U.S. Department of Labor

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

BRB No. 20-0044 BLA

TABATHIA CROUSE (o/b/o RICHARD L. CARPER) 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: 5/31/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting 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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2018-BLA-05735) rendered on a subsequent claim filed on November 22, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier because it self-insured Eastern on the last day of the Miner's coal mine employment. The ALJ credited the Miner with twenty-eight years of coal mine employment, based on the parties' stipulation, and determined Claimant established the Miner had complicated pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.203(b), 718.304. She therefore concluded Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018), established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c),[2] and awarded benefits.

[1] Claimant is the daughter of the Miner, who died on May 20, 2017. She is pursuing the miner's claim on his estate's behalf. *See* Director's Brief at 3 n.2; Hearing Transcript at 15; Director's Exhibit 25. The Miner filed his first claim for benefits on February 12, 2001, which the district director denied on April 2, 2002, because the Miner did not establish total disability. Director's Exhibit 1. The Miner requested reconsideration, but the district director denied his request on May 2, 2002. *Id*. The Miner took no further action on his denied claim.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless she 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 a totally disabling respiratory or pulmonary impairment, Claimant had to establish this element in order to obtain review of the merits of her father's claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. It also challenges the commencement date for benefits.[3] Claimant responds in support of the ALJ's determination regarding the commencement date of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Eastern is the responsible operator and that Peabody Energy is liable for the payment of benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Responsible Insurance Carrier

The Miner last worked in coal mine employment from January 17, 1969, until January 29, 1999, for Eastern, a subsidiary of Peabody Energy. Director's Exhibits 8, 10. In 2007, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot), but the Miner, who ceased working eight years before the sale, never worked for Patriot. In 2011, the Department of Labor (DOL) authorized Patriot to self-insure for black lung liabilities relating to the Peabody subsidiaries it purchased, including Eastern, retroactive to July 1, 1973. Director's Exhibit 28; Employer' Brief at 17. This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15 million. *Id*. In 2015, Patriot went bankrupt. Director's Exhibit 28.

Employer admits Eastern is the correct responsible operator and was self-insured through Peabody Energy on the last day Eastern employed the Miner.[5] Employer's Brief

---

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and the award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §725.309(c); Decision and Order at 19; Employer's Brief at 20-21.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 17.

[5] Eastern qualifies as a potentially liable operator because it is undisputed that: (1) the Miner's disability arose at least in part out of his employment with Eastern; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed the Miner for a cumulative

at 5. However, it contests Peabody Energy's liability as the responsible carrier. *Id*. at 6-20. Employer maintains Patriot is the responsible carrier because it last insured Eastern's black lung liabilities, DOL released Peabody Energy from liability,[6] and the Director is equitably estopped from imposing liability on Peabody Energy. *Id.* at 6-14. It further maintains Black Lung Benefits Act Bulletin (BLBA Bulletin) Nos. 12-07 and 14-02 place liability on the Black Lung Disability Trust Fund (Trust Fund) when a private insurer is unable to assume liability. *Id*. at 14.

The Director counters that the Act's implementing regulations do not support Employer's last-to-insure theory of liability, and neither Patriot's self-insurance authorization nor any other agreement relieved Peabody Energy of liability for benefits of miners whose last day of employment with Eastern was covered by Peabody Energy's self-insurance. Director's Brief at 8-15. Further, he contends there is no basis for Employer's equitable estoppel argument, and that BLBA Bulletin Nos. 12-07 and 14-02 do not support transferring liability to the Trust Fund. *Id*. at 15-19. The Director maintains Patriot could no longer pay claims after its self-insurance failed in 2015, and Peabody Energy remained liable for the claims of miners who last worked for Eastern while Peabody Energy owned and self-insured Eastern. *Id*. at 2, 9-11.

District Director Proceedings

---

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, the ALJ designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 7.

[6] Although a private contract between Peabody Energy and Patriot purported to release Peabody Energy from liability for the claims of miners who worked for Eastern, Employer contends:

> This is not a situation in which two companies have contracted between themselves to determined which company is liable. Instead it is a situation in which all assets and liabilities for [Eastern] were transferred to Patriot Coal and . . . the [DOL] made Patriot Coal to be the self-insurer for all claims for employees of its subsidiaries retroactive to July 1, 1973.

Employer's Brief at 7.

Following receipt of the claim on November 22, 2016, the district director identified Eastern, self-insured through Peabody Energy, as the "potentially liable operator" in the Notice of Claim issued on December 5, 2016. Director's Exhibits 3, 26. The notice gave Employer ninety days to submit documentary evidence if it wished to dispute its designation as the potentially liable operator. Director's Exhibit 26. In response, Employer denied liability, asserting Patriot is the proper responsible carrier and requesting that the district director dismiss Peabody Energy as the liable carrier. Director's Exhibit 28. However, Employer did not submit any documentary evidence to support its contentions. *Id*.

On April 25, 2017, the district director issued the Schedule for the Submission of Additional Evidence (SSAE), which identified Eastern as the designated responsible operator and Peabody Energy as its insurer. Director's Exhibit 29. The district director informed Eastern and Peabody Energy that they had until June 24, 2017, to submit additional documentary evidence relevant to liability and should identify any witnesses they intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on May 16, 2017, and contested liability. Director's Exhibit 30. The district director granted Employer's request for an extension to submit medical evidence and gave it until December 15, 2017, to complete its submissions. Director's Exhibits 31-32. Employer did not submit any additional evidence to the district director to support its controversion of liability or designate any liability witnesses.

The district director issued a Proposed Decision and Order (PDO) on March 6, 2018, awarding benefits and designating Eastern as the responsible operator and Peabody Energy as its insurer. Director's Exhibit 34. In its April 5, 2018 response to the PDO, Employer denied liability and requested the district director reconsider its determination that Peabody Energy is liable or, in the alternative, requested a hearing.[7] Director's Exhibit 38. In support, Employer attached, as Exhibit A, various documents relating to carrier liability: (1) a 2007 Separation Agreement between Peabody Energy and Patriot; (2) a November 23, 2010 letter from the Division of Coal Mine Workers' Compensation (DCMWC) to Patriot requiring $22.5 million for authorization to self-insure; (3) a March 4, 2011 letter from the DCMWC granting Patriot authorization to self-insure retroactive to July 1, 1973, and releasing Peabody Energy's $13 million letter of credit; (4) a March 4, 2011 indemnity agreement between DOL and Bank of America; (5) an undated letter from Michael Chance,

[7] The district director did not rule on Employer's request for reconsideration but referred the claim to the OALJ for a hearing. Director's Brief at 4; Director's Exhibit 40.

the Director of the DCMWC, regarding Patriot's self-insurance reauthorization audit; (6) documentation dated November 16 to 18, 2015, showing authorization to transfer, and the transfer of, $15 million from Patriot to the Trust Fund; and (7) Peabody Energy's April 29, 2013 indemnity bond. *Id*.

ALJ Proceedings

After the case was transferred to OALJ, Employer submitted more evidence pertaining to its liability: Employer's Exhibits 1 and 2, which consist of the deposition transcripts of Steven Breeskin and David Benedict. Employer's Motion to Dismiss Peabody Energy Corporation as Insurer and to Set a Briefing Schedule; Hearing Transcript at 6-10. Employer conducted these depositions as part of other black lung claims, but it had not previously submitted the transcripts to the district director in this claim. *Id*. The Director responded, opposing the admission of these depositions and asserting the liability-related documents contained as Exhibit A in Director's Exhibit 38 were not timely submitted to the district director. Director's Opposition to Employer's Motion to Admit the Depositions.

Employer replied, arguing the deposition transcripts and documentary exhibits are relevant to its defense and asserting extraordinary circumstances exist to admit this evidence. Employer's Brief in Support of Motion to Admit DOL Documents and the Depositions of David Benedict and Steve Breeskin, or, in the Alternative, as an Offer of Proof, and Motion to Set Briefing Schedule. The ALJ acknowledged the deposition testimony and documentary liability evidence are relevant to Employer's equitable estoppel defense but concluded Employer failed to timely submit this evidence to the district director and did not establish extraordinary circumstances for failing to do so. 20 C.F.R. §725.456(b)(1); ALJ's May 3, 2019 Order Denying Employer's Motions to Admit Depositions and to Dismiss Peabody. Therefore, she excluded Exhibit A from Director's Exhibit 38 and Employer's Exhibits 1 and 2 from the record.[8] *Id*.

In her Decision and Order, the ALJ concluded Claimant is entitled to benefits. She determined Employer satisfied the responsible operator criteria at 20 C.F.R. §725.494 and had not shown its self-insurer, Peabody Energy, was incapable of paying benefits pursuant to Sections 725.494(e) and 725.495(b). Decision and Order at 3-7. Specifically, she rejected Employer's argument that the Director had released Peabody Energy from liability

[8] Employer filed a Motion to Reconsider the ALJ's Order denying admission of the liability evidence and deposition transcripts, which the ALJ denied. ALJ's June 14, 2019 Order Denying Employer's Motion to Reconsider.

by authorizing Patriot to self-insure and releasing Peabody Energy's surety bond.[9] *Id*. at 7-8. She found Employer incorrectly relied on 20 C.F.R. §726.203 as a basis for shifting liability because the regulation applies only to commercial insurance, not to self-insurance. *Id*. at 7. In addition, the ALJ rejected Employer's arguments that the Director was estopped from imposing liability on it or that the Director committed affirmative misconduct or misrepresentation. *Id.* at 8-9. She disagreed that Patriot's self-insurance agreement with DOL relieved Peabody Energy of liability, and she considered the status of Patriot's surety bond to be irrelevant to the responsible carrier analysis. *Id*. at 9-10. Thus, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. *Id.* at 3-10.

Issues on Appeal

Exclusion of Deposition Transcripts and Other Liability Evidence

An ALJ 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, 1-153 (1989). Thus, a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009). The relevant regulations require that the identification of the responsible operator or responsible carrier must be made before the district director transfers the case to the OALJ. *See* 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1). As the district director had informed Employer, the regulations require that absent extraordinary circumstances, all liability evidence must be timely submitted to the district director. *Id.* The ALJ properly noted the district director's responsibility to identify all potentially responsible operators, issue notice to the parties, schedule receipt of responsive evidence, and ultimately designate a responsible operator and responsible carrier. 20 C.F.R. §§725.407(b), 725.410(a)(3), 725.495(a)(1). Following its designation as the responsible operator, to escape liability Eastern had the burden of showing it either lacked sufficient assets to pay the claim or is not the potentially liable operator that last employed the Miner. 20 C.F.R. §725.495(c); *see* Decision and Order at 5.

Employer does not specifically challenge, and we therefore affirm, the ALJ's ruling that the submission of its liability evidence to her was untimely because it was not properly

[9] In considering whether Peabody Energy was released from liability, the ALJ stated: "[A]s the Director points out, Employer improperly relies on evidence that I have excluded from the record. Nonetheless, I will generally address Employer's remaining arguments." Decision and Order at 8.

submitted before the district director. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); *see* Employer's Brief at 3-4. Employer also does not specifically challenge the ALJ's finding that extraordinary circumstances do not exist that would excuse its failure to timely submit liability evidence. *Skrack*, 6 BLR at 1-711; *see* Decision and Order at 6 & n.6. Nor does Employer argue it somehow misunderstood its obligations to timely respond with substantiating evidence relative to its controversion of liability for the claim. *Skrack*, 6 BLR at 1-711. Rather, Employer avers that once it contested or controverted liability before the district director, DOL was required to either prove the Miner worked for Employer or name another responsible operator. Employer's Brief at 2-3 & n.1.

Contrary to Employer's suggestion, neither DOL nor the district director have an affirmative burden here; it is Employer's burden to overcome the regulatory presumption that the proper responsible operator and carrier has been named by submitting evidence to the contrary. 20 C.F.R. §725.495(c); *see* Decision and Order at 6; Director's Brief at 9; Employer's Brief at 2-3 & n.1, 4-5. Therefore, we affirm the ALJ's exclusion of Employer's liability evidence. Director's Exhibit 38, Exhibit A.

Additionally, Employer argues the evidence it sought to have admitted into the hearing record "in large part" is comprised of DOL's "own orders, letters, findings, actions, and knowledge about what company was made the insurer, what period of time that company was made the insurer, what action was or was not taken in terms of establishing or increasing it surety of that company, and DOL's own knowledge about what it was doing." Employer's Brief at 3-6 & nn.2-3, 9-10. Employer also challenges the ALJ's refusal to admit deposition transcripts relating to liability that it identified as Employer's Exhibits 1 and 2. Decision and Order at 2, 5 & n.3, 8-10 & n.7; *see* Director's Brief at 5-6; Employer's Brief at 5 & n.3. As noted above, Employer does not assert it timely submitted this evidence to the district director. Employer's Brief at 3-6. It asserts that because the Director is a party to this claim and possessed but did not voluntarily share these Exhibits with Employer, it need only show good cause for failing to timely exchange this evidence.[10] Employer's Brief at 5-6; *see* 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 ALJ must either exclude the evidence or

