did not mention the district director. Employer was clearly aware of the substantive law it now cites to challenge for the first time the district director's authority.

560743 (D.C. Cir. Feb. 16, 2021). Instead, Employer waited to raise this issue until after the administrative law judge issued an adverse decision. Based on these facts, we conclude Employer forfeited its right to challenge the district director's appointment. Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its forfeited argument. *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).

Due Process Challenge

Employer states that "out an abundance of caution" it outlines a due process challenge in order to preserve the issue for appeal. Employer's Brief at 16 (unpaginated). It generally asserts that the regulatory scheme whereby the district director, as a DOL employee, must determine the liability of a responsible operator and its carrier when the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing. Employer's Brief at 16 (unpaginated).

Here again, Employer failed to raise the issue to the administrative law judge. *See generally Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); *Taylor v. 3D Coal Co.*, 3 BLR 1-350, 1-355 (1981). Moreover, Employer does not explain why a DOL employee inherently lacks authority to render an initial determination on the responsible operator in light of the fact that the Act itself imposes liability on a miner's employer(s) and contemplates Trust Fund liability only when a responsible operator cannot be assigned. 30 U.S.C. §§932, 933, 934; *see also National Min. Ass'n v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (upholding regulations establishing deadlines for an operator's submission of evidence "if they disagree with their designation [by the district director] as parties potentially liable for a miner's claim" and shifting the burden of disproving liability "once an operator has been determined to be responsible for a claim").

Employer's sole argument – that the district director's ability to make an initial determination regarding the responsible operator violates its due process – also fails.

Due process requires only that a party be given notice and the opportunity to respond. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). The regulations provide an employer who receives a Notice of Claim ninety days to present evidence regarding its status as a potentially liable operator. 20 C.F.R. §725.408. After issuance of the SSAE, an employer has another sixty days to submit such evidence. 20 C.F.R. §725.410. An employer may also request extensions of these time limits and challenge the denial of any extension request before an administrative law judge, the Board, or a circuit court. 20 C.F.R. §725.423; *see, e.g.*, *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018). Moreover, an identified responsible operator may challenge its liability before an administrative law judge. *Arch of Kentucky, Inc. v. Director, OWCP,* 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *see* 20 C.F.R. §725.455 ("any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge"). Employer has failed to identify any instance in which the district director did not give notice or allow it to respond. As it was timely put on notice of its liability, had the opportunity to submit relevant evidence to the district director and challenge its designation as the responsible operator before the administrative law judge, Employer has not demonstrated a due process violation.

Responsible Insurance Carrier

We now turn to Employer's arguments on the merits of why it believes it cannot be held liable for this claim.

Claimant last worked in coal mine employment for Eastern Associated Coal, LLC (Eastern) from November 1976 to April 1994. Director's Brief at 2, *citing* Director's Exhibit 8 (Employer's Sept. 25, 2007 letter regarding Claimant's dates of service); Director's Exhibit 9 (Social Security Administration earnings record); Hearing Transcript at 23-24. By the end of Claimant's employment, Eastern was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy Corporation (Peabody). Director's Brief at 2; Employer's Brief at 17 (unpaginated) ("Peabody Energy was authorized to self-insure its obligations on the claimant's last day of exposure."); Hearing Transcript at 24 (Eastern changed its name to "Eastern Peabody" in the "middle" of Claimant's employment.).

Patriot Coal Corporation (Patriot) was initially Peabody's subsidiary. In 2007, thirteen years after Claimant's coal mine employment ended, Peabody sold Eastern to Patriot and Patriot became an independent company. Director's Exhibit 39 at 1, 4-57 (Separation Agreement). On March 4, 2011, the DOL authorized Patriot to self-insure "retro-active to July 1, 1973" for black lung liabilities, including for claims filed before Patriot purchased the Peabody subsidiaries. Director's Exhibit 40 at 15-16 (Steven

Breeskin's Letter and Decision Granting Authority to Act as a Self-Insurer).[11] This authorization determined the amount of potential liability to insure the obligation, acknowledged Patriot's deposit of U.S Treasury funds with the Federal Reserve Bank on behalf of the DOL in satisfaction of the liability obligation, and released the letter of credit Patriot financed under Peabody's self-insurance program.[12] Director's Exhibit 40 at 15 (Steven Breeskin's March 4, 2011 Letter to Patriot). In 2015, Patriot went bankrupt. Director's Exhibit 27.

