U.S. Department of Labor

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

BRB Nos. 20-0165 BLA
and 20-0166 BLA

NILIA FAUBER (o/b/o and Widow of JAMES H. FAUBER) Claimant-Respondent v. EASTERN ASSOCIATED COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/25/2021 DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

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

Sarah M. Hurley (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 ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decisions and Orders Awarding Benefits (2017-BLA-06213 and 2018-BLA-05736) rendered on claims filed pursuant 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 August 13, 2014,[1] and a survivor's claim filed on December 18, 2017.[2]

In a Decision and Order Awarding Benefits dated January 13, 2020, the administrative law judge addressed the Miner's claim. He found Eastern Associated Coal Company (Eastern) is the properly identified responsible operator and its parent company, Peabody Energy Corporation (Peabody Energy), the responsible carrier. He also found Claimant established the Miner had thirty-two years of coal mine employment, including twenty nine years in underground mines, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Claimant thus invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)

[1] This is the Miner's fourth claim for benefits. Miner's Claim (MC) Director's Exhibits 1-3, 5. On March 17, 2009, the district director denied his most recent prior claim, filed on July 24, 2008, because although the Miner established total disability, he failed to establish the existence of pneumoconiosis. MC Director's Exhibit 37. The Miner requested modification of his denied claim on June 1, 2009, which Administrative Law Judge Richard A. Morgan denied in a July 15, 2011 Decision and Order. Judge Morgan's 2011 Decision and Order at 34. The Miner took no further action on his denied claim.

[2] Claimant is the widow of the Miner, who died on October 23, 2017. Survivor's Claim (SC) Director's Exhibit 2. She is pursuing the Miner's claim on his estate's behalf and her survivor's claim. SC Director's Exhibits 1, 3. Employer's appeal in the Miner's claim was assigned BRB No. 20-0165 BLA, and its appeal in the survivor's claim was assigned BRB No. 20-0166 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only. *Fauber v. Eastern Associated Coal Co.*, BRB Nos. 20-0165 BLA and 20-0166 BLA (Feb. 7, 2020) (Order) (unpub.).

(2018),[3] and established a change in an applicable condition of entitlement.[4] He further found Employer did not rebut the presumption and awarded benefits.

In a separate Decision and Order Awarding Benefits dated January 13, 2020, the administrative law judge found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018),[5] based on the award of benefits in the Miner's claim.

On appeal, Employer contends the district director, the Department of Labor (DOL) official who processes claims, is an inferior officer who was not appointed in accordance with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[6] It also contends

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

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner's prior claim was denied for failure to establish pneumoconiosis, Claimant had to establish the Miner suffered from pneumoconiosis in order to obtain review of the merits of her husband's claim. *See White*, 23 BLR at 1-3; MC Director's Exhibit 3.

[5] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] 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

the administrative law judge erred in finding it liable for the payment of benefits. On the merits, Employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the awards. 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.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause – District Director

Employer argues that if the administrative law judge does not reopen the record for admission of additional evidence on the responsible operator issue, then it "would appear" the district director is an improperly appointed "inferior officer" who lacks authority to process this case pursuant to the Appointments Clause. Employer's Brief at 17-19. The Director responds, contending the district director is not an inferior officer and that Employer's arguments must fail. Director's Response Brief at 19-25. We find Employer's limited argument both unpersuasive and inadequately briefed. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such

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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.

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the Miner's last coal mine employment was performed in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 7.

proposed result." *Id*. To merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). Moreover, a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

In support of its general contention that district directors are inferior officers, Employer cites the regulations requiring employers to either submit their liability evidence to the district director or establish "extraordinary circumstances" for its admission to the administrative law judge. Employer's Brief at 18; *see* 20 C.F.R. §§725.414, 725.456(b)(1). It also cites *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018),[8] 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. Employer's Brief at 17-19. Employer thus concludes the district directors' "final authority to decide a responsible operator issue" constitutes "broad" and "significant discretion that renders them inferior officers subject to the Appointments Clause. Employer's Brief at 17-19.

Employer is incorrect, however, that district directors necessarily make the "final" decision on the responsible operator. As happened in this case, an employer may request a hearing before an administrative law judge who makes his or her own decision on the issue. *See* 20 C.F.R. §725.455(a) ("any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge"). Other than a conclusory assertion that district directors have the same "authority wielded" by administrative law judges, based on an overstatement of the district director's role, Employer has not attempted to analyze the district directors' authorities, compare those to the significant authorities held by administrative law judges, or otherwise explain how *Lucia's* holding that administrative law judges are subject to the Appointments Clause supports its position that district directors are inferior officers. Employer's Brief at 17.

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

Thus we decline to address this issue. *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; *see also* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47.

