No. 15-4255

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPLETON & RATLIFF COAL CORP., et al

Petitioner

v.

DEWEY RATLIFF

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor

MAIA S. FISHER
Acting Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

JEFFREY S. GOLDBERG
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2117, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5650

Attorneys for the Director, Office of Workers' Compensation Programs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES (cont'd)

CASES (cont'd)

STATUTES

STATUTES (cont'd)

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-944

Internal Revenue Code

The Jones Act

Kentucky Insurance Code

Kentucky Insurance Guaranty Association Act

STATUTES (cont'd)

Kentucky Contracts

Longshore and Harbor Workers' Compensation Act, as amended

REGULATIONS

REGULATIONS (cont'd)

REGULATIONS (cont'd)

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-4255

APPLETON & RATLIFF COAL CORP., et al

Petitioners

v.

DEWEY RATLIFF

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

The Director adopts Petitioners' statement of jurisdiction. Petitioners' Brief (Pet. Bf.) at 8-9.

STATEMENT OF THE ISSUES

1. The black lung regulations require a coal mine operator and its insurer to inform the Office of Workers' Compensation Programs, United States Department of Labor (OWCP) that they are not financially capable of assuming liability for the

payment of benefits during the initial stages of claim adjudication. The black lung regulations also require that OWCP name the liable party before the case goes to an administrative law judge (ALJ) and prevents OWCP from naming another party if its first choice is overturned. When OWCP incorrectly identifies the responsible party, the Black Lung Disability Trust Fund (Trust Fund) must assume liability for benefits, if awarded.

When this claim was before OWCP, the Kentucky Insurance Guarantee Association (KIGA), which pays covered claims against insolvent insurers, agreed that the coal mine operator, Appleton & Ratliff Coal Corporation (A&R), was financially capable of assuming benefits. KIGA made this admission despite the fact that A&R was defunct and A&R's insurance carrier, Reliance Insurance Company (Reliance), was insolvent.[1] Because A&R met all other criteria for liability, OWCP named A&R and Reliance as the responsible parties. When the claim went to the ALJ, KIGA changed its mind based on a new interpretation of state law, and argued that A&R was not financially capable of assuming liability because KIGA did not back federal black lung insurance claims.

[1] Unless there is a need to identify a petitioner individually, we refer to all petitioners collectively as KIGA, since it is the real party in interest. A&R ceased operations in January 1998, and was dissolved on September 30, 2014, DX 12, and Reliance was liquidated on October 3, 2001. www.insurance.pa.gov/Regulations/LiquidationRehab/Pages/Reliance%20Insurance%20Commissioners%20Statement.aspx.

The first question presented is whether the black lung regulations prohibit KIGA from contending before the ALJ (and thereafter) that A&R is not financially capable of assuming liability when KIGA previously informed OWCP that A&R was financially capable.

2. In general, a miner's most recent employer of at least one year, or its insurance carrier, is responsible for the payment of benefits. Although neither can do so here, KIGA, a creature of the Kentucky Insurance Guarantee Association Act (the State Guaranty Act or Act), is obligated to pay the covered claims of insolvent insurers, like Reliance. The State Guaranty Act, however, excludes from coverage "ocean marine insurance" and "insurance provided, written, reinsured, or guaranteed by any government or governmental agencies."

The second question presented is whether the State Guaranty Act precludes KIGA from paying benefits because black lung insurance is "ocean marine insurance" or because the Black Lung Disability Trust Fund (Trust Fund) "guarantees" black lung insurance.

3. 20 C.F.R. § 725.310(b) and 20 C.F.R. § 725.414 limit the amount of medical evidence, including the number of x-ray readings, that a party can submit in a black lung claim. These limitations arose in part from this Court's concerns in *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993), and the courts of appeals and Benefits Review Board have upheld them.

The third question presented is whether the evidentiary limitations violate due process.

4. The evidentiary limitations require that a chest x-ray referenced in an admitted medical report also be admissible. 20 C.F.R. § 725.414(a)(3)(i). The ALJ here declined to consider that part of Dr. Broudy's medical opinion that relied on his positive reading of the March 16, 2010, x-ray because KIGA withdrew the positive reading from the record and replaced it with a negative reading by Dr. Paul Wheeler.

The fourth question presented is whether the ALJ abused her discretion in not considering that part of Dr. Broudy's medical opinion that relied on his withdrawn x-ray reading.

5. OWCP's BLBA Bulletin 14-09 instructs its staff not to credit Dr. Wheeler's x-ray readings in certain circumstances. The parties did not bring the Bulletin to the ALJ's attention, and she did not refer to it in her decision. KIGA claims that the ALJ secretly relied on the Bulletin, and her reasons for discrediting Dr. Wheeler's reading were not her true reasons.[2]

The fifth and final question presented is whether the Bulletin played a role in the ALJ's decision.

[2] The Director will not address KIGA's arguments concerning the ALJ's weighing of the medical evidence.

STATEMENT OF THE CASE

A. Procedural history

Dewey Ratliff (the miner) filed his claim for benefits under the BLBA, 30 U.S.C. §§ 901-944, on September 17, 2001. Appendix (AX) 43.[3] OWCP found Ratliff entitled to benefits, payable by A&R. AX 33. A&R requested a hearing before an Administrative Law Judge, who denied benefits. AX 15.