Employer does not directly challenge its designation as the responsible operator.[13] Rather, it asserts the "liability issue is that of the [responsible] carrier, not of the responsible operator," and that the Black Lung Trust Fund (the Trust Fund), not Peabody, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 5-6 (unpaginated). It argues the administrative law judge erred in finding it liable for benefits because: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) the DOL released Peabody from liability; and (3) the Director is equitably estopped from imposing liability on Peabody. Employer's Brief at 9-12, 16, 18-26 (unpaginated). It maintains that a separation agreement – a private contract between Peabody and Patriot – released Peabody from liability and that DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*. at 16-18; Director's Exhibits 39, 40 at 15-16.

Applicability of the Extraordinary Circumstances Requirement

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[11] Steven Breeskin is the former Director of the Division of Coal Mine Workers' Compensation (DCMWC).

[12] The monetary values are redacted. Director's Exhibit 40; *see* July 31, 2018 Order Excluding EX 1 - EX 7 at 6 n.10.

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

To support its assertion that Peabody is not the liable insurance carrier, Employer relies, in part, on documentary evidence submitted to the administrative law judge marked Employer's Exhibits 3-7.[14] The administrative law judge excluded these exhibits because 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); July 31, 2018 Order Excluding EX 1 – EX 7.

Employer initially argues the administrative law judge erred in excluding its exhibits because evidence pertaining to a carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1). Employer's Brief at 5-7 (unpaginated). We disagree.

A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations thus specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its liability for the payment of benefits. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952. Because the district director must identify the responsible operator or carrier before a case is referred to the Office of Administrative Law Judges, the regulations require that, absent extraordinary circumstances, liability evidence pertaining to the responsible carrier must be timely submitted to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989.

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[14] 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; Employer's Exhibit 2, a March 4, 2011 letter from Mr. Breeskin to Patriot; 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. Michael Chance, the current Director of the DCMWC, 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 the original; 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.

Employer's Exhibits 1 and 2 are also included at Director's Exhibit 40. Therefore, only the admissibility of Employer's Exhibits 3 through 7 are in dispute.

Employer also argues the administrative law judge erred in excluding its exhibits by requiring it to show extraordinary circumstances pursuant to 20 C.F.R. §725.456(b)(1). Employer's Brief at 2-3 (unpaginated). Employer asserts that because the Director is a party to the claim, and did not voluntarily share these exhibits with Employer, it need only show good cause for failing to timely exchange its evidence. *Id.* at 5, *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, the administrative law judge correctly found the good cause standard at 20 C.F.R. §725.456(b)(3) applies only to non-liability evidence, and 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*. . . .

July 31, 2018 Order Excluding EX 1 – EX 7 at 4-5, *citing* 20 C.F.R. §725.456(b)(1)-(3).

Relying on *Howard v. Valley Camp Coal Co*., 94 F. App'x 170 (4th Cir. 2004), Employer argues the administrative law judge was required to first determine that Employer "actually" obtained the exhibits when the matter was pending before the district director. Employer's Brief at 2-3 (unpaginated). Employer alleges it did not obtain the exhibits until after the district director issued the Proposed Decision and Order (PDO) and, therefore, it was not required to show extraordinary circumstances for their admission. We reject Employer's arguments.

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

In this case, the applicable regulation regarding liability evidence at 20 C.F.R. §725.465(b)(1) requires the administrative law judge to reject liability evidence when it is not first submitted to the district director, without regard to when it was obtained, unless extraordinary circumstances are established. After the Schedule for the Submission of Additional Evidence (SSAE) was issued and several extensions of time to submit additional evidence were granted to Employer, it had until March 31, 2017 to submit evidence to the district director. 20 C.F.R. §725.410(b); Director's Exhibits 42 at 2-3, 59, 60. The record shows Employer obtained the liability evidence contained in Employer's Exhibits 3 through 7 by March 10, 2017, three weeks before the March 31, 2017 deadline and three months before the district director's June 13, 2017 PDO awarding benefits.[15] Director's Brief at 8; Employer's Brief at 2 (unpaginated) (admitting Employer obtained EX 3-7 in March 2017); Director's Exhibit 72.