[10] Employer states the depositions at Employer's Exhibits 1-2 were taken in December 2018 but "their deposition testimony was under a protective order such that they could not be shared prior to the issuance of the PDO or transfer to the OALJ." Employer's Brief at 5 n.3. It also asserts "the DOL hides the information about making another company the insurer for this very period for this very company, Eastern, and hides the information it has that confirms the DOL intentionally made the other company the insurer and set the surety for that period." *Id*. at 5-6 n.3. Employer contends these actions constitute good cause to admit this evidence. *Id*.

remand the case to the district director for consideration of that evidence). Employer is incorrect. As a litigant and the designated responsible carrier, Peabody Energy had the burden to timely contest liability as outlined in the regulations and substantiate its controversion of liability with timely documentation. 20 C.F.R. §725.408. It failed to do so. It was therefore required to show extraordinary circumstances to justify any late submission of its liability evidence. It does not argue before us that extraordinary circumstances existed.[11] We therefore conclude Employer has failed to demonstrate the regulations were incorrectly interpreted or applied. Since before us Employer does not contend that extraordinary circumstances existed for the late submission of the evidence, we further conclude the ALJ properly excluded Employer's liability evidence from the hearing record. Decision and Order at 2, 5 & n.3, 8-10. As her evidentiary ruling comports with the regulations, and as Employer has not demonstrated an abuse of discretion, it is affirmed.[12] *See Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113.

Letter of Credit, Indemnity Agreement, and Undated Michael Chance Letter

Employer next contends the ALJ erred in deeming Peabody Energy liable because DOL relieved it from liability when it authorized Patriot to self-insure Peabody Energy's liabilities for claims dating back to July 1, 1973. Employer's Brief at 6-11. Employer cites DCMWC's March 4, 2011 letter to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program and enclosing a signed indemnity agreement

[11] The specific language in 20 C.F.R. §725.456(b)(1) relating to documentary evidence of liability takes precedence over the general language in 20 C.F.R. §725.456(b)(3) relating to submission of documentary evidence. *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling").

[12] We also reject Employer's unsupported assertion that the ALJ should not have ruled on liability issues because she did not admit its untimely submitted liability evidence. Employer's Brief at 4.

with Bank of America.[13] *Id.* at 9-11; Director's Exhibit 38, Exhibit A.[14] In releasing Peabody Energy's security, Employer contends that DOL terminated Eastern's self-insurance liability under the Act and recognized Patriot as the responsible self-insurer for Eastern employee claims filed after March 4, 2011. Employer's Brief at 9-11. Employer asserts the applicable regulations authorize DOL to determine which company has self-insured an operator's liabilities, and in this case DOL determined Patriot, not Peabody Energy, is liable for Eastern's claims. *Id.* at 10-11.

We reject Employer's contention that liability turns on the existence of a security deposit or a DOL authorization to self-insure. The ALJ correctly found neither the Act nor the regulations support Employer's arguments that a self-insurer's liability is established when an operator posts a security or that its liability is dissolved when the DOL subsequently releases the security. Decision and Order at 7-8. The Act and the regulations require an operator to "secure the payment of benefits by (1) qualifying as a self-insurer . . . or (2) insuring and keeping insured [with a commercial carrier] the payment of such benefits . . . ." 30 U.S.C. §933(a), as implemented by 20 C.F.R. §726.110. To qualify as a self-insurer, operators must "execute and file with the Office [of Workers' Compensation Programs (OWCP)] an agreement and undertaking . . . in which the applicant shall agree . . . [t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-Miners." 20 C.F.R. §726.110(a)(1). An operator is also required to "provide security in a form approved by the [OWCP] . . . and in an amount established by the [OWCP]." 20 C.F.R. §726.110(a)(3). These provisions establish that an operator's liability stems from its obligation to pay federal black lung benefits, rather than its compliance with security requirements or the DOL's authorization of it or another operator to self-insure. The ALJ thus properly found "[n]either the Department's failure to authorize an operator to self-insure, nor an operator's lack of compliance with the self-insurance program precludes [a properly designated responsible operator's] liability." Decision and Order at 8.

---

[13] The letter provided:

> In recognition of Patriot's authority to act as a self-insurer, we have released the $[redacted] 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.

Director's Exhibit 38, Exhibit A.

[14] As discussed previously, we have affirmed the ALJ's determination that Director's Exhibit 38, Exhibit A, was untimely submitted.

Further, we reject Employer's contention that DOL's execution of the March 4, 2011 indemnity agreement with Bank of America released Eastern and Peabody Energy from liability. The Director contends that Employer retained liability because even though the Department of Labor (DOL) released Peabody's letter of credit, it did not release its indemnity bond, consequently Peabody remained liable. Director's Brief at 11. We agree with the Director. The indemnity agreement was between DOL and Bank of America, which issued the letter of credit on behalf of Peabody Energy. Director's Exhibit 38, Exhibit A. In the agreement, DOL requested Bank of America cancel the letter of credit and agreed to hold Bank of America harmless under it. *Id.* The indemnity agreement did not include any provisions referencing Employer or releasing any party other than Bank of America from liability. *Id*. Moreover, as the Director argues, Eastern "continued to self-insure and be responsible for its black lung obligations" after DOL returned Peabody Energy's security deposit and executed the indemnity agreement.[15] Director's Brief at 14.

We also reject Employer's assertion that Mr. Chance's undated letter to Patriot establishes the DOL released Peabody Energy from its liabilities, as we have affirmed the ALJ's exclusion of that letter as part of Employer's untimely submitted liability evidence. Employer's Brief at 9-10. Thus, based on the foregoing, we reject Employer's arguments that the DOL absolved Peabody Energy of liability by either releasing the letter of credit to Patriot or executing the indemnity agreement with Bank of America.

Equitable Estoppel

Employer next asserts it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 11-14. To invoke equitable estoppel, Employer must show both that the DOL engaged in affirmative misconduct and that Employer reasonably relied on the DOL's action to its detriment. *See Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the

[15] The Director notes that after Peabody Energy filed for bankruptcy, it conceded to the bankruptcy court that 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 Brief at 14 (citing 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 the employer's request where the claimant did not dispute the employer's description of the document)).

government and the agent's requisite intent." *U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116. Employer has not met its burden.

Employer alleges the Director's release of Peabody Energy from liability without securing proper funding from Patriot constitutes affirmative misconduct. Employer's Brief at 13. As discussed above, however, it identifies no evidence establishing the DOL released Peabody Energy from liability or made a representation of such a release. It further does not challenge the ALJ's finding that "there is no evidence in the record whatsoever regarding the intent of the Department or those acting on its behalf." Decision and Order at 9; *see Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's rejection of Employer's equitable estoppel argument because it has failed to establish the necessary elements. Decision and Order at 8-10; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

Successor Operator

Additionally, Employer asserts the ALJ erred in finding Patriot is not a successor operator liable for benefits. Employer's Brief at 6-7, 16-17. A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Additionally, 20 C.F.R. §725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). In any case in which an operator is a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1).

The ALJ determined that even if Patriot were solvent, it would not be liable as a successor operator because Employer remains primarily liable. Decision and Order at 7-8. While we agree with the Director[16] that Patriot is not a successor operator here, the ALJ's misapprehension did not affect her permissible finding that Eastern meets all the requirements of a potentially liable operator : the Miner's presumed total disability arose, at least in part, out of his coal mine work for Eastern; Eastern was an operator after June 30, 1973; the Miner worked for Eastern from 1969 to 1999, and therefore for a cumulative period of not less than one year; the Miner's employment with Eastern included at least one working day after December 31, 1969; and Eastern is able to pay benefits through Peabody. 20 C.F.R. §725.494; Decision and Order at 5-6; Director's Exhibits 8-10. In

[16] The Director states: "[C]ontrary to the ALJ's suggestion, the successor-operator regulations do not apply in this situation, given that Eastern itself never ceased to exist or transferred its assets to another operator. But any error in that regard does not affect the ALJ's ultimate finding that Employer is liable." Director's Brief at 6 n.3.

addition, the ALJ accurately determined Eastern did not submit any evidence establishing it is not the operator that most recently employed the Miner or that it is unable to assume liability for the payment of benefits. 20 C.F.R. §725.495(c); Decision and Order at 6-7. As the foregoing findings comport with law, they are affirmed.

Liability under 20 C.F.R. §725.495(a)(4)

Referencing 20 C.F.R. §725.495(a)(4),[17] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability and places it on the Trust Fund. Employer's Brief at 16-18. We are not persuaded by Employer's contention.

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, which was self-insured by Peabody Energy. As Patriot never employed Claimant, the ALJ correctly found Section 725.495(a)(4) cannot apply by its unambiguous language.[18]

[17] 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).

[18] We affirm, as unchallenged, the ALJ's findings that Eastern satisfies the definition of a responsible operator under the Act and that Eastern has not shown its carrier, Peabody Energy, is financially incapable of assuming liability. Decision and Order at 6-7, 10; *see* 20 C.F.R. §§725.494(e), 725.495(a)(3), 802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Peabody Energy neither disputes it was Eastern's self-insurer on the Miner's last day of employment nor denies it is financially capable of paying benefits; instead, it contends it should not be required to self-insure claims of Eastern miners based solely on

Decision and Order at 10. Rather she found Eastern met the requirements for a responsible operator under the Act and that Eastern did not allege its carrier, Peabody Energy, is financially incapable of assuming liability. Decision and Order at 6-7, 10; *see* 20 C.F.R. §§725.494(e), 725.495(a)(3). Employer identifies no error in these findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

Employer alternatively asserts the ALJ failed to properly determine whether DOL properly exhausted Patriot's surety bond before holding Peabody Energy liable as the responsible carrier. Employer's Brief at 14-18. This argument incorrectly presumes Patriot, rather than Peabody Energy, meets the requirements for primary liability under the Act because it was the last self-insurer for Eastern. 20 C.F.R. §§725.494(e), 725.495(a)(1). However, Peabody Energy's liability is not based on a specific regulation but rather on the following facts: (1) Peabody Energy provided self-insurance to Eastern on the last day of the Miner's employment in 1999, (2) Patriot was liquidated and thus incapable of assuming liability despite any agreement with Peabody Energy, and (3) the Director never released Peabody Energy from liability. Director's Brief at 19; *see* 20 C.F.R. §725.495(c).

Additionally, we reject Employer's contention that the Director failed to present evidence to show Peabody Energy self-insured Eastern. Employer's Brief at 6-11. Having identified Eastern as a potentially liable operator, the burden shifted to Employer to show it is incapable of assuming liability. 20 C.F.R. §725.495(b), (c). It failed to do so. Moreover, as discussed above, Eastern has never contended it was not self-insured by Peabody Energy on the last day of the Miner's employment with it and does not argue it is financially incapable of paying benefits. Indeed, as the Director points out, its argument that liability shifted to Patriot, on a date subsequent to the termination of the Miner's employment, implicitly concedes that Peabody Energy was the self-insurer when the Miner was last employed. *See* Director's Brief at 10.

Thus, we reject Employer's contention that Peabody Energy is absolved of liability pursuant to 20 C.F.R. §725.495(a)(4).

DOL Bulletins

Finally, Employer contends BLBA Bulletins 12-07 and 14-02 establish the Trust Fund must assume liability based on Patriot's inability to pay benefits as a bankrupt self-insurer for Eastern. We disagree. First, Employer's argument again improperly presumes

---

the theory that it was absolved from liability when DOL authorized Patriot to self-insure claims of Eastern miners retroactively. Employer's Brief at 5.

Eastern, as self-insured by Peabody Energy, does not meet the requirements for liability. 20 C.F.R. §§725.494(e), 725.495(a)(1). Second, these Bulletins do not establish a policy applicable to all bankrupt self-insurers but on their face are specific to two self-insured coal mine operators unrelated to Peabody Energy's liability under the facts of this case, and Employer has not shown otherwise. BLBA Bulletin 12-07 concerns a settlement between the Director and Frontier Insurance Company over an expired surety bond.[19] *See* Director's Brief at 19 n.11. BLBA Bulletin 14-02 concerns a settlement between the Director and Travelers Casualty and Surety Company (Travelers), a private self-insurer, rather than a policy applicable to all self-insured coal mine operators and their bankrupt self-insurers.[20] *Id*. Thus, Employer's argument regarding the significance of these Bulletins is rejected.

For all of the above reasons, we conclude the ALJ properly excluded Employer's liability evidence, Director's Exhibit 38 Exhibit A, and Employer's Exhibits 1 and 2; properly found Eastern is the responsible operator, 20 C.F.R. §§725.494(e), 725.495(a)(1); and properly determined that Peabody Energy is the responsible carrier. Thus, we affirm the ALJ's finding that Eastern, self-insured by Peabody Energy, is liable for benefits.

Commencement Date for Benefits

The commencement date for benefits is the month in which the Miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). Where a miner suffers from complicated pneumoconiosis, the fact-finder must consider whether the evidence establishes the date of onset of the disease. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979). If not, the commencement date is the month in which the claim was filed, unless the evidence establishes the Miner had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the

[19] BLBA Bulletin 12-07, issued on July 20, 2012, states in relevant part that "when adjudicating claims involving a self[-]insured Responsible Operator for whom the miner's last and qualifying employment was during a period covered by a bond issued by Frontier Insurance Company," the Trust Fund assumes liability. Director's Brief at 19 n.11. The Bulletin does not establish a policy applicable to all self-insurers, but a settlement reached specifically between the Director and Frontier. *Id*.

[20] BLBA Bulletin 14-02, issued on April 29, 2014, states that in claims involving Travelers, liability will transfer to the Trust Fund in "claims in which the date of last employment was with a coal mine operator during the period of self-insurance covered by New Horizons Holdings (parent of Great Western Resources) whose surety bond was issued by Travelers[.]" Director's Brief at 19 n.11. The Bulletin is specific to Travelers, and thus does not cover Peabody Energy or Patriot. *Id*.

date for the commencement of benefits follows the period of simple pneumoconiosis. *Williams*, 13 BLR at 1-30; 20 C.F.R. §725.503(b). In a subsequent claim, however, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Relying on the Miner's February 22, 2011 chest x-ray, which Dr. Crum interpreted as positive for complicated pneumoconiosis, the ALJ determined the Miner's simple pneumoconiosis became complicated pneumoconiosis no later than that date. Decision and Order at 18. He therefore awarded benefits beginning February 2011. *Id*. Employer argues the ALJ improperly set the commencement date of benefits five years before the Miner filed his claim.[21] Employer's Brief at 20-21. It asserts "[u]nder the interpretation of the regulations applied by the Court here, a claimant could wait ten or twenty years to file a claim and then prove that he had been entitled to benefits twenty years earlier." *Id*. at 20-21. Employer therefore contends that the commencement date should be the date on which the Miner filed his current claim.[22] *Id*. at 21. Employer's argument is misplaced.

The regulations governing timeliness of filing a claim for benefits preclude a Miner from sitting on a claim if he was told he was totally disabled by pneumoconiosis more than three years prior to filing his claim. However, the existence of an x-ray that is positive for complicated pneumoconiosis does not trigger the running of the statute of limitations unless accompanied by that specific diagnosis of total disability due to pneumoconiosis communicated to the Miner.[23] *See* 20 C.F.R. §725.308; Employer's Brief at 20-21. Before us, Employer has not contested the timeliness of the claim nor shown prejudice as a result of the use of the particular evidence used to establish entitlement. Employer does not challenge, and we therefore affirm, the ALJ's determination that the Miner's February 22, 2011 x-ray is the earliest x-ray interpreted as positive for complicated pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 12-15, 18; Claimant's Exhibit 3. Because the February 22, 2011 x-ray was unrebutted and fully credited by the ALJ, she permissibly found the Miner's simple pneumoconiosis had progressed to complicated pneumoconiosis no later than that date. *See Williams*, 13 BLR 1-18, 1-30; Decision and Order at 18. We

[21] Employer asserts "Claimant did not even file a claim until 2016." Employer's Brief at 20. Contrary to Employer's contention, the Miner filed an initial claim for benefits on February 12, 2001. Decision and Order at 2; Director's Exhibit 1.

[22] The Director takes no position on the merits of the commencement date issue. Director's Brief at 2 n.2.

[23] Employer withdrew the timeliness issue at the hearing. Hearing Transcript at 11.

therefore affirm the ALJ's finding that the commencement date for the payment of benefits is February 2011.[24] *See Williams*, 13 BLR at 1-30; Decision and Order at 18.

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[24] To the extent that Employer's argument can be construed as asserting the onset date was improper based on the filing date of the instant, subsequent claim, it is rejected. *See* Employer's Brief at 20-21. In a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6). The Miner's prior claim was finally denied in May 2002. *See* Director's Exhibit 1; Decision and Order at 2. Thus, as no benefits are due for any period prior to May 2002, Employer has failed to demonstrate error in the ALJ's onset date determination on this basis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).