**U.S. Department of Labor**

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

BRB No. 19-0122 BLA

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| CHERI LYNN WEBB (Executrix of the Estate of WILLIAM E. VINCENT) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| PEABODY COAL COMPANY | ) | |
| and | ) | |
| | ) | DATE ISSUED: 05/29/2020 |
| PEABODY ENERGY CORPORATION | ) | |
| Employer/Carrier-Petitioners | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

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

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

H. Brettt Stonecipher and Tighe Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for employer/carrier.[1]

[1] Tighe Estes and Andrew L. Kenney (Fogle Keller Walker, PLLC) filed the petition for review and brief on behalf on employer and its carrier (employer). On June 25, 2019,

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

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

BOGGS, Chief Administrative Appeals Judge:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05196) of Administrative Law Judge Timothy J. McGrath issued on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on August 29, 2014.

The administrative law judge initially determined employer is the responsible operator liable for payment of benefits. He found the miner had at least nineteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

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

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Brett Stonecipher advised the Board that he and Mr. Estes are currently representing employer through a different law firm.

[2] Section 411(c)(4) establishes a rebuttable presumption that the miner was 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) (2012); 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,

judge erred in finding it liable for the payment of benefits. Additionally, employer contends he erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's Appointments Clause challenge and affirm the determination that employer is liable for benefits.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

**Appointments Clause**

Employer argues for the first time in this appeal that the district director lacked the authority to identify the responsible operator and process this case because she is an "inferior Officer" of the United States not properly appointed under the Appointments Clause. Employer relies on *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), in which the United States Supreme Court held administrative law judges employed by the Securities

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> Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that: the miner had twenty-one years of underground coal mine employment; he was totally disabled; and the Section 411(c)(4) presumption was invoked. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

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

and Exchange Commission are officers who must be appointed in conformance with the Appointments Clause. Employer's Brief at 16.

The Appointments Clause issue is "non-jurisdictional" and subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture."). *Lucia* was decided over four months prior to the administrative law judge's Decision and Order Awarding Benefits, but employer failed to raise its challenge to the district director's appointment while the case was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case remanded - the remedy it seeks here. *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. Based on these facts, we conclude employer forfeited its right to challenge the district director's appointment.[6] Further, because employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its forfeited arguments. *See Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging).

**Responsible Insurance Carrier**

The miner last worked in coal mine employment for Peabody Coal Company (Peabody Coal) from 1969 to 1997. Peabody Coal was a subsidiary of, and self-insured for black lung liabilities through, Peabody Energy Corporation (Peabody Energy). Director's Brief at 3, *citing* Director's Exhibits 3, 6; Employer's Brief at 8. Peabody Coal

[6] On August 23, 2018, the administrative law judge issued a Notice and Order instructing employer to file a statement within fourteen days indicating whether it intended to seek reassignment of the case to a different administrative law judge based on the Supreme Court's holding in *Lucia*. August 23, 2018 Order at 2. Because employer did not respond, the administrative law judge "deem[ed] the issue waived." *Id*. Although that order related to the administrative law judge's authority to decide the case, employer was clearly aware of the substantive law it now cites to challenge the district director's authority and the opportunity to raise it. Employer, however, chose not to raise its challenge until after the administrative law judge issued an adverse decision on the merits.

changed its name to Heritage Coal Company (Heritage) after the miner retired.[7] Decision and Order at 4 n.3, *citing* Director's Post-Hearing Brief at 2; Director's Exhibits 6, 7, 8. In 2007, Peabody Energy sold Peabody Coal/Heritage to Patriot Coal Corporation (Patriot). Employer's Brief at 9. In 2011, DOL authorized Patriot to self-insure for black lung liabilities, including for claims filed by employees of Peabody Energy subsidiaries before Patriot purchased them. Director's Exhibit 36. This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15 million. In 2015, Patriot went bankrupt. *Id*.

Employer does not directly challenge its designation as the responsible operator.[8] Rather, it asserts "the liability at issue is that of the carrier, not of the responsible operator." Employer's Brief at 27. In its Statement of the Facts, employer generally asserts that a private contract between Peabody Energy and Patriot (Separation Agreement) released Peabody Energy from liability for the claims of miners who worked for Peabody Coal. Employer's Brief at 20; Director's Exhibit 20. It claims the "shift of complete liability from Peabody [Energy] to Patriot was understood and endorsed by the Director[] during the approval of Patriot's self-insurance application." Employer's Brief at 20.