Due Process Challenge

Employer generally asserts the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, and also administer the Black Lung Disability Trust Fund (Trust Fund),[9] creates an inherent conflict of interest that violates its due process right to a fair hearing.[10] Employer's Brief at 19-24. The Director correctly notes, "Congress intended that 'individual coal mine operators rather than the [Trust Fund] bear the liability for claims arising out of such operators' mines to the maximum extent feasible.'" Director's Brief at 26, *quoting* S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. on Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979); *see also Old Ben Coal v. Luker*, 826 F.2d 688, 693 (7th Cir. 1987). Employer does not explain why a DOL employee inherently lacks authority to initially determine the responsible operator, considering the Act itself imposes liability on a responsible operator and contemplates Trust Fund liability only when one 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 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

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

[10] Employer states that its due process argument is being included "out of an abundance of caution." Employer's Brief at 20. Employer does not explain whether it means to preserve this issue for appeal or have the Board address it.

evidence regarding its status as a potentially liable operator. 20 C.F.R. §725.408. After issuance of the Schedule for the Submission of Additional Evidence (SSAE), an employer has another sixty days to submit 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. 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, and 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.

Additionally, Employer states it wants to "preserve" arguments that the administrative law judge's decision to cut off discovery and the Director's failure to maintain proper records "potentially rises to the level of a denial of our due process rights." Employer's Brief at 44. It also states that it wants to "preserve" its ability to challenge Black Lung Benefits Act Bulletin No. 16-01, issued on November 12, 2015, "instructing Directors to name Peabody the responsible operator for purposes of paying [Patriot Coal Corporation's] obligations under the [Act]" on the grounds that "it contradicts the [Act's] liability rules." *Id*. at 46. Because Employer does not provide any specific argument regarding these challenges or explain how they resulted in due process violations, we are unable to address them. *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; *see also* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47.

Responsible Operator/Insurance Carrier

The Miner last worked in coal mine employment from 1956 to 1999 for Eastern, a subsidiary of Peabody Energy. Miner's Claim (MC) Director's Exhibits 9, 29. In 2007, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). MC Director's Exhibit 53. In 2011, the DOL authorized Patriot to self-insure for black lung liabilities, including for claims that employees of Peabody Energy subsidiaries filed before Patriot purchased them. *Id*. This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15 million. *Id*.; *see* MC Director's Exhibit 54. In 2015, Patriot went bankrupt. MC Director's Exhibit 56; Director's Brief at 10.

Employer[11] does not challenge Eastern's designation as the responsible operator.[12] Rather, it contests Peabody Energy's liability as the carrier. Hearing Transcript at 6. Employer maintains that a private contract between Peabody Energy and Patriot (Separation Agreement) released Peabody Energy from liability for the claims of miners who worked for Eastern. Employer's Brief at 12-17, 25-46; *see* MC Director's Exhibit 53. Employer also maintains the DOL endorsed this shift of liability when it authorized Patriot to self-insure. Employer's Brief at 12-17, 25-46.

The Director counters that neither Patriot's self-insurance authorization nor any other agreement or equitable doctrine relieved Peabody of liability for paying benefits to miners when Peabody owned and provided self-insurance to Eastern. Instead, after Patriot's self-insurance failed in 2015, it could no longer pay those claims, and Peabody remained on the hook for the claims of miners who last worked for Eastern while Peabody owned and self-insured that company. Given Claimant ended his employment with Eastern eight years before Patriot was created, a straightforward application of the liability regulations to the facts of this case establishes Eastern as the responsible operator and Peabody as the responsible carrier.

Following receipt of the Miner's claim on August 13, 2014, the district director identified Patriot as the potentially liable operator in the Notice of Claim issued on September 30, 2014. MC Director's Exhibits 27, 59. On January 12, 2016, the district director issued a second Notice of Claim to Eastern, self-insured through Peabody Energy, as the potentially liable operator. MC Director's Exhibit 40. Employer responded on January 21, 2016, asserting that Peabody Energy should be dismissed as the liable operator

[11] In portions of its brief, Employer refers to Heritage Coal as the entity that employed the Miner. Employer's Brief at 14-46. As Employer correctly identifies Eastern in the caption and initial portion of its brief, we attribute these references to scrivener's errors.

[12] Eastern qualifies as a potentially liable operator because (1) the Miner's disability arose at least in part out of his employment with it; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed the Miner for a cumulative period of at least one year; (4) the Miner's employment included at least one working day after December 31, 1969; and (5) Eastern is capable of assuming liability for the payment of benefits through Peabody Energy's self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ the Miner as a miner, the administrative law judge designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. MC Decision and Order at 10.

but did not provide any documentary evidence to support its assertion. MC Director's Exhibit 42.

In the SSAE, the district director designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. MC Director's Exhibit 43. Employer responded on June 13, 2016, through its third-party agent, disagreeing with Peabody Energy's designation as the responsible carrier. MC Director's Exhibit 48. Upon Employer's request, the district director granted an extension of time for the submission of evidence until August 30, 2016. MC Director's Exhibit 52. On September 1, 2016, the district director received the Separation Agreement between Peabody and Patriot. MC Director's Exhibit 53. On September 20, 2016, Employer identified Steven Breeskin, former Director of the Division of Coal Mine Workers' Compensation (DCMWC) and David Benedict, also an employee of DCMWC, as potential liability witnesses.[13] MC Director's Exhibits 54, 56, 57, 58.

On June 1, 2017, the district director issued a Proposed Decision and Order (PDO) awarding benefits and identifying Peabody Energy as the liable operator. MC Director's Exhibit 59. Employer objected and requested a formal hearing. MC Director's Exhibit 64. On September 5, 2017, the Miner's claim was referred to the OALJ. MC Director's Exhibit 68.

The Miner died on October 23, 2017. Survivor's Claim (SC) Director's Exhibit 2. Claimant filed a claim for survivor's benefits on December 18, 2017. SC Director's Exhibit 1. On January 16, 2018, the district director issued a PDO awarding benefits in the survivor's claim and designated Eastern and Peabody Energy as the responsible operator and carrier, respectively. SC Director's Exhibit 6. Pursuant to Employer's request dated

[13] The Director notes the district director included the following documentation regarding Patriot's bankruptcy into the record: MC Director's Exhibit 54, the March 4, 2011 letter from Mr. Breeskin confirming Patriot's authorization to self-insure and releasing a letter of credit Patriot financed under Peabody's Energy's self-insurance program, along with a copy of Patriot's self-insurance policy; MC Director's Exhibit 56, a Bankruptcy Court Settlement Order between Patriot, the United Mine Workers' of America and Peabody, *In re Patriot Coal Corp*., Case No. 12-51502-659 (Bankr. E.D. Mo.) (Nov. 7, 2013); MC Director's Exhibit 57, Notice of Patriot's Chapter 11 bankruptcy, *In re Patriot Coal Corp.*, Case No. 15-32450 (Bankr. E.D. Va.); and MC Director's Exhibit 58, Peabody Energy's Form 8-K filing with the SEC dated October 4, 2013, which declares 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."

February 2, 2018, the district director referred the survivor's claim to the OALJ for a formal hearing. SC Director's Exhibits 13, 14.

Both claims were initially assigned to Administrative Law Judge Richard A. Morgan. On August 1, 2018, Employer submitted a request for subpoenas for the depositions of Mr. David Benedict and Mr. Steven Breeskin "regarding Patriot Coal's bankruptcy, self-insurance, continued authorization as a self-insurer and the status of the surrendered letter of credit to Peabody Coal."[14] The Director objected, arguing the information sought is irrelevant to the issue of operator or carrier liability and unduly burdensome. August 24, 2018 Director Objection. On August 30, 2018, Judge Morgan denied Employer's subpoena request, finding it failed to explain why the testimony of Messrs. Breeskin and Benedict would lead to relevant admissible evidence. Administrative Law Judge Exhibit 5.

After the cases were transferred to the administrative law judge, Employer requested reconsideration of Judge Morgan's denial of its subpoena request. On October 23, 2018, the administrative law judge denied the request, similarly finding the depositions unduly burdensome and unlikely to lead to admissible evidence. Administrative Law Judge Exhibit 6. The administrative law judge also found merit in the Director's assertion that the requested information would be subject to the deliberative process privilege. *Id*. After the administrative law judge conducted the hearing on November 8, 2018,[15] Employer filed

[14] Employer also requested subpoenas for additional DOL employees, the denial of which it does not contest in this appeal. Employer's July 27, 2018 letter to Judge Morgan at 1-2.

[15] At the hearing, Employer submitted, *inter alia*, documentary evidence pertaining to liability, which included MC Employer's Exhibit 5, the DOL decision granting authority to Patriot to self-insure; MC Employer's Exhibit 6, the March 4, 2011 letter from Mr. Breeskin to Patriot; MC Employer's Exhibit 7, a letter from Mr. Breeskin regarding the decision to grant authority to Patriot to self-insure; MC Employer's Exhibit 8, a letter from Mr. Chance, the current Director of the DCMWC, regarding Patriot's self-insurance; MC Employer's Exhibit 9, the indemnity agreement between DOL and Bank of America; MC Employer's Exhibit 10, documentation showing transfer of the initial deposit of negotiable securities from Patriot to the Trust Fund; and MC Employer's Exhibit 11, the indemnity bond. *See* Hearing Transcript at 10-11.

a motion to admit transcripts from depositions of Mr. Breeskin and Mr. Benedict that had been conducted in December 2018 as part of a different black lung claim.[16]

The administrative law judge denied the motion, finding Employer's arguments had been thoroughly analyzed and the issue decided. February 28, 2019 Order at 2. He further found the separation agreement between Peabody Energy and Patriot established Patriot as a successor operator, and determined Peabody Energy satisfies the criteria for a potentially liable operator and retained liability despite Patriot being its successor. *Id*. at 9, *citing* 20 C.F.R. §§725.492(d), 725.494. The administrative law judge also found Employer failed to meet its burden of proving that: (1) it does not possess sufficient assets to secure payment of benefits; or (2) it is not the potentially liable operator that most recently employed the Miner. *Id*., *citing* 20 C.F.R. §§725.494, 725.495(a)(l). He therefore concluded Eastern is the liable operator and Peabody Energy is the liable carrier. *Id*. at 10.

Employer initially contends the administrative law judge erred in excluding the deposition transcripts of Messrs. Breeskin and Benedict, asserting that "all that was required" was that it give notice to the district director that it intended to call them as witnesses, and once the depositions had been accomplished "there remained no valid reason to exclude" them.[17] Employer's Brief at 10-12. We disagree.

First, witness testimony is not automatically admissible before the administrative law judge simply because an employer identifies the names of the witnesses to the district director. Identifying liability witnesses to the district director relieves an employer of the obligation to establish "extraordinary circumstances" for its admission to the administrative law judge. 20 C.F.R. §§725.414(c), 725.457(c)(1). But, the admissibility of such evidence nevertheless remains subject to the "objections of any party." 20 C.F.R. §725.455(b). Second, in addressing the Director's objection to the admission of this testimony, the administrative law judge acknowledged Employer's argument that the testimony is relevant to the issue of operator and carrier liability, but he determined it had no relevant evidentiary value. February 28, 2019 Order, *referencing* Administrative Law

[16] Administrative law judges issued subpoenas for the depositions in other claims. Employer's Brief at 12.

[17] As the Director correctly points out, Employer submitted to the district director its September 20, 2016 notice of potential witnesses one day after the extended August 30, 2016 deadline set forth in the Schedule for the Submission of Additional Evidence. Director's Brief at 30 n.19; MC Director's Exhibits 52, 54. The district director, however, did not indicate she was excluding Employer's submission when she issued the PDO. MC Director's Exhibit 57.

Judge Exhibits 5, 6. While Employer contends Messrs. Breeskin and Benedict "had knowledge relevant to its defense," it has not pointed to any testimony supporting its assertions that Peabody Energy was released from liability for this claim or that Patriot is still capable of paying benefits through its security deposit. Employer's Brief at 10-12.

An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus a party seeking to overturn the disposition of a procedural or evidentiary issue must establish an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer does not set forth how the administrative law judge's disposition of this procedural issue constitutes an abuse of discretion. *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63. Thus, we affirm his ruling excluding the deposition transcripts of Messrs. Breeskin and Benedict.[18]

Employer next maintains a March 4, 2011 letter from Mr. Breeskin to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program,[19] and a signed indemnity agreement with Bank of America, absolves Peabody Energy from potential liability under the Act.[20] Employer's Brief at 24-27, *citing* 20 C.F.R. §§726.1, 726.101; MC Director's Exhibit 54; MC Employer's Exhibits 6, 9. 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.

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[18] Employer also argues the administrative law judge erred in denying its subpoena requests. Employer's Brief at 10. As it ultimately obtained the depositions of Messrs. Breeskin and Benedict, and we affirm the administrative law judge's exclusion of these depositions in this case, Employer's argument is moot.

[19] The letter provided:

> In recognition of Patriot's authority to act as a self-insurer, we have released the $13,000,000 letter of credit you financed under the Peabody Energy self-insurance program. In regards to this letter of credit, this office has executed the enclosed indemnity agreement as we do not possess the original document . . . issued by Bank of America.

MC Director's Exhibit 54; MC Employer's Exhibit 6.

[20] Employer also suggests the depositions of Messrs. Breeskin and Benedict support its arguments. Employer's Brief at 25-26. As discussed above, the administrative law judge permissibly excluded this evidence from the record.

Employer's Brief at 24-27. The "submission of that security by the operator," Employer argues, "establishes its liability." *Id*. Insofar as the DOL "releases said security," Employer contends "the self-insurer's obligations under the Act are terminated, as the security previously proffered by the self-insurer no longer exists." *Id*. Because the DOL informed Patriot it was releasing the letter of credit financed under Peabody Energy's self-insurance program, Employer argues the DOL "withdrew the security which created Peabody [Energy's] liability." *Id*.

We reject Employer's argument. As the Director maintains, in addition to the letter of credit, Peabody Energy's liabilities were secured by an indemnity bond that DOL never released. Director's Brief at 13; MC Employer's Exhibit 11. Accordingly, even assuming release of the instruments securing liability results in the release of an operator or carrier from liability, Employer's liability remained.

Additionally, we agree with the Director's position that Employer is incorrect in alleging liability turns on the existence of a "security deposit." Director's Brief at 11. The Act and the regulations require an operator to "secure the payment of benefits by (1) qualifying as a self-insurer . . . or (2) insuring and keeping insured [with a commercial carrier] the payment of such benefits . . . ." 30 U.S.C. § 933(a), as implemented by 20 C.F.R. §726.110. To qualify as a self-insurer, operators must "execute and file with the Office [of Workers' Compensation Programs (OWCP)] an agreement and undertaking . . . in which the applicant shall agree . . . [t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-Miners." 20 C.F.R. §726.110(a)(1). An operator is also required to "provide security in a form approved by the [OWCP] . . . and in an amount established by the [OWCP]." 20 C.F.R. §726.110(a)(3). These provisions establish an operator's liability stems from its obligation to pay federal black lung benefits, rather than whether it has complied with the requirements that it provide security for the payment of benefits.

We also reject Employer's contention that Mr. Breeskin's execution of an "Indemnity Agreement" constituted a release of Eastern and Peabody Energy from liability. Employer's Brief at 26. In contrast to Employer's characterization, the Indemnity Agreement was between DOL and Bank of America, which issued the actual letter of credit on behalf of Peabody Energy. MC Employer's Exhibits 6, 9. DOL asked Bank of America to cancel the letter of credit and agreed not to hold Bank of America responsible for not making good on the letter of credit. *Id*. The Indemnity Agreement did not include any provisions referencing Employer or releasing any party other than Bank of America from liability. Moreover, after the letter from Mr. Breeskin and the Indemnity Agreement,

Eastern continued to self-insure through Peabody Energy and pay federal black lung claims decided against it.[21] Director's Brief at 12-13.

Citing 20 C.F.R. §725.495(a)(4),[22] Employer also contends the Director failed to secure proper funding from Patriot, thus absolving Peabody Energy of liability. Employer's Brief at 27-32. This argument has no merit.

Section 725.495(a)(4) transfers liability to the Trust Fund in certain cases in which "the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability" and that operator no longer possesses sufficient funds to pay benefits. 20 C.F.R. §725.495(a)(4). In this case, however, the Miner's "most recent employment by an operator" for over one year was in 1999 when he worked for Eastern, who was self-insured by Peabody Energy. MC Director's Exhibits 9, 40, 59. As the administrative law judge correctly noted, the Miner never worked for Patriot and there is no evidence that Eastern, through self-insurance by Peabody Energy, cannot assume liability for the payment of benefits. Decision and Order at 9. The administrative law

[21] After it filed for bankruptcy, Peabody Energy noted its subsidiaries "satisfy their statutory Black Lung Benefits Act obligations on a self-insured basis," including via a five million dollar surety bond. Director's Post-Hearing Brief, Exhibit D (Motion of the Debtors, *In re Peabody Energy Corp.*, No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016)) ¶¶ 16, 21, 25(e); *cf. Hatton v. Westmoreland Coal Co.*, BRB No. 13-0219 BLA, 2014 WL 993063, at *2 n.4 (Feb. 20, 2014) (unpub.) (Board taking official notice of document at employer's request where the claimant did not dispute the employer's description of the document).

[22] The regulation states:

> 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.

20 C.F.R. §725.495(a)(4).

judge therefore correctly found 20 C.F.R. §725.495(a)(4) inapplicable.[23] *Id*. Employer identifies no error in these findings. *Cox*, 791 F.2d at 446-47; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

Employer further argues the doctrine of equitable estoppel relieves it of liability. Employer's Brief at 33-43. To invoke equitable estoppel, Employer must show that both the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. The Youghiogheny and Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995); *Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992) (distinguishing between specific intent to mislead and inadvertent misrepresentation). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads . . . . The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite intent." *See U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116.

Employer alleges that the Director's releasing Peabody Energy from liability "without securing proper funding by Patriot" constitutes affirmative misconduct. Employer's Brief at 35. As discussed above, however, Employer identifies no evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release. Thus, the administrative law judge properly rejected this argument.[24] Decision and Order at 10; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Because we reject Employer's contentions of error with respect to the administrative law judge's determination Eastern and Peabody Energy are the responsible operator and carrier, respectively, we affirm his finding.

Miner's Claim

Admission of Dr. Cohen's Deposition Testimony

[23] Employer also argues the Director failed to comply with its duty to monitor Patriot's financial health. Employer's Brief at 32-33. As Employer has not established that Patriot is liable in this case, we need not address its argument.

[24] Employer also argues DOL arbitrarily and capriciously departed from past practice by "proceeding against an extant self-insured company after the transfer of the employing coal mining company to a bankrupt successor." Employer's Brief at 43-44. We reject Employer's argument as it offers no support for its assessment of the DOL's prior practices or how they have changed in this instance.

Employer next argues the administrative law judge erred in denying its motion to quash deposition testimony from one of Claimant's medical experts, Dr. Cohen. Employer asserts that because Dr. Cohen did not submit a medical report, the administrative law judge may admit his testimony only upon a finding of good cause in accordance with 20 C.F.R. §725.457. Employer's Brief at 6. Employer's contention lacks merit.

The regulations provide that if a party has submitted fewer than two medical reports as part of its affirmative case, a physician who did not prepare a report may testify in lieu of such a report, and the testimony will be considered a medical report for the purposes of the evidentiary limitations. 20 C.F.R. §§725.414(c), 725.457(c)(2). Claimant provided Employer at least thirty days' notice of the deposition and a statement of Dr. Cohen's anticipated testimony, and designated Dr. Cohen's testimony as one of his two affirmative medical reports as permitted by 20 C.F.R. §725.457(c)(2). October 30, 2018 Order denying Employer's motion, *citing* 20 C.F.R. §§725.457, 725.458. Finding Claimant complied with the regulations and there was no prejudice to Employer, the administrative law judge properly denied the motion. October 30, 2018 Order denying Employer's motion at 2. Moreover, Employer's counsel expressly stated at the hearing he had "[n]o objection" to the admission of Dr. Cohen's deposition. Hearing Transcript at 9. Consequently, we affirm the administrative law judge's ruling admitting Dr. Cohen's testimony as one of Claimant's two affirmative medical reports.[25] *See* 20 C.F.R. §725.414(c)(1); *Blake*, 24 BLR at 1-113 (party seeking to overturn the disposition of a procedural or evidentiary issue must establish the administrative law judge's action represented an abuse of discretion); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986).

Employer does not challenge the administrative law judge's determinations that Claimant established total disability at 20 C.F.R. §718.204(b)(2) or that the Miner had thirty-two years of coal mine employment, at least fifteen of which were qualifying. *See* MC Decision and Order at 31; Hearing Transcript at 6. Moreover, Employer does not challenge his finding that Claimant invoked the Section 411(c)(4) presumption. We therefore affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 32.

[25] Moreover, it is uncontested Claimant invoked the Section 411(c)(4) presumption and Dr. Cohen's opinion does not support Employer's burden on rebuttal. As the ALJ discredited Employer's experts for reasons unrelated to Dr. Cohen's opinion, Employer has not explained how admission of his testimony, even if error, made any difference to the outcome of this claim. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[26] or "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 did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Zaldivar and Rosenberg.[27] Dr. Zaldivar opined the Miner had asthma/chronic obstructive pulmonary disease (COPD) and emphysema, while Dr. Rosenberg opined he had COPD, emphysema, and chronic bronchitis. MC Director's Exhibit 22; MC Employer's Exhibits 1, 13, 16. Both physicians attributed the Miner's obstructive impairment entirely to smoking with no contribution from coal mine dust exposure. *Id.* The administrative law judge found their opinions

[26] 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).

[27] Because Drs. Rasmussen, Forehand, and Cohen diagnosed legal pneumoconiosis, their opinions do not assist Employer in satisfying its burden of proof. MC Director's Exhibits 15, 19; MC Claimant's Exhibits 1, 2. In addition, the administrative law judge considered the opinions of Drs. Crisalli and Gaziano from the Miner's prior claims and found them insufficient to disprove the existence of legal pneumoconiosis or establish that the Miner's total disability was unrelated to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii); MC Decision and Order at 32-33. Because Employer does not challenge these findings, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

inadequately explained and not well-reasoned, and therefore insufficient to satisfy Employer's burden to disprove legal pneumoconiosis. MC Decision and Order at 32-33.

Employer argues the administrative law judge applied an "incorrect standard" in considering legal pneumoconiosis because he "required [it] to establish that no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis." Employer's Brief at 6, *quoting* MC Decision and Order at 32. It maintains that to disprove legal pneumoconiosis it need only show that coal mine dust exposure played no more than a de minimis role in the Miner's impairment. Employer's Brief at 6, *citing Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

Employer mischaracterizes the administrative law judge's rebuttal analysis and his identification of the appropriate legal standards. The administrative law judge correctly stated that to rebut the Section 411(c)(4) presumption Employer must establish "either (1) that the Miner did not have clinical or legal pneumoconiosis or (2) that no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis." MC Decision and Order at 32, *citing* 20 C.F.R. §718.305(d)(1). Relevant to legal pneumoconiosis, the administrative law judge properly considered whether the Miner had a respiratory or pulmonary impairment that was significantly related to, or substantially aggravated by, coal mine dust exposure.[28] MC Decision and Order at 28-30, 33.

Regarding the administrative law judge's specific credibility findings, we reject Employer's contention that he erred in finding Dr. Zaldivar's opinion not well-reasoned. MC Employer's Brief at 7-9. In excluding a diagnosis of legal pneumoconiosis, Dr. Zaldivar opined that the Miner suffered from irreversible respiratory impairment caused by lung remodeling due to longstanding asthma, most likely beginning in childhood, and

[28] The administrative law judge first addressed legal pneumoconiosis by placing the burden of proof on Claimant to establish that he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see* MC Decision and Order at 28-30. He found that Claimant established legal pneumoconiosis based on the newly submitted evidence. MC Decision and Order at 30. At rebuttal, the administrative law judge referenced his legal pneumoconiosis determination, considered the opinions from the Miner's most recent prior claim, and found that Employer could not establish Claimant does not have pneumoconiosis. *Id*. at 32-33. Because the administrative law judge applied the correct regulatory definition of legal pneumoconiosis and permissibly discredited Employer's medical opinions, we consider any error in his initially placing the burden of proof on Claimant to be harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

his smoking history. MC Director's Exhibit 22; MC Employer's Exhibit 13 at 11-15; MC Employer's Exhibit 16. The administrative law judge permissibly found Dr. Zaldivar's rationale that the Miner's respiratory impairment was most consistent with lung remodeling caused by smoking-related asthma undermined by the lack of evidence in the record that the Miner had childhood asthma, which Dr. Zaldivar stated would have made him susceptible to early lung damage. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 441 (4th Cir. 1997); Decision and Order at 28, *citing* MC Employer's Exhibit 13 at 11-12. The administrative law judge further found Dr. Zaldivar's comments speculative on the Miner's alleged childhood asthma: "Now we don't know enough about his family to know whether other asthmatics exist in his family, but asthma is not an uncommon disease." Decision and Order at 28, *quoting* MC Employer's Exhibit 13 at 14; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

Moreover, the administrative law judge permissibly found that even accepting Dr. Zaldivar's opinion that the Miner's respiratory impairment was caused by asthma because coal mine dust exposure is not a causative factor for the development of asthma,[29] Dr. Zaldivar did not adequately explain why the Miner's thirty-two years of dust exposure in coal mine employment did not aggravate his asthma or his obstructive respiratory impairment.[30] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-24 (4th Cir. 2013); MC Decision and Order at 30.

[29] As the administrative law judge accurately noted, Dr. Zaldivar relied in part on the premise that asthma is a condition not caused by coal mine dust as a basis to conclude Claimant's impairment is unrelated to coal mine dust exposure. MC Decision and Order at 26; MC Employer's Exhibit 13 at 27.

[30] Because Employer has the burden to affirmatively establish the absence of legal pneumoconiosis, we reject its contention that Claimant is required to provide a medical opinion establishing that coal mine dust aggravated the Miner's asthma. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8; Employer's Brief at 9. Regardless, Dr. Cohen opined the Miner's coal dust exposure is a "significant" and "substantial" contributor to his smoking-related impairment thereby diagnosing legal pneumoconiosis; he also specifically addressed and rejected Dr. Zaldivar's opinion that the Miner's respiratory impairment was due to lung remodeling from asthma. Claimant's Exhibit 2 at 12.

Nor is there merit to Employer's contention that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 9. As the administrative law judge accurately noted, Dr. Rosenberg eliminated coal dust exposure as a cause of the Miner's chronic bronchitis because his coal mine dust exposure ended in 1999. MC Decision and Order at 30; MC Employer's Exhibit 1 at 10. The administrative law judge permissibly found Dr. Rosenberg's opinion inconsistent with DOL's recognition that pneumoconiosis is "a latent and progressive disease, which may first become detectable only after the cessation of coal mine dust exposure."[31] 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); MC Decision and Order at 30.

We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's determination that Employer did not disprove the existence of legal pneumoconiosis. MC Decision and Order at 30, 32-33. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). Consequently, we also affirm the administrative law judge's determination that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). MC Decision and Order at 30, 32-33.

Disability Causation

The administrative law judge next considered whether Employer established "no part of the miner'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). The administrative law judge rejected the opinions of Drs. Zaldivar and Rosenberg that the Miner's respiratory disability was unrelated to legal pneumoconiosis because they did not diagnose the disease.[32] MC Decision and Order at 33, *citing Hobet Mining, LLC v. Epling*, 783 F.3d

[31] We note that Dr. Rosenberg did not discuss aggravation in this context. MC Employer's Exhibit 1

[32] Neither physician offered an explanation with respect to whether legal pneumoconiosis caused Claimant's disability independent of his incorrect conclusion that Claimant does not have the disease.

498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). Employer raises no specific error with regard to the administrative law judge's findings on disability causation other than its assertion the Miner did not have legal pneumoconiosis, which we have rejected. We therefore affirm the administrative law judge's finding that Employer failed to establish no part of the Miner's total respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 154-56. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits in the Miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the administrative law judge's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decisions and Orders Awarding Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to affirm the administrative law judge's liability determination and affirm his awards of benefits. I write separately, however, to express my view that whether or not Employer adequately briefed its Appointments Clause challenge is immaterial because as a matter of law the only authority it cites, *Lucia v. SEC*,

585 U.S. , 138 S.Ct. 2044 (2018), does not establish that black lung district directors are inferior officers. Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

Employer argues district directors are similar to the Securities and Exchange Commission (SEC) administrative law judges *Lucia* held are inferior officers because they exercise "significant discretion" and perform "important function[s]," specifically in the context of employer liability issues in black lung claims. Employer's Brief at 19. From this, it concludes *Lucia* establishes district directors as inferior officers subject to the Appointments Clause, and it asserts district directors must also be appointed by the Secretary. *Id.* at 17-24.

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 20. They do not have "significant adjudicative" capacity, possessing none of the four powers *Lucia* held make administrative law judges akin to federal district court judges. *Id*. Moreover, the regulations cabin their ability to identify a responsible operator and determine entitlement -- subject to de novo appellate review -- eliminating any remaining Appointments Clause issues. Like the vast majority of federal employees, district directors thus are not members of the very small subset of inferior officers who must be appointed by the head of an agency. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 & n.9 (2010) (noting that in 1879 about 90% of federal employees were lesser functionaries and the percentage of those functionaries has dramatically increased over time).[33]

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

[33] 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).

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.[34]

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 job duties." Director's Brief at 22. Indeed, the remedy the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed administrative law judge -- demonstrates the vital significance the Court ascribed this missing adjudicatory function. 138 S.Ct. at 2055.

Second, district directors do not "take testimony," examine witnesses at hearings, or take pre-hearing depositions -- because they do not conduct hearings at all. Similarly, unlike administrative law judges, district directors do not "administer oaths." *See, e.g.,* 20 C.F.R. § 725.351(a), (b) (differentiating between authorities of district directors and administrative law judges).

Third, district directors do not "critically shape" the administrative record by making evidentiary rulings akin to administrative law or federal district court judges. Although they may compile routine documents and forms at the outset of a case, the "official" (and final) record is created at the formal hearing, after significant additional discovery subject to an administrative law judge's continuing oversight. 20 C.F.R. § 725.421(b) (specifying documents that must be transmitted to the Office of Administrative Law Judges (OALJ), and noting they "shall be placed in the record at the hearing subject to the objection of any party"). Fundamentally, parties are not required to submit medical evidence to the district director; they may submit it to the administrative law judge until twenty days before a formal hearing. *Id.*; 20 C.F.R. § 725.456(b)(2). Thus, in most cases, the basic record relevant to a claimant's entitlement will not be developed until the formal administrative law judge hearing, long after the district director has transferred the case to the OALJ. 20 C.F.R. §§ 725.456(b)(3), 725.457; 65 Fed. Reg. 79,920, 79,991 (Dec. 20, 2000) ("[T]he Department expects that parties generally will not undertake the

[34] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 21 n.13.

development of medical evidence until the case is pending before the administrative law judge.").

Fourth, district directors do not enforce compliance with discovery orders like administrative law or federal district court judges. No formal discovery takes place before them, only "informal discovery proceedings." 20 C.F.R. § 725.351(a)(2). And the district director's "enforcement" power in those limited proceedings is not "especially muscular" -- having nothing remotely similar to "the nuclear option" federal courts possess "to toss malefactors in jail," or "the conventional weapons" to sanction wielded by administrative law judges. *Lucia*, 138 S. Ct. at 2054. Instead, where a Claimant fails to prosecute a claim, the only (and necessary) remedy is a simple denial by reason of abandonment. 20 C.F.R. § 725.409. But even then dismissal is limited to four specific circumstances in which a claimant refuses to go forward with her case and is predicated on a district director first notifying the claimant and giving her an opportunity to cure the defect. 20 C.F.R. § 725.409(b). Moreover, any dismissal order may be reviewed by an administrative law judge. 20 C.F.R. § 725.409(c). No similar provisions penalize a responsible coal mine operator for like conduct. A district director may only certify the facts to federal district court. 20 C.F.R. § 725.351(c).[35]

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

[35] The district director can sanction in one narrow circumstance: when a party fails to comply with the medical information disclosure requirements. 20 C.F.R. § 725.413(e). But any sanction imposed by a district director is subject to review by an administrative law judge, 20 C.F.R. § 725.413(e)(4), and the possibility parties receive medical information before the claim is transferred to the Office of Administrative Law Judges mandates the requirement. 20 C.F.R. § 725.413(c).

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

First, district directors lack independent discretion in designating responsible operators given the comprehensive regulatory scheme. Evidence relevant to a responsible operator designation must be initially submitted to the district director to streamline administrative proceedings by restricting the district director's authority. 65 Fed. Reg. at 79,990. As the Director notes, "the district director gets only one chance at identifying the liable operator; the goal of the rule is to allow the district director to make the most informed choice possible, but also to limit the district director's discretion." Director's Brief at 23. If the district director chooses incorrectly, the Trust Fund must pay any benefits awarded in the claim. *Id*. at 23-24.

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.[36]

[36] 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

Second, the district director's ability to resolve either responsible operator status or entitlement issues with finality depends largely on the power to persuade rather than on any programmatic authority. The district director issues a Proposed Decision and Order (PDO) purporting to resolve all claim issues, but that decision does not become effective if any party timely requests a hearing or revision. 20 C.F.R. § 725.419(d). And, most fundamentally, the district director's PDO findings do not constrain administrative law judge oversight in any way: *they review all issues de novo*. 20 C.F.R. § 725.455(a).

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

JONATHAN ROLFE
Administrative Appeals Judge

> 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 24 n.15.