Ratliff filed for modification pursuant to 20 C.F.R. § 725.310 within one year of the denial.[4] AX 14. On July 25, 2014, an ALJ awarded benefits against A&R and held KIGA responsible for benefits if A&R could not pay. AX 2, AX 2-6. The Benefits Review Board affirmed. AX 1, AX 1-5. KIGA's appeal to this Court followed.

---

[3] Petitioners' appendix is unpaginated, although a "Record No." identifies each document. (This "Record No." does not correspond to the respective exhibit number given the document in the agency proceedings below.) We refer first to the Appendix Record No., and then, when necessary, to the page number within that document. Thus, "AX 43-4-5" would be pages four through five of Appendix Record No. 43.

We have also filed a paginated Supplemental Appendix (SA) that contains documents not included in Petitioners' Appendix. We refer to the exact page number(s) in it.

[4] Within one year of a denial of a claim, a miner can petition the district director to modify that decision, alleging a mistake in a determination of fact or a change in condition. 20 C.F.R. § 725.310(a); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227 (6th Cir. 1994).

B. Statutory and regulatory background

1. Substantive BLBA and regulatory provisions relating to liability

The BLBA provides disability benefits to miners who are totally disabled by pneumoconiosis, and survivors' benefits to their qualifying dependents. 30 U.S.C. §§ 901(a), 922, 932(c). It was Congress' intent to have liability for these benefits fall on the miner's employer "to the maximum extent feasible." *See Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014) (quoting *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989)); 30 U.S.C. § 932(c). Congress thus made individual coal mine operators liable for benefits if the miner's disability or death arose "at least in part" out of coal mine employment with the operator after December 31, 1969, while requiring the Trust Fund to assume liability only when "there is *no* operator who is liable for the payment of such benefits." 26 U.S.C. § 9501(d)(1)(B) (emphasis added); 30 U.S.C. § 932(c).[5]

Congress additionally took steps to ensure that liable operators would be able to pay for benefits when awarded. It mandated that coal mine operators secure the payment of benefits either by obtaining permission from OWCP to self-insure or by purchasing insurance from an entity authorized under state law to

[5] Given that the vast majority of current BLBA claims involve miners who worked in coal mine employment after 1969, individual coal mine operators, not the Trust Fund, are typically liable for approved claims. 20 C.F.R. § 725.490(a) (noting primary purpose of Trust Fund is to pay approved claims for pre-1970 coal mine employment).

insure state workers' compensation liabilities. 30 U.S.C. § 933(a); 20 C.F.R. § 726.1. This BLBA insurance coverage is established through a mandatory endorsement attached to the standard workers' compensation policy, which specifies that the "unqualified term 'workmen's compensation law'" set forth in the policy includes BLBA coverage. 20 C.F.R. § 726.203(a).

To further prevent operators from passing liability onto the Trust Fund, Congress gave the Labor Department broad authority to promulgate regulations "for determining whether pneumoconiosis arose out of employment in a particular coal mine" or, "if appropriate," "for apportioning liability" among operators. 30 U.S.C. § 932(h). The Department accordingly promulgated regulations broadly defining the cast of employers that may be potentially liable for a claim. 20 C.F.R. § 725.494.[6] Of the five criteria that must be met to be potentially liable, only the last – the operator's financial capability to assume liability – is at issue here.

---

[6] An operator is "*potentially liable*" when:

(i) the miner's disability or death arose out of employment with the operator;
(ii) the entity was an operator after June 30, 1973;
(iii) the miner worked for the operator for at least one year;
(iv) the miner's employment with the operator included at least one working day after December 31, 1969; and
(v) the operator is financially capable of assuming liability for the claim.

20 C.F.R. § 725.494(a)-(e).

An operator is deemed financially capable of assuming liability if it "obtained a policy or contract of insurance . . . that covers the claim" unless "the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed." 20 C.F.R. § 725.494(e)(1). This provision thus clearly anticipates holding insurance guarantors liable, including state guaranty associations, when possible. *See* 62 Fed. Reg. 3338, 3364 (Jan. 22, 1997) (explaining that an operator's purchase of insurance is insufficient to establish financial capability where insurer is insolvent and no successor, such as another insurance company or state guaranty association, is available to pay benefits); *see also* 20 C.F.R. § 725.619(e) (allowing enforcement of an award against an entity that "has assumed or succeeded to the obligations of the operator or insurer by operation of any state or federal law"); 62 Fed. Reg. 3338, 3369 (Jan. 22, 1997) (explaining that OWCP may collect from a state insurance guaranty association where state law requires such an association to assume the insurer's liabilities).[7]

The Director typically identifies the operator that most recently employed the miner for more than one year as the "responsible operator," *i.e.*, the entity finally-determined to be liable for benefits if awarded. 20 C.F.R. § 725.495(a)(1). But if the most recent employer is not financially capable of assuming liability, the

[7] An operator is also capable of assuming liability if it "qualified as a self-insurer" or "possesses sufficient assets to secure the payment of benefits." 20 C.F.R. § 725.494(e)(2)-(3). Neither alternative is at issue in this appeal.