In support, it points to several documents relating to Patriot's self-insurance authorization and indemnity bonds Patriot allegedly executed with DOL. The administrative law judge admitted some of these documents into the record, including the Separation Agreement; DOL's 2011 authorization for Patriot to self-insure (Patriot's Self-Insurance Authorization); and a March 4, 2011 letter in which Steven Breeskin, then the Director of the Division of Coal Mine Workers' Compensation (DCMWC), returned a

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[7] The administrative law judge noted Peabody Coal Company (Peabody Coal) and Heritage are the same company and employer does not contest this characterization. Decision and Order at 4 n.3; Director's Brief at 3 n.2.

[8] Peabody Coal qualifies as a potentially liable operator because (1) the miner's disability arose at least in part out of employment with Peabody Coal; (2) Peabody Coal operated a mine after June 30, 1973; (3) Peabody Coal 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) Peabody Coal is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Peabody Coal was the last potentially liable operator to employ the miner, the administrative law judge designated Peabody Coal as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 14.

letter of credit financed by Bank of America under the Peabody Energy self-insurance program (the Breeskin Letter). Director's Exhibits 20, 36 (resubmitted as Employer's Exhibits 18, 19).

The administrative law judge excluded other documents on which employer hoped to rely, however, because employer did not submit them to the district director and did not establish extraordinary circumstances for failing to do so. *See* 20 C.F.R. §725.456(b)(1). These include additional communications from the DCMWC regarding Patriot's self-insurance and other documents relating to Patriot and Peabody Energy indemnity bonds. Employer's Exhibits 20-25.

With respect to the administrative law judge's finding that Peabody Energy is the responsible carrier, employer identifies three alleged errors: 1) the administrative law judge erred in requiring employer to establish extraordinary circumstances for admission of Employer's Exhibits 20 through 25; 2) in the alternative, he erred in finding employer did not establish extraordinary circumstances; and 3) he erred in analyzing carrier liability "like a traditional prior/successor operator situation" and, in so doing, "confused the nature of Peabody Coal and Peabody Energy." Employer's Brief at 27-34. Employer also asserts that allowing the district director to make an initial determination of the responsible carrier in instances involving potential Black Lung Disability Trust Fund (Trust Fund) liability violates due process. *Id*. at 22-27.

In response to employer's general factual assertion that Peabody Energy transferred its black lung liabilities to Patriot, the Director states the Separation Agreement is a private contract and not determinative of carrier liability under the regulations. Director's Brief at 11. She further states that because Patriot's authorization to self-insure "was not exclusive," Peabody Energy "was never released" from liability for the claims of miners who worked for it [but never for Patriot] in the event Patriot's self-insurance failed." *Id*. In response to Patriot Coal's legal arguments in this appeal, the Director asserts Peabody Energy was properly designated the responsible carrier because the miner last worked for Peabody Coal when it was self-insured through Peabody Energy and there is no argument it is incapable of paying benefits; therefore, any error in analyzing successor operator regulations is harmless. *Id*. at 10. She further maintains the administrative law judge properly excluded employer's additional liability evidence because it was not timely submitted and urges rejection of its due process argument. *Id*. at 19-21, 27-31.

**Relevant Procedural History**

The district director issued a Notice of Claim on December 17, 2015, informing Peabody Coal, self-insured through Peabody Energy, that it was identified as a "potentially liable operator." Director's Exhibit 21. On December 28, 2015, employer denied liability

but did not provide any documentary evidence to support its contention that Patriot, not Peabody Energy, was liable for benefits. Director's Exhibit 23.

On March 6, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Peabody Coal and Peabody Energy as the responsible operator and carrier, respectively. Director's Exhibit 25. The district director informed Peabody Coal and Peabody Energy they had until June 5, 2016 to submit additional documentary evidence relevant to liability and should identify any witnesses relevant to liability 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, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3, *citing* 20 C.F.R. §725.456(b)(1).

Employer responded to the SSAE on May 17, 2016, contesting liability. Director's Exhibit 29. In a June 22, 2016 letter, employer designated a Peabody representative, Robert Fenley, "as an individual having detailed information regarding the contract and transfer of Peabody's [Black Lung Benefits Act] liabilities to Patriot." Director's Exhibit 36. Employer further designated as a potential witness the "Secretary of Labor, or any chosen subordinate, as an individual having detailed knowledge regarding the surrender of the Patriot Bond and assumption of liability by the Trust Fund." *Id.*

On July 20, 2016, the district director granted employer an extension until September 15, 2016, to submit its liability evidence. Director's Exhibit 32. On September 20, 2016, employer submitted the Breeskin Letter and a copy of Patriot's Self-Insurance Authorization. Director's Exhibit 36. Employer also stated it was "now designating Steven Breeskin and David Benedict with DOL as well as Rob Meade as potential witnesses at a formal hearing." *Id*. Employer did not request any additional time to submit further liability evidence.

In an October 5, 2016 Proposed Decision and Order, the district director identified Peabody Coal and Peabody Energy as the responsible operator and carrier, respectively. Director's Exhibit 37. Employer requested a hearing and the case was forwarded to the OALJ on November 29, 2016. Director's Exhibits 41, 50.

By Order dated December 19, 2016, the administrative law judge scheduled a hearing for April 19, 2017. On January 17, 2017, employer filed a request for the production of documents related to Patriot's application for self-insurance, its bankruptcy, and the status of the security deposits submitted in conjunction with its self-insurance. Employer also moved to dismiss Peabody Energy as the carrier, asserting "Patriot is the correct self[-]insurer for this claim, and therefore the Trust Fund which received funds as

part of the Patriot bankruptcy, retains liability." Employer's Motion to Dismiss at 2. Employer again cited the Separation Agreement and Patriot's Self-Insurance Authorization as proof Patriot is the liable carrier.[9] *Id*. at 2-3. The Director responded to the motion, asserting that Peabody Energy retained secondary liability for benefits regardless of the Separation Agreement or Patriot's self-insurance. February 24, 2017 Response to Motion to Dismiss at 1-2.

The Director forwarded documents to employer on March 10, 2017, including the excluded documents contained at Employer's Exhibits 20 through 24. Following a series of telephone conferences between the administrative law judge and the parties, it was agreed the case would be bifurcated and the administrative law judge set an October 25, 2017 deadline to complete discovery on the responsible carrier issue. On October 24, 2017, employer submitted Employer's Exhibits 20 through 24.[10] After discovery closed, employer filed a motion to extend the discovery period in order to obtain a copy of "any and all indemnity bonds" Patriot may have executed with DOL or, in the absence of its production, to depose several DOL employees who may be able to "address the specific language of that document." Employer's Motion to Extend Discovery at 2, 5. According to employer, the indemnity bond "controls liability when a company becomes bankrupt and is authorized to self-insure" and is "crucial" to the determination of whether Peabody Energy is liable for benefits. *Id*. at 2.

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[9] Employer attached copies of the March 4, 2011 Breeskin letter and Patriot's Self-Insurance Authorization, which it previously submitted to the district director. Director's Exhibits 20, 36.

[10] Employer actually submitted Employer's Exhibits 18 through 24 but the first two exhibits, Employer's Exhibits 18 and 19, were already in the record. Employer submitted Employer's Exhibit 20, a November 23, 2010 letter from Steven Breeskin, returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 21, an undated letter from Michael Chance regarding Patriot's self-insurance reauthorization audit and requiring retroactive coverage for all claims through July 1, 1973; Employer's Exhibit 22, a March 4, 2011 letter from Steven Breeskin releasing Bank of America for liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance because DOL had either lost or destroyed it; Employer's Exhibit 23, documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Black Lung Disability Trust Fund; and Employer's Exhibit 24, a Peabody Energy Indemnity Bond.

On December 6, 2017, the administrative law judge denied employer's motion to reopen the record. After reviewing various exhibits submitted by the parties containing communications between DOL and Patriot, he accepted the Director's explanation that no such indemnity agreement exists and that DOL did not accept Patriot's proposal to replace the $15 million in Treasury deposits with an indemnity bond. The administrative law judge stated:

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

December 6, 2017 Order Denying Employer's Motion to Extend Discovery Period and Setting Briefing Deadline at 3; *see* Director's March 30, 2017 Response to Employer's Submission of Documents at 4 and Exhibit A (Proof of Claim filed in Patriot Bankruptcy, Declaration of Michael Chance).

On February 2, 2018, four months after the close of discovery, employer filed a motion to reopen the record for submission of an Indemnity Bond between Patriot and Atlantic Specialty Insurance Company, marked as Employer's Exhibit 25. On February 20, 2018, employer filed a motion to compel the Director to respond to employer's proposed stipulations and interrogatories. Specifically, employer requested that the Director provide a detailed accounting of the DOL's expenditures of Patriot's $15 million in Treasury deposits. The Director opposed both motions.

The administrative law judge refused to admit Employer's Exhibit 25 because the discovery period had closed, employer did not make a showing of extraordinary circumstances to permit admission of documentary evidence not submitted to the district director, and "[t]he indemnity bond proffered by [e]mployer is of no probative value as there is no record of DOL's acceptance of the bond." March 9, 2018 Order Denying Employer's Motion to Reopen Record. He further denied employer's motion to compel, finding employer waived its argument that the Director's "failure to provide a full and accurate accounting of the [$15 million deposited by Patriot] constitutes a violation of due process" by failing to timely raise it during the year-long discovery period. March 22, 2018 Order Denying Employer's Motion to Compel at 3-4.

Following submission of briefs by the parties, the administrative law judge issued his Decision and Order Awarding Benefits on November 2, 2018. He noted that the identification of the responsible operator or carrier must be resolved before the district director transfers the case to the OALJ. Decision and Order at 9. He further noted the regulations require that absent extraordinary circumstances, all liability evidence must be submitted to the district director. *Id*. at 9-10; *see* 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). He excluded Employer's Exhibits 20 through 24[11] because they had not been submitted to the district director and employer "presented no argument that its failure to comply with the regulations should be excused due to extraordinary circumstances." Decision and Order at 10. He also found employer "presented no evidence that it does not have sufficient assets to secure the payment of benefits in accordance with [20 C.F.R.] §725.606 or that it is not the potentially liable operator that most recently employed the miner." *Id*. at 14, *citing* 20 C.F.R. §725.495(c). Thus the administrative law judge determined Peabody Coal and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 10.

**Applicability of Extraordinary Circumstances Requirement**

Employer initially argues that the administrative law judge erred in excluding Employer's Exhibits 20 through 25 because evidence pertaining to the carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1). Employer's Brief at 28. We disagree.

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

[11] The administrative law judge did not mention Employer's Exhibit 25 in his Decision and Order, as he had already denied its admission. March 9, 2018 Order Denying Employer's Motion to Reopen the Record.

Citing *Howard v. Valley Camp Coal Co.*, 94 Fed. App'x 170 (4th Cir. 2004), employer also asserts it did not have to show extraordinary circumstances, only good cause, for the late submission of its evidence. Employer's Brief at 29-30. In *Howard*, the United States Court of Appeals for the Fourth Circuit held the administrative law judge misapplied the "extraordinary circumstances" standard of 20 C.F.R. §725.456(d) (2000) in excluding medical exhibits submitted by petitioner, based only on a finding they had been "in existence," without making a further finding petitioner had "obtained" the documents while the case was before the district director. *Id*. at 174. Under the factual circumstances presented in *Howard*, the court held that the proper inquiry was whether petitioner established good cause for admission of the exhibits, not extraordinary circumstances. *Id*. Employer similarly asserts that it was not required to show extraordinary circumstances, only good cause, because the documents it seeks to admit into evidence were not in its possession "during the pendency of the proceedings before the [d]istrict [d]irector." Employer's Brief at 31. We disagree.

As the Director notes, the since-repealed regulation at issue in *Howard* stated that documentary evidence a party obtained, but did not submit, while the case was before the district director could not be admitted into the record by the administrative law judge in the absence of extraordinary circumstances. 20 C.F.R. § 725.456(d) (2000); Director's Brief at 19. In contrast, the applicable regulation here, 20 C.F.R. §725.465(b)(1), requires the administrative law judge to reject liability evidence that was not submitted first to the district director without regard to when it was obtained, unless extraordinary circumstances are established.[12] *See* Director's Brief at 19. Regardless, we also find employer could not meet a good cause standard even if it applied: employer had not yet *obtained* all of its liability evidence at the district director level because it made no attempt to do so. Employer's Brief at 30. Employer offers no explanation in this appeal why it did not file its request for the production of documents when the case was before the district director instead of waiting until the case was transferred to OALJ. We see no reason why employer's inaction at the district director level now justifies use of a "good cause" standard and not the "extraordinary circumstances" standard for admission of its untimely submitted evidence. 20 C.F.R §725.465(b)(1).

**Whether Employer Established Extraordinary Circumstances**

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

We also reject employer's contention it established extraordinary circumstances to warrant admitting its untimely evidence into the record. Employer's Brief at 31. Because an administrative law judge exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn the disposition of an evidentiary issue must establish the administrative law judge's action represented an "abuse of . . . discretion." *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer contends the administrative law judge abused his discretion in finding extraordinary circumstances do not exist because the documents at Employer's Exhibits 20 through 25 were in DOL's possession and it "encountered 'particular difficulty obtaining the necessary evidence.'"[13] Employer's Brief at 31, *quoting* 65 Fed. Reg. at 79989 (DOL recognized that extraordinary circumstances may be shown where an employer encounters "particular difficulty obtaining the necessary evidence."). Employer does not explain this contention. The mere fact Employer's Exhibits 20 through 25 were in DOL's possession does not show extraordinary circumstances or that employer was constrained from timely obtaining them. Indeed, DOL provided employer with "nearly 800 pages of documents" related to Patriot's self-insurance authorization and bankruptcy when employer finally requested them after the case was transferred to OALJ. Director's Brief at 5-6; Employer's January 17, 2017 Request for Documents; Director's March 10, 2017 Response to Documents Request. As the Director notes, "[t]he documentation that [employer] requested [contained at Employer's Exhibits 20 through 25] had existed for years" and "even though the Director produced documents on March 10, 2017, [e]mployer did not attempt to submit several of them to the [administrative law judge] for over seven more months," on October 24, 2017. Director's Brief at 21.

Further, we reject employer's contention the Director should have voluntarily placed the documentation in the record to support employer's position. Employer's Brief at 29. It is employer's responsibility, not the Director's, to submit any documentation relevant to its liability by the deadline set forth in the SSAE. *See* 20 C.F.R. §§725.410, 725.412(a), 725.456(b)(1). Based on these facts, the administrative law judge did not abuse his discretion in finding employer failed to establish extraordinary circumstances to justify the late admission of its liability evidence. *Blake*, 24 BLR at 1-113.

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[13] Employer does not challenge the administrative law judge's finding it "presented no argument that its failure to comply with the regulations should be excused due to extraordinary circumstances." Decision and Order at 10; *see Skrack*, 6 BLR at 1-711. Nonetheless, we reject employer's contentions on this issue.

**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 Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing.[14] Employer's Brief at 22-27. 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.'" *Id*. at 27, *quoting* S. Rep. No. 209, 95 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). The Trust Fund is liable only if no responsible operator is found.

The regulatory requirement that liability evidence be submitted to the district director is not prejudicial to the extent an employer who receives a Notice of Claim has ninety days to present evidence regarding its status as a potentially liable operator. 20 C.F.R. §725.408. After issuance of the SSAE, an employer has another sixty days to submit evidence. 20 C.F.R. §725.410. Employer may also request extensions of these time frames.[15] Thus, we reject employer's assertion that it was deprived of due process. Due process requires only that a party be given the opportunity to mount a meaningful defense against a claim. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). As discussed, *infra*, employer had the opportunity to develop and submit all of its liability evidence relevant to the responsible carrier issue while the case was before the district director but it failed to do so. Employer therefore has not demonstrated a due process violation under the facts of this case.

**The Responsible Operator and Carrier Regulations**

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[14] Employer states that its due process argument is being included "out of an abundance of caution." Employer's Brief at 27. Employer does not explain whether it means to preserve this issue for appeal or have the Board address it. Further, some of employer's arguments on due process appear to be aimed at showing that district directors exercise significant powers in conjunction with its Appointments Clause challenge, which we have found to be forfeited. *Supra* p. 4.

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

Having failed to establish error with respect to its evidentiary and due process arguments, employer's sole remaining contention is that the administrative law judge erred in analyzing "the Patriot and Peabody Energy issue like a traditional prior/successor operator situation." Employer's Brief at 33-34. Employer, however, does not address the administrative law judge's alternate finding that it is "unnecessary to analyze Patriot's liability as a successor operator" since Peabody Coal most recently employed the miner and was self-insured at the time through Peabody Energy, which is financially capable of paying benefits. Decision and Order at 14 n.12.

Employer's largely unexplained assertion that the Director erred by referring to employer as Peabody Coal instead of Heritage does not establish error in the administrative law judge's findings. Employer's Brief at 33-34. That Peabody Coal changed its name to Heritage does not alter the outcome. *Id*.; *see* Decision and Order at 4 & n.3, *citing* Director's Post-Hearing Brief at 2; Director's Exhibits 6, 7, 8. Further, while employer states Peabody Coal/Heritage later became a "wholly owned subsidiary of Patriot," employer does not contest that the miner's last coal mine employment was with employer prior to that sale or that Peabody Energy provided its self-insurance at the time the miner retired.[16]

The administrative law judge found Peabody Coal was properly designated the most recent potentially liable operator to employ the miner and therefore had the burden to prove it is incapable of paying benefits or that another financially-capable operator more recently employed the miner. Decision and Order at 14; 20 C.F.R. §725.495. Employer has not established error in his finding it "presented no evidence" Peabody Coal did not last employ the miner or Peabody Energy is incapable of paying benefits. Decision and Order at 14; Employer's Brief at 33-34. Thus, regardless of any error in the

[16] This is so even accepting employer's apparently erroneous assertion the miner's employment "actually" occurred with Heritage, as employer does not contest that Peabody Energy continued to self-insure black lung claims for employer after Peabody Coal changed its name to Heritage or that the miner last worked for employer when it was self-insured by Peabody Energy. Employer's Brief at 33. In fact, employer concedes the miner's "last date of exposure pre-dated the transfer" of Heritage from Peabody Energy to Patriot. *Id*. at 9. Moreover, even if it were relevant, the record belies employer's assertion that the miner worked for employer after it changed its name to Heritage. *Id*. at 33. The administrative law judge accurately found the miner "was last employed by Peabody Coal Company in 1997 . . . when it was a subsidiary of Peabody Energy." Decision and Order at 13; *compare* Director's Exhibit 3 (miner specifically identified his last coal mine employment with "Peabody Coal Co" in 1997) *with* Director's Exhibits 6, 7, 8 (now listing the employer's name as Heritage).

administrative law judge's application of the successor-operator rules, we affirm his finding Peabody Energy is the liable carrier for this claim. 20 C.F.R. §725.495; *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[17] or that "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)(i), (ii). The administrative law judge found employer did not establish either method of rebuttal.

**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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The Sixth Circuit has held the standard requires employer to disprove the existence of legal pneumoconiosis by showing that the miner's coal mine employment "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). Employer contends the administrative law judge erred in finding the opinions of Drs. Tuteur and Selby insufficient to establish the miner did not have legal pneumoconiosis. We disagree.

Dr. Tuteur opined the miner suffered from disabling chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Employer's Exhibits 7, 13. The administrative law judge correctly noted Dr. Tuteur "cited to medical studies and statistics to support his hypothesis that coal mine dust exposure rarely causes COPD." Decision and Order at 31; Employer's Exhibit 7. Dr. Tuteur explained that a non-smoking miner has a one to two

[17] "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).

percent risk of developing COPD in comparison to a smoker who has a twenty percent risk of developing the disease. Employer's Exhibit 7 at 4. He opined that based on the miner's "extensive smoking history, it is with reasonable medical certainty that his clinical picture of [COPD] is uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id.*

Contrary to employer's contention, the administrative law judge permissibly found Dr. Tuteur's opinion unpersuasive because he relied on relative risk theories and "generalities" rather than an analysis of the miner's individual case. Decision and Order at 31; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Additionally, given DOL's recognition that the risks of coal dust exposure and smoking are additive, the administrative law judge permissibly found Dr. Tuteur did not adequately explain why the miner's "long-term coal mine dust exposure did not significantly aggravate his COPD," along with smoking. Decision and Order at 32; *see* 65 Fed. Reg. at 79,940; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007). We therefore affirm the administrative law judge's discrediting of Dr. Tuteur's opinion on legal pneumoconiosis.

Dr. Selby opined that the miner suffered from a severe obstructive impairment and emphysema due to cigarette smoking and possible asthma. Employer's Exhibits 10, 14. He explained the miner had "more than enough tobacco exposure" to cause his respiratory impairment and therefore coal dust exposure was not a causative factor. Employer's Exhibit 14 at 11. The administrative law judge permissibly rejected Dr. Selby's opinion because it is based on "statistics and generalities"[18] and not the specifics of the miner's case. *Barrett*, 478 F.3d at 356; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Knizner*, 8 BLR at 1-7. He also permissibly found that Dr. Selby's opinion "does not explain why [the miner's] more than twenty years of coal mine dust exposure did not

[18] As noted by the administrative law judge, Dr. Selby opined, based on unspecified studies, that people generally underestimate their smoking history and thus he assumed that the miner's smoking history is "2 to 3 times the amount [the miner] admitted to." Employer's Exhibit 10 at 16-17; Employer's Exhibit 14 at 8-9, 23-24. He noted in the "tri-state area where [the miner] worked there are no reported cases let alone peer reviewed studies that are published showing any relation to coal mine dust inhalation and the development of emphysema or COPD." Employer's Exhibit 10 at 15. He opined the miner's emphysema was unrelated to coal mine dust because "with statistics and [his] experience in the [t]ri-state as well as what the studies have shown, there is a vast increase in emphysema from tobacco smoke. And it's a very minute fraction of emphysema that has developed from coal mine inhalation." Employer's Exhibit 14 at 11-12.

substantially aggravate his advanced emphysema" even if it was primarily caused by smoking. Decision and Order at 33; *see* 65 Fed. Reg. at 79,940; *Barrett*, 478 F.3d at 356; Employer's Exhibits 10, 14.

The administrative law judge must weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's discrediting of employer's physicians and his finding employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Young*, 947 F.3d at 405; *Barrett*, 478 F.3d at 356; Decision and Order at 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 Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011).

**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). He permissibly rejected the opinions of Drs. Tuteur and Selby on the cause of the miner's respiratory disability because neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer did not disprove the existence of the disease.[19] Decision and Order at 35; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). We therefore affirm the administrative law judge's finding employer failed to establish that no part of the miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34-35.

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

[19] Neither physician offered an explanation as to why pneumoconiosis played no part in the miner's disability, apart from his conclusion that the miner did not have pneumoconiosis.

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 the award of benefits. Notably, employer does not argue before us the Separation Agreement transfers liability for this claim to the Trust Fund. It instead specifically limits its liability arguments to the exclusion of exhibits, asserts the administrative law judge erred by analyzing "the Patriot and Peabody Energy issue like a traditional prior/successor operator situation[,]" and requests remand to a different administrative law judge with instructions "to not limit liability evidence[.]" Employer's Brief at 27-33, 33-34, 37.

As the majority recognizes, none of that affects the administrative law judge's determination employer did not establish extraordinary circumstances to permit admission of liability evidence not submitted to the district director, 20 C.F.R. § 725.456(b)(1), or meet its burdens to show it is incapable of paying benefits or was not the potentially responsible operator to most recently employ the miner. 20 C.F.R. § 725.495(c)(1), (2).

I write separately, however, to express my view that, even if employer had preserved the argument, *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018) does not establish that black lung district directors are inferior officers subject to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

Employer argues district directors are similar to the SEC administrative law judges *Lucia* held are inferior officers because they "exercise 'significant discretion' in carrying

out 'important functions' such as determining the proof allowed in the record, conducting conferences, and issuing decisions which can become final in awarding or denying benefits." Employer's Brief at 17 (citation omitted). It also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id*. at 18, citation omitted. Finally, it alleges the district director's role as "final decision-maker" generally creates "an Appointments Clause issue." *Id*. From this, it concludes *Lucia* establishes district directors as inferior officers subject to the Appointments Clause, and it asserts the case must be remanded and reassigned to a properly appointed district director. *Id.* at 21-22.[20]

I agree with the Director, however, that a more accurate examination of their authority reveals district directors instead perform "routine administrative functions." Director's Brief at 22. They do not have "significant adjudicative" capacity, possessing none of the four powers *Lucia* held make administrative law judges akin to federal district court judges. Moreover, the regulations cabin their ability to identify a responsible operator and determine entitlement -- subject to de novo appellate review -- eliminating any remaining Appointments Clause issues. Like the vast majority of federal employees, district directors thus are not members of the very small subset of inferior officers who must be appointed by the head of an agency. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 & n.9 (2010) (noting that in 1879 about 90% of federal employees were lesser functionaries and the percentage of those functionaries has dramatically increased over time).[21]

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[20] It is unclear how employer reconciles this request with its later request for remand to a different administrative law judge.

[21] 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).

Two features determine officer status under the Appointments Clause: holding a continuing position established by law and exercising "significant authority" pursuant to it. *Lucia,* 138 S.Ct. at 2051 (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). After noting they hold continuing positions, the *Lucia* Court identified four powers administrative law judges possess establishing significant authority comparable to "a federal district judge conducting a bench trial": 1) to conduct trials and regulate hearings; 2) to take testimony and administer oaths; 3) to rule on the admissibility of evidence; and 4) to enforce compliance with discovery orders. *Id.* at 2049 (citation omitted). A "point-by-point" analysis reveals district directors meaningfully possess none of these expansive adjudicatory powers. *Id.* at 2053.[22]

*First,* black lung district directors never conduct formal hearings. Thus, as the Director notes, the paramount factor the *Lucia* Court found to justify officer status, the authority to hold an adversarial hearing, "is simply missing from the district director's portfolio." Director's Brief at 24. Indeed, the remedy the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed administrative 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 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

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[22] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 23 n.16.

law judge hearing, long after the district director has transferred the case to the OALJ. 20 C.F.R. §§ 725.456(b)(3), 725.457; 65 Fed. Reg. 79,920, 79,991 (Dec. 20, 2000) ("[T]he Department expects that parties generally will not undertake the development of medical evidence until the case is pending before the administrative law judge.").

*Fourth*, district directors do not enforce compliance with discovery orders like administrative law or federal district court judges. No formal discovery takes place before them, only "informal discovery proceedings." 20 C.F.R. § 725.351(a)(2). And the district director's "enforcement" power in those limited proceedings is not "especially muscular" -- having nothing remotely similar to "the nuclear option" federal courts possess "to toss malefactors in jail," or "the conventional weapons" to sanction wielded by administrative law judges. *Lucia*, 138 S. Ct. at 2054. Instead, where a claimant fails to prosecute a claim, the only (and necessary) remedy is a simple denial by reason of abandonment. 20 C.F.R. § 725.409. But even then dismissal is limited to four specific circumstances in which a claimant refuses to go forward with her case and is predicated on a district director first notifying the claimant and giving 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).[23]

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).

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[23] 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 OALJs mandates the requirement. 20 C.F.R. § 725.413(c).

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

*First*, district directors lack independent discretion in designating responsible operators given the comprehensive regulatory scheme. Evidence relevant to a responsible operator designation must be initially submitted to the district director to streamline administrative proceedings by restricting the district director's authority. 65 Fed. Reg. at 79,990. As the Director notes, "the district director gets only one chance at identifying the liable operator: the goal of the rule is to allow the district director to make the most informed choice possible, but also to limit the district director's discretion." Director's Brief at 25. If the district director chooses incorrectly, the Trust Fund must pay any benefits awarded in the claim. *Id*.

Moreover, specific rules govern which operators may be considered as potentially liable and ultimately designated as the responsible operator. 20 C.F.R. §§ 725.494, 725.495. The program rules require that various types of liability evidence must be submitted at specific times and during a defined period. *See, e.g.*, 20 C.F.R. § 725.408(b) (evidence relating to status as a potentially liable operator must be submitted within 90 days after receiving the Notice of Claim); 20 C.F.R. § 725.410 (evidence that another operator may be liable must be submitted within 60 days of the Schedule for the Submission of Additional Evidence with 30 additional days for submission of rebuttal evidence). These programmatic constraints show the district director lacks significant independent authority in claims processing relevant to the responsible operator designation.[24]

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[24] 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, had employer preserved its Appointments Clause argument, I would find district directors are not inferior officers but "part of the broad swath of 'lesser functionaries' in the Government's workforce." *Id.* at 2051 (citation omitted).[25]

JONATHAN ROLFE
Administrative Appeals Judge

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> Fund, and ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests." 65 Fed. Reg. 80005 (Dec. 20, 2000).

Director's Brief at 25 n.18.

[25] While I agree with my colleagues that employer failed to preserve its Appointments Clause argument, I would hold it waived, rather than forfeited, the issue. Forfeiture is the failure, often inadvertent, "to make the timely assertion of a right"; waiver by contrast "is the 'intentional relinquishment or abandonment of a known right."' *Hamer v. Neighborhood Housing Serv. of Chicago*, 138 S.Ct. 13, 17 & n.1 (2017) (citation omitted). The administrative law judge specifically ordered employer to address the application of *Lucia* and to request reassignment or to decide to go forward with the case, warning that failure to respond would result in waiver. *See* August 23, 2018 Order at 2 ("[i]f a response is not timely filed, *the remedy of reassignment* and a new hearing in this

matter *will be deemed waived and the case will proceed before the undersigned.*") (emphasis added).

Even viewing the order in the most charitable light as primarily applying to the administrative law judge's appointment, employer's conscious decisions not to address *Lucia* or request reassignment when ordered to brief those issues cannot be viewed as simple inadvertence. Consequently, I would hold it cannot resurrect the argument on appeal. *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012) (distinguishing waivers and forfeitures and observing that "a federal court has the authority to resurrect only forfeited defenses"); *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (failure to timely object to recommendations of magistrate judge when generally ordered to address them "waives appellate review of both factual and legal questions.").