We also reject Employer's contention it established extraordinary circumstances to admit its untimely evidence into the record. Employer's Brief 3 (unpaginated). 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 generally contends the administrative law judge abused his discretion because Employer's Exhibits 3 through 7 were in DOL's possession, it sought discovery from the Director but the Director ignored its request, and therefore it had to obtain the exhibits "in another proceeding." Employer's Brief at 3 (unpaginated). However, the mere fact employer's exhibits were in DOL's possession does not show extraordinary circumstances for why Employer did not timely obtain and submit them.

The administrative law judge correctly noted that in Employer's January 24, 2017 discovery request (Director's Exhibit 41), Employer's counsel stated he "requested these [documents] in several claims. Once I have the documents for one claim, this will sufficiently address all of the requests." July 31, 2018 Order Excluding EX 1 – EX 7 at 6. On March 10, 2017, the Director provided discovery responsive to Employer's request in another Patriot case. *Id*. The administrative law judge found "unavailing" Employer's

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[15] The district director issued a Proposed Decision and Order (PDO) on October 20, 2016, but it was vacated to allow Employer additional time to submit liability evidence. Director's Exhibits 63, 68. The district director named Employer as the responsible operator in a June 13, 2017 PDO. Director's Exhibit 72.

assertion it did not have enough time to "sift through 800 pages and identify relevant documents for submission" prior to the March 31, 2017 deadline, and that three weeks was more than sufficient for this purpose.[16] *Id.* at 7. Because Employer obtained its liability evidence by March 10, 2017, three weeks before the March 31, 2017 deadline for submitting that evidence to the district director, we affirm the administrative law judge's finding Employer failed to demonstrate extraordinary circumstances. Moreover, it is Employer's responsibility, not the Director's, to submit any documentation relevant to its liability by the deadline set forth in the SSAE. *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. *Blake*, 24 BLR at 1-113.

20 C.F.R. §725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[17] Employer contends the Director's failure to secure sufficient funding from Patriot absolves Peabody of liability. Employer's Brief at 9-11 (unpaginated). This argument has no merit.

If the operator that most recently employed a miner may not be considered a potentially liable operator pursuant to 20 C.F.R §725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). If the most recent operator, however, was authorized to self-insure and no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be

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[16] The administrative law judge further noted the district director denied as untimely Employer's April 5, 2017 request for an extension of time to submit evidence because it was not filed prior to the March 31, 2017 deadline. 20 C.F.R. §725.423; Order Excluding EX 1 – EX 7 at 6; Director's Exhibit 62.

[17] Under 20 C.F.R. §725.495(a)(4):

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495(a)(3)] shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

named as the responsible operator, and liability falls to the Trust Fund. 20 C.F.R. §725.495(a)(4).

Employer argues the Trust Fund is liable because Patriot should be considered Claimant's last employer, was authorized to self-insure, and no longer possesses sufficient funds to meet its liabilities. Employer's Brief at 9-11 (unpaginated), *citing* 20 C.F.R. §725.495(a)(4); 20 C.F.R §725.494(e). As Claimant retired thirteen years before Patriot came into being and thus never worked for Patriot, however, 20 C.F.R. §725.495(a)(4) cannot apply by its unambiguous language. The administrative law judge properly found Employer met the requirements for liability under the Act: Eastern, a mine operator, employed Claimant as a miner for one year or more; Claimant was not employed by any other coal mine operator after Eastern; and Eastern was self-insured through Peabody during Claimant's employment with it. Decision and Order at 5-6. 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 assume liability in the event Claimant is found eligible for benefits. Decision and Order at 5; 20 C.F.R. §§725.494(e), 725.495(a)(3).[18]

Release of Liability - 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.[19] Employer's Brief (unpaginated) at 17-18, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibit 40 at 15. 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 (unpaginated) at 17. The "submission of that security by the operator," Employer argues, "establishes its liability." *Id*. Insofar as the DOL "releases said security," Employer

[18] Employer also argues the Director failed to comply with its duty to monitor Patriot's financial health. Employer's Brief at 29-30. As Employer has not established that Patriot is liable in this case and relies on evidence properly excluded from the record, we need not address its argument.