Director may hold liable a prior employer that is financially capable of paying benefits. 20 C.F.R. §§ 725.495(a)(3); *Arkansas Coals*, 739 F.3d 313 (noting that "a common reason why a director might select a prior employer as the responsible operator is if the most recent employer lacked insurance"). Naming an earlier operator is thus another way OWCP reduces Trust Fund exposure.

2. Black lung procedures for identifying the responsible operator

As the description of the proceedings below make clear, *infra* at 17-19, the administrative procedures used to identify the responsible operator play an important role in this appeal.

Once a claim is filed, OWCP investigates and determines whether there are one or more operators that are potentially liable for the claim. 20 C.F.R. § 725.407(a). OWCP then notifies each potentially-liable operator of the claim. 20 C.F.R. § 725.407. Each notified operator then has thirty days in which to accept or contest its designation as a potentially-liable operator. 20 C.F.R. § 725.408(a)(1). If it fails to respond, it may not later challenge its designation as a "potentially liable operator," *i.e.*, it cannot challenge the five criteria or facts – including its financial capacity to pay – that comprise the designation. 20 C.F.R. § 725.408(c); *Arkansas Coals*, 739 F.3d at 318; *see also supra* n.6 (listing the five criteria). If the operator contests its designation, it must state the precise nature of its

disagreement, and it has ninety days in which to submit documentation supporting its defense. 20 C.F.R. § 725.408(b)(2).

After the operator responds to the Notice of Claim and additional evidence is submitted and developed, OWCP makes preliminary determinations – embodied in the Schedule for the Submission of Additional Evidence – both on the miner's entitlement to benefits and on which of the potentially liable operators will be the responsible operator on the claim. 20 C.F.R. § 725.410(a).

The named responsible operator has thirty days in which to accept or reject its designation as the liable party. 20 C.F.R. § 725.412(a)(1). Because the named responsible operator was previously required to raise any defenses regarding its status as potentially liable (the five criteria), this second stage defense must be directed at showing that another potentially-liable operator more recently employed the miner (and can pay benefits if awarded). 20 C.F.R. § § 725.414(b)(1) (the operator can submit any "evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant").

OWCP has two options once the operator's defenses and supporting evidence are in. First, it may identify a different potentially-liable operator as the responsible operator and issue another Schedule for the Submission of Additional Evidence. 20 C.F.R. § 725.415(b). Or OWCP may issue a Proposed Decision and Order (PDO). The PDO contains OWCP's final determinations on entitlement and

the identity of the responsible operator. 20 C.F.R. § 725.418. The PDO must dismiss as parties to the claim all other previously-notified, potentially-liable operators. *Id*. 725.418(d). The parties then have thirty days to contest the PDO's findings by requesting an ALJ hearing. 20 C.F.R. § 725.419(a).

It bears emphasis that after OWCP issues a PDO designating a responsible operator and the claim is referred to the Office of Administrative Law Judges for a hearing, OWCP has no further opportunity (with one narrow exception not relevant here) to impose liability on another entity if the first choice is overturned. In that event, the Trust Fund assumes liability for the claim. By limiting operator identification to the initial stage of claim adjudication, the Secretary accepted the risk of increased Trust Fund liability in order to provide more expeditious and fair claim adjudications. *See generally* 65 Fed. Reg. 79990-91, ¶ (b) (Dec. 20, 2000); *Director, OWCP, v. Trace Fork Coal Co*, 67 F.3d 503, 507-08 (4th Cir. 1995) (addressing responsible operator identification under prior regulations). Because the Trust Fund may end up being liable if OWCP's designation is overturned, it is essential that an operator raise its defenses (and submit supporting evidence) at the proper time. In that way, OWCP can investigate and consider the defenses, and if found valid, identify a different operator.

3. The State Guaranty Act

The State Guaranty Act, KY Rev. Stat. § 304.36-010 through § 304.36-170 (West), established KIGA "to cover claims made against insureds whose carrier becomes insolvent." *Ky. Ins. Guar. Ass'n v. Jeffers*, 13 S.W. 3d 606, 607 (Ky. 2000) (citing KY Rev. Stat. § 304.36-010 (West)). The Act, which is modeled on a proposal by the National Association of Insurance Commissioners (NAIC), *Hawkins v. Ky. Ins. Guar. Ass'n*, 838 S.W. 2d 410, 412 (Ky. Ct. App. 1992), applies "to all kinds of direct insurance."[8] KY Rev. Stat. 304.36-030(1) (West). Although the State Guaranty Act leaves "direct insurance" undefined, the term essentially encompasses property and casualty insurance by virtue of the many types of insurance the Act excludes. *Id*.; *see also NAIC* ***Property and Casualty Insurance*** *Model Act*, NAIC 540-1 (2015) (emphasis added). In any event, the Act clearly covers claims under workers' compensation insurance. KY Rev. Stat. 304.36-080(1)(a)(1), 304.36-120(2) (West); *see also* KY Rev. Stat. 304.5-070 (including workers' compensation and employer's liability within the definition of "casualty insurance"). Conversely, the Act does not cover claims under "[o]cean marine insurance" and "[a]ny insurance provided, written, reinsured, or guaranteed

[8] The current version of the NAIC Property and Casualty Insurance Guaranty Association Model Act, NAIC 540-1 (2015), is available on Westlaw in the National Association of Insurance Commissioners database.

by any government or government agencies[.]" KY Rev. Stat. 304.36-030 (1)(f) and (h).

The Act provides a lengthy definition of "ocean marine insurance," which (in essence) covers risks and perils associated with the operation of a vessel on the ocean or inland waterways, and includes coverage written pursuant to the Jones Act, the Longshore Harbor and Workers' Compensation Act, and similar Federal statutes.[9] KY Rev. Stat. 304.36-050(11). By contrast, the Act does not explain what it means by insurance "provided, written, reinsured, or guaranteed by any government or government agencies." Comments to the NAIC model guaranty association act, however, indicate this provision was meant "to exclude flood and crop hail damage insurance guaranteed by the federal government." NAIC PC 540-1 at 9 (discussing amendment to Section 12 of Model Act).

KIGA is a nonprofit unincorporated legal entity comprised of its member insurers. KY Rev. Stat. 304.36-060. A "member insurer" is an insurer that sells the kinds of insurance that KIGA guarantees. KY Rev. Stat. 304.36-050(8). KIGA likewise covers claims that "arise[ ] out of . . . an insurance policy to which this subtitle applies," KY Rev. Stat. 304.36-050(6), 304.36-080(1)(a), and in doing

[9] The BLBA incorporates various provisions of the Longshore Act, but the latter's insurance provisions are not among them. 30 U.S.C. § 932(a) (not incorporating 33 U.S.C. §§ 932, 936, 938, the Longshore Act's insurance sections). As discussed above, the duty to obtain BLBA insurance arises from the BLBA itself (30 U.S.C. § 933).

so, is deemed to be the insolvent insurer, taking on "all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." KY Rev. Stat. 304.36-080(1)(c). To cover its costs and pay claims, KIGA makes assessments on the premiums of policies written by its members. KY Rev. Stat. 304.36-080(1)(d). The member insurers may then recoup these assessments in the "rates and premiums charged for insurance policies to which this subtitle applies." KY Rev. Stat. 304.36-160. Finally, the KIGA may return unspent assessments to its members. *Id*.

One further purpose of KIGA is signficant: KIGA was established "to aid in the detection and prevention of insurer insolvencies." KY Rev. Stat. 304.36-130. Among other duties, the KIGA board of directors is obligated to notify the insurance commissioner of any information indicating that a member insurer may be insolvent; request the insurance commissioner conduct a financial examination of the member; issue reports and make recommendations regarding the solvency of member insurers; and, in insolvencies where KIGA paid covered claims, KIGA must prepare a report on the history and causes of the insolvency. *Id*.

4. Black lung evidentiary limitations

Section 725.414 limits the quantity of evidence each party can submit. As part of their affirmative case, each party is limited to two x-ray readings, two pulmonary function tests, two arterial blood gas tests, and two medical reports. 20

C.F.R. § 725.414(a)(2), (a)(3)(i). As part of their rebuttal case, each party is permitted one reading of each x-ray, pulmonary function test, and arterial blood gas test submitted as part of the other parties' affirmative cases, as well as an additional doctor's report. 20 C.F.R. § 725.414(a)(2)(ii), (a)(3)(ii). Section 725.414(a)(3)(i) also provides that "[a]ny chest X-ray interpretations . . . that appear in a medical report must each be admissible under this paragraph[.]" 20 C.F.R. § 725.414(a)(3)(i).

Within one year of a claim decision, a party can petition the district director for modification. 20 C.F.R. § 725.310(a). On modification, each party is permitted to submit one piece of affirmative evidence in each category described above (such as "one additional [affirmative] chest X-ray interpretation,") as well as evidence in rebuttal to the opposing side's case. 20 C.F.R. § 725.310(b). Furthermore, if a party did not submit its full complement of evidence in the initial proceedings, it may complete the slate on modification. *Rose v. Buffalo Min. Co.*, 23 BLR 1-221, 1-227, 2007 WL 1644033 (Ben. Rev. Bd. 2007). The intent of the regulatory limitation "is to ensure that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder." 65 Fed. Reg. 79976 (Dec. 20, 2000).

Notwithstanding these provisions, an administrative law judge may admit medical evidence in excess of the limitations for "good cause shown." 20 C.F.R.

725.456(b); *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002).

5. BLBA Bulletin 14-09

In October 2013, the Center for Public Integrity (CPI), in conjunction with ABC news, produced a series of investigative reports regarding the Black Lung Benefits Program titled, "Breathless and Burdened."[10] The second part of the three-part series was particularly critical of Dr. Paul Wheeler, an Associate Professor of Radiology at the Johns Hopkins Medical Institutions. The report found that in over 1,500 cases decided since 2000, Dr. Wheeler had never diagnosed a miner with complicated pneumoconiosis, the most severe form of black lung disease.

In June 2014, OWCP issued BLBA Bulletin 14-09, *available at* http://www.dol.gov/owcp/dcmwc/blba/indexes/bulletins.htm. The Bulletin instructs OWCP staff not to credit Dr. Wheeler's negative x-ray readings unless the submitting party provides evidence challenging the news reports or otherwise rehabilitating his readings.

By its terms, the Bulletin does not apply to administrative law judges. Moreover, OWCP's findings are not binding on them. 20 C.F.R. § 725.455(a).

[10] The original series as well as several articles detailing the events that followed are available on CPI's website at: http://www.publicintegrity.org/environment/breathless-and-burdened.

C. Summary of the relevant evidence

The Director will describe only the evidence relevant to KIGA's liability, and the relevant x-ray evidence. The miner last worked as a coal miner for A&R from August 1994 to November 1995. Director's Exhibit (DX) 3, 4, 7, 29. A&R was insured by Reliance on the miner's last day of employment, but Reliance is now insolvent.

Following the miner's modification petition, KIGA substituted Dr. Wheeler's negative reading of the March 16, 2010 x-ray (AX 8) for Dr. Broudy's positive reading (AX 6). AX 1 at 6; SA 67-68. In its June 20, 2012 Second Revised Employer's Evidence Summary Form, KIGA listed the evidence it had submitted into the record; Dr. Broudy's positive x-ray reading was not identified. SA 62.

D. Decisions below

1. OWCP's proposed decision and order awarding benefits

Following its receipt of the miner's September 2001 claim, and verification of his coal mine employment through his social security records, OWCP determined that A&R was the miner's most recent employer, and financially capable of assuming liability by virtue of it having obtained insurance through Reliance. OWCP accordingly issued a Notice of Claim on December 10, 2001, to

A&R and Reliance, notifying them of the miner's pending claim and A&R's identification as a potentially liable operator. AX 42-2.

Consistent with the program regulations, the Notice of Claim informed A&R and Reliance that they were required to respond within thirty days if they wished to contest A&R's status as a potentially liable operator; that they must state the precise nature of their disagreement by accepting or rejecting each of the five assertions listed" in 20 C.F.R. § 725.408(a)(2) (*supra* n.6); and that, if they denied any of the assertions about the employment of the miner or their status as an operator, they had ninety days to submit supporting evidence. The Notice of Claim further warned that "**[i]f you do not respond within 30 days of your receipt of this Notice of Claim, you will not be allowed to contest your liability for payment of benefits on any of the grounds set forth in 20 C.F.R. 725.408(a)(2).**" *Id*. (emphasis in original).

A&R and Reliance did not respond to the Notice of Claim, and OWCP proceeded to develop medical evidence regarding the miner's entitlement to benefits. On August 6, 2002, it issued a Schedule for the Submission of Additional Evidence. SA 1. In it, OWCP determined that the miner was not entitled to benefits, but that A&R was the responsible operator liable for benefits. *Id*. In reaching that conclusion, OWCP observed that A&R and Reliance had failed to

respond to the prior notice of claim and therefore could no longer contest, among other facts, that they were not financially capable of assuming benefits. *Id*.

On September 3, 2002, KIGA responded to the Schedule for the Submission of Additional Evidence, as well as the Notice of Claim, issued ten months earlier. SA 5. In response to the Notice of Claim, KIGA *agreed* that "the operator or its insurer is financially capable of assuming liability for the payment of benefits." SA 6. It disagreed, however, that A&R was the operator that most recently employed the miner for more than one year, and it was on this basis that it contested A&R's designation as the responsible operator.[11] SA 8; *see also* SA 12 (similar KIGA response to Schedule for the Submission of Additional Evidence). Significantly, both responses identified KIGA as the insurer, and accordingly, were prepared and signed by a law firm representing A&R "through the Kentucky Insurance Guaranty Association." SA 7, 9; *see also* SA 12.

On May 6, 2003, OWCP issued a proposed decision and order awarding benefits and finding A&R responsible for their payment. SA 13. In its liability analysis, OWCP reiterated that "the operator or its insurer is financially capable of assuming liability for the payment of benefits in accordance with 20 CFR 725.494(e)." SA 15.

[11] KIGA has dropped this defense. Pet. Bf. 12 ("[The miner's] last employment of not less than one year was with [A&R].")

KIGA disagreed with the proposed decision and timely requested a hearing before an administrative law judge. KIGA's statement of contested issues, in addition to rejecting the miner's medical entitlement, contested liability on the ground that A&R was not the miner's most recent employer of more than one year. SA 18, 20. It did not contend that A&R was not financially capable of assuming liability.

2. The ALJ's 2009 denial of benefits

After being transferred to the Office of Administrative Law Judges, the claim suffered through a series of procedural delays lasting several years, including hearing continuances and a remand to the district director for the development of additional medical evidence. DX 28-31, 33, 37. (The district director returned the case to the ALJ without taking action, explaining that she was precluded by regulation from doing so. DX 28-3, 28-6.)

Finally, in May 2007, more than five years after the regulatory deadline and more than four years after it had agreed that A&R was financially capable of paying benefits, KIGA raised an entirely new legal defense: it argued that A&R could not pay because KIGA does not cover federal black lung claims under the State Guaranty Act. SA 21. ALJ rejected KIGA's argument, ruling that black lung insurance is neither "ocean marine insurance" nor "guaranteed" by the Trust Fund. He explained that, in context, "guarantee" refers to a legal contractual relationship

between the parties, and no such relationship exists between the Trust Fund and the insolvent carrier (or the miner). AX 16, 18.

The claim finally went to hearing on June 19, 2008, and an ALJ decision and order denying benefits was issued on July 20, 2009. AX 15. The ALJ agreed that A&R was responsible for the payment of benefits, finding that it failed to submit evidence establishing *inter alia* that it was defunct, insolvent, or lacked tangible assets to satisfy an award. AX 15-17. On the merits of entitlement, however, the ALJ denied benefits: he found clinical pneumoconiosis established, but not total respiratory disability. AX 15- 23-27.

3. The ALJ's 2014 decision awarding benefits against KIGA

About two months after the ALJ's denial, the miner filed for modification under 20 C.F.R. 725.310. AX 14. This sent the case back to the district director. 20 C.F.R. § 725.310; SA 41. Oddly, KIGA continued to assert that A&R was not the miner's most recent employer of more than one year, but it again failed to raise the defense that A&R was unable to pay because KIGA does not cover black lung claims under state law. SA 43, 45. OWCP quickly denied the modification request and forwarded the claim to the ALJ. DX 70.

KIGA resurrected its state law defense at the hearing before the ALJ, and the ALJ, "see[ing] no harm in sending the case back," remanded for OWCP to straighten out "the insurance and surety issues." SA 49-52, 55. OWCP declined to

re-evaluate the designation of the responsible operator or transfer liability to the Trust Fund, explaining that the regulations (20 C.F.R. § 725.407(d)) set forth strict deadlines for an operator to contest its liability and submit supporting defensive evidence. AX 12. Accordingly, OWCP continued to hold A&R and Reliance as the responsible parties and returned the claim to the ALJ. *Id*.

On July 25, 2014, the ALJ issued a decision and order granting modification and awarding benefits payable by A&R and KIGA. AX 2. The ALJ explained that it was the employer's burden of proof to establish its financial inability to pay benefits. AX 2-6 (citing *inter alia* 20 C.F.R. § 725.495). She found, however, "no evidence in the record that the Employer in this case is unable to pay benefits," and concluded that A&R "is the responsible operator capable of paying benefits, and that KIGA may be held liable if [A&R] is unable to pay benefits." AX 2 at 6. The ALJ then found that the miner had established complicated pneumoconiosis under 20 C.F.R. § 718.304, and accordingly awarded benefits.[12] AX 2 at 42-43.

In weighing the medical evidence, the ALJ declined to consider that portion of Dr. Broudy's medical report that relied on his positive interpretation of the March 16, 2010 x-ray because KIGA had not offered the reading into evidence.

[12] Complicated pneumoconiosis is generally established by x-ray evidence of opacities measuring at least one centimeter in diameter, or biopsy or autopsy evidence of massive lesions in the lung. 20 C.F.R. § 718.304(a), (b). A claimant who proves the existence of complicated coal workers' pneumoconiosis invokes an irrebuttable presumption of entitlement. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304; *Gray v. SLC Coal Co.*, 176 F.3d 382, 386 (6th Cir. 1999).

AX 2 at 40. She also declined to credit Dr. Wheeler's four negative x-ray readings. She found one reading outweighed by the positive readings of the same film (and the other three readings unsupported or contradicted by the medical record, or contrary to an earlier judicial determination). AX 2 at 33-36.

4. The Board's affirmance

The Board affirmed the ALJ's findings regarding KIGA's liability and the miner's entitlement to benefits. The Board held that the State Guaranty Act's exclusion of ocean marine insurance did not encompass black lung insurance: "The mere fact that the BLBA contains certain provisions also contained in the [Longshore and Harbor Workers' Compensation Act (Longshore Act)] does not alter the BLBA's status as a distinct statute that is not subject to the Kentucky Act's exclusion of coverage for 'ocean marine insurance.'" AX 1 at 5. The Board also held that black lung insurance is not similar to "coverage written in accordance with" the Jones Act, the Longshore Act, or any other "similar statutory enactment," because it "covers benefits arising from employment in coal mining," and not "'ocean marine' activities as defined in the Kentucky Act." AX 1 at 5 n.4.

The Board also rejected KIGA's argument that the Trust Fund guarantees black lung insurance, holding that A&R's "insurance policy was provided by, and written for, a nongovernmental commercial entity pursuant to the BLBA's requirement that coal mine operators purchase insurance or qualify as a self-

insurer." AX 1-5. Nor was the Board "persuaded that the Trust Fund's payment of benefits, when there is no viable responsible operator, is equivalent to the Trust Fund insuring, guaranteeing, or reinsuring a mine operator against liability for the payment of black lung benefits." AX 1-5.

Next, the Board rejected KIGA's argument that the post-modification evidentiary limits at 20 C.F.R. § 725.310(b) violate due process. The Board noted that the D.C. Circuit had upheld the evidentiary limits in *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002), and that KIGA was incorrect in contending that a modification decision is limited to one x-ray film. It explained that, in addition to submitting a new affirmative x-ray interpretation, the parties may submit a rebuttal reading as well as "additional evidence to the extent the evidence already submitted . . . is less than the full complement allowed." AX 1-7.

Addressing the particular evidence here, the Board affirmed the ALJ's weighing of the x-ray evidence, including her decision not to credit Dr. Wheeler's readings because his interpretations were outweighed by other x-ray readings or lacked support in the medical record. AX 1 at 10-11. Additionally, the Board rejected KIGA's argument that the ALJ's decision not to credit Dr. Wheeler's readings reflected bias caused by BLBA Bulletin 14-09. It dryly observed that "[e]mployer does not identify any evidence to support its contention, nor does a review of the record reveal any such evidence." AX 1 at 11.

Finally, the Board held that the ALJ acted within her discretion in not considering Dr. Broudy's positive reading of the March 16, 2010, x-ray, and in declining to credit that part of Dr. Broudy's medical report based on that reading. AX 1-6-7; AX 1-12. Accordingly, it affirmed the award of benefits.

SUMMARY OF THE ARGUMENT

Generally, the responsible operator is the miner's last coal mine employer of at least one year's duration. Here, that was A&R, but both A&R and its insurance carrier, Reliance, are out of business and thus incapable of assuming liability. KIGA, however, steps in and assumes liability for a covered claim when one of its member insurers (like Reliance) is insolvent.

KIGA argues that it cannot be responsible for federal black lung benefits because the State Guaranty Act under which it operates excludes insurance guaranteed by a government agency and ocean marine insurance. KIGA asserts that the Trust Fund, which pays awarded benefits when no operator is available, is such a guarantor. It further argues that black lung insurance is "ocean marine insurance." The Court should reject these contentions and hold KIGA liable.

The first problem with KIGA's contentions is that it failed to make them at the required time – when OWCP was first determining who was capable of paying benefits and who would be the liable party. The black lung regulations mandate that a party making a financial incapacity defense must timely raise the defense,

and certainly before the claim is transferred to the ALJ. Here, when OWCP was processing the claim, KIGA affirmatively agreed that A&R was financially capable of paying benefits while indicating it was the liable insurer. It was only years later that KIGA asserted a financial incapacity defense. By then, it was too late, and the financial incapacity defense is barred.

KIGA is also substantively wrong. The Trust Fund does not "guarantee" black lung insurance, as that term is meant under the State Guaranty Act. The Trust Fund is not part of a federal insurance program. Nor is there any formal arrangement or contract between the Trust Fund and insurers under which the Trust Fund agrees to take on, or guarantee, their liabilities. Finally, because KIGA is charged by law with preventing insolvencies, it should be held liable as a policy matter for the failure of Reliance here.

Furthermore, black lung insurance obviously is not "ocean marine insurance." "Ocean marine insurance" refers to "maritime perils or risks;" the BLBA addresses pulmonary disability arising from coal mine employment (including employment underground). Moreover, the inclusion of Longshore Act insurance within the definition of "ocean marine insurance" does not make KIGA's case. The BLBA expressly excludes the Longshore Act's insurance requirements in favor of its own.

KIGA next argues that it has been deprived of due process because 20 C.F.R. § 725.310(b) limits the number of x-ray readings a party can submit on modification. But KIGA never asked to exceed the limitations, and in fact voluntarily withdrew an excess positive x-ray reading (in favor of a negative one) because it undermined its case. Regardless, the courts of appeals have upheld the evidentiary limitations as constitutionally valid. *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 873-74 (D.C. Circuit 2002); *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 297 (4th Cir. 2007).

KIGA also takes issue with the ALJ's decision not to consider that part of Dr. Broudy's opinion that was based on the excess reading it withdrew from the record. But it was within the ALJ's discretion to truncate the doctor's opinion, and KIGA has shown no abuse of discretion.

Finally, KIGA asserts that the ALJ covertly based her decision not to credit Dr. Wheeler's reading of the March 16, 2010 x-ray on BLBA Bulletin 14-09, and not on the reasons she actually gave in her decision. This contention is entirely unsubstantiated and should be rejected out-of- hand.

ARGUMENT

A. Standard of Review

The issues addressed in this brief are primarily legal in nature. The Court exercises plenary review with respect to such questions. *Caney Creek Coal Co. v.*

Satterfield, 150 F.3d 568, 571 (6th Cir. 1998). In reviewing an appeal from the Board, the Court "review[s] the Board's legal conclusions de novo . . . [and] will not vacate the Board's decision unless the Board has committed legal error or exceeded its scope of review[.]" *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1068 (6th Cir. 2013). In deciding questions of law, the Court applies the well-established *Chevron* framework and accords deference to the Director's interpretation of the BLBA and its implementing regulations. *Gray v. SLC Coal Co.*, 176 F.3d 382, 386-87 (6th Cir. 1999); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994).

KIGA's claim that the ALJ improperly applied the evidence-limiting regulations is reviewed for an abuse for discretion. *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 288 (4th Cir. 2007); *NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 305-06 (6th Cir. 2009).

B. The ALJ and Board correctly found A&R and KIGA liable for benefits.

1. The black lung regulations bar KIGA from arguing that A&R is not financially capable of assuming liability for the miner's benefits.

The Secretary's extensive and carefully-balanced responsible-operator procedures require an operator, *inter alia*, to timely contest its financial capability to assume liability, or lose the defense. At critical junctures here, A&R and KIGA not only failed to contest, but affirmatively agreed that they had the financial capability to assume liability. Their assertion of a financial incapacity defense

came too late and was made before the wrong tribunal. The Court should not consider it.

OWCP notified A&R and Reliance of their potential liability for the claim in December 2001. AX 42-2; *supra* at 17-20 (detailed description of proceedings below). Among other things, this Notice of Claim informed A&R and Reliance of OWCP's belief that they were financially capable of paying the miner's benefits, if awarded. *Id*.; 20 C.F.R. § 725.408(a)(2); *see* n.6 *supra* (listing the assertions). In September 2002, KIGA filed a response to the Notice of Claim in which it indicated it was the liable insurer and *agreed* that "the operator or its insurer is financially capable of assuming liability for the payment of benefits."[13] SA 6. Not until May 2007, more than four years later and while the case was pending before the ALJ, did KIGA assert that A&R was not financially capable of paying benefits because KIGA does not cover claims for federal black lung benefits. SA 21-22.

KIGA's first raising of a financial incapacity defense before the ALJ is fatal to its liability challenge. Among other defenses, a party contesting its financial ability to pay must do so promptly and with specificity, or lose the defense. 20 C.F.R. §725.408(a)(2), (a)(3); *Arkansas Coals*, 739 F.3d at 318 ("subsection (a)(2) is narrowly and clearly focused on when and how an *operator* may contest its

[13] Its sole defense to liability was that A&R was not the miner's most recent employer of more than one year. SA 8; *see also* SA 11.

identification to a [district] director") (emphasis in original). Instead of raising the financial incapacity defense, KIGA flat-out agreed that A&R was capable of paying benefits. And it did so, despite the fact that A&R was defunct and Reliance insolvent. *See supra* n.1.

OWCP accordingly accepted KIGA's representation in issuing its proposed decision and order, which "reflected the district director's final designation of the responsible operator." 20 C.F.R. § 725.418(d). Once that designation occurred, there were no second chances: either the named operator (A&R/KIGA) or the Trust Fund had to accept liability. *Id*.; 65 Fed. Reg. 79990-91 (Dec. 20, 2000). And it is because there are no second chances that an operator must raise before the district director all of its defenses to liability. KIGA did not raise its financial incapacity defense to OWCP, and therefore was barred from doing so before the ALJ in later proceedings.

KIGA nonetheless argues that the OWCP should have re-examined the responsible operator issue when the case was remanded in 2010. Pet. Bf. at 41; SA 53. But by then, it was too late. OWCP's May 2003 proposed decision and order represented OWCP's final determination on the responsible operator issue.[14]

[14] The fact that the claim came before OWCP a second time on the miner's modification petition does not excuse KIGA's procedural failures during the initial proceedings. *See Arch of Ky., Inc. v. Director, OWCP*, 556 F.3d 472, 479 (6th Cir. 2009).

(The ALJ was thus mistaken in remanding the case in the first instance, and the district director correctly refused to reconsider the designation. SA 53.)

Congress intended that coal mine operators, not the Trust Fund, bear primary liability for the payment of BLBA benefits. *Arkansas Coals*, 739 F.3d at 313. It further authorized the Secretary to promulgate regulations to establish procedures for identifying, notifying, and ultimately designating the liable (or responsible) coal mine operator. 30 U.S.C. § 932(h). The Secretary accordingly promulgated extensive and carefully-balanced responsible-operator procedures. KIGA ignored these regulations and failed to timely assert its financial incapacity defense. Accordingly, it is barred from raising the defense now.

2. The State Guaranty Act does not prevent KIGA from assuming liability. The Trust Fund is not a guarantor of black lung insurance, and black lung insurance is not ocean marine insurance.

As discussed above, KIGA expressly informed OWCP that A&R and itself were financially capable of assuming the payment of the miner's benefits. Having done so, KIGA was thereafter precluded from contesting this admission. 20 C.F.R. § 725.412(a)(2). Notwithstanding this fatal procedural shortcoming, KIGA contends that the State Guaranty Act prevents it from assuming liability, and that the Trust Fund must pay benefits. This argument is incorrect.

a. The Trust Fund is not a guarantor of black lung insurance.

KIGA argues that it is not liable because the State Guaranty Act provides, in relevant part, that it does not apply to "[a]ny insurance provided, written, or reinsured, or guaranteed by any government or government agency." KY Rev. Stat. 304.36-030 (1)(h) (West). KIGA then alleges that because the Trust Fund pays benefits when there is no liable operator, it "functionally operates as a guarantor of benefits to Claimants that would otherwise be under the insurance policies." Pet. Bf. 37 (citing 26 U.S.C. § 9501(d)(1)(B)) (emphasis in original).

KIGA's casual – or even non-legal – understanding of "guarantee" cannot be squared with the State Guaranty Act. The provision and writing of insurance and reinsurance are highly regulated activities with technical meanings and requirements, filling scores of pages in the Kentucky Code and Administrative Regulations. *See e.g.*, KY Rev. Stat. Chapter 304 (Insurance Code); KY Admin. Regs. Chapters 3-20. There is no reason to suspect that a "guaranty of insurance" would be any less formal an arrangement or be any less regulated. *See e.g., Parker v. Met. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (applying the canon of statutory construction *noscitur a sociis*); *see also* KY Rev. Stat. §§ 304.1-030, 304.5-130 (West) (defining "insurance" and reinsurance" as "contracts"); KY Rev. Stat. 371.065(1) (West) (setting forth the requirements for a valid, enforceable guaranty). Indeed, the proceedings of the NAIC explain that the insurance

guaranty provision was meant to exclude recognized and well-established government insurance guaranty programs, such as flood and crop insurance.

The Trust Fund operates nothing like the federal government agencies in these programs. Whereas