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

contends, a "self-insurer's obligations under the Act are terminated, as the security previously proffered by the self-insurer no longer exists." *Id.* We disagree.

Employer's liability is created by statute, which requires that during any period after December 31, 1973, coal mine operators "shall be liable for and shall secure the payment of benefits." 30 U.S.C. §932(a), (b). Operators are authorized to self-insure if, among other requirements, they obtain security approved by the DOL. 20 C.F.R. §726.101(a), (b)(4). In addition to obtaining "adequate security," a self-insurance applicant "shall [also] as a condition precedent to receiving such authorization, execute and file . . . an agreement . . . in which the applicant shall agree" to "pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners." 20 C.F.R. §726.110(a)(1). Thus, we agree with the Director that "the security deposit is an additional obligation separate from the responsibility to pay benefits."[20] Director's Response at 15.

Lastly, Employer contends that, in executing the Indemnity Agreement with Bank of America on March 4, 2011, the DOL terminated Peabody's self-insurance status and became contractually bound to hold Peabody and its surety harmless. Employer's Brief at 17-18 (unpaginated). However, the Indemnity Agreement was between DOL and Bank of America, which issued the letter of credit. Employer's Exhibit 4. In the agreement, the DOL simply requested cancellation of the letter of credit and agreed to hold Bank of America harmless under it. *Id.* The Indemnity Agreement is not a communication to Peabody, nor does it mention Peabody. As the Director argues, the Indemnity Agreement "does not release any party from liability (aside from Bank of America), and it is not an agreement, in Employer's words, 'to hold Peabody and its surety harmless.'" Director's Brief at 16, *quoting* Employer's Brief at 22 (unpaginated). Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit absolves Peabody of liability.

[20] Further, Employer concedes that its self-insurance authorization was established by both a letter of credit and an indemnity bond. Employer's Brief at 18 (unpaginated). Employer specifically states "Peabody [] 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." *Id.* The regulations allow an operator to post security in the form of "a letter of credit issued by a financial institution," but clarify that "a letter of credit shall not be sufficient by itself to satisfy a self-insurer's obligations under this part." 20 C.F.R. §726.104(b)(3). Employer did not submit any evidence the DOL also released the indemnity bond that Peabody posted.

Equitable Estoppel

Finally, Employer argues it should be relieved of liability under the doctrine of equitable estoppel. To invoke equitable estoppel, Employer must show the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *Dawkins v. Wit,* 318 F.3d 606, 611 (4th Cir. 2003); *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 "unprofessional and misleading conduct" or providing misinformation; it is "lying" or a "malicious" act rather than negligent conduct. *Id.* at 612; *Keener v. E Associated Coal Corp.,* 954 F.2d 209, 214 n.6 (4th Cir. 1992); s*ee also U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *Reich*, 66 F.3d at 116.

Employer alleges the Director's release of Peabody from liability "without securing proper funding by Patriot" constitutes affirmative misconduct. Employer's Brief at 19-20 (unpaginated). As discussed above, however, Employer identifies no admissible evidence establishing the DOL released Peabody from liability or made a representation of such a release with respect to Peabody's liability. Thus, we reject Employer's argument. *See Dawkins,* 318 F.3d at 611-612; *Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Moreover, Peabody does not establish it relied to its detriment on any representation by the DOL; the record belies its assertion that it understood the DOL released it from liability. In 2013, two years after the DOL approved Patriot's self-insurance, Peabody filed with the Securities Exchange Commission a document declaring that as part of a proposed settlement agreement, it would provide monetary support to Patriot to fund "Patriot's Federal Black Lung obligations for which Peabody could be held responsible if Patriot fails to fund such obligations when they became due." Director's Brief at 19; *see* Director's Exhibit 29. Finally, Employer does not even allege the DOL acted either intentionally or recklessly to support its contention of affirmative misconduct. *See Dawkins* at 611; *Keener,* 954 F.2d at 214 n.6. Because Employer failed to establish the necessary elements, we reject Employer's equitable estoppel argument.

For the foregoing reasons, we affirm the administrative law judge's determination that Employer is liable for this claim.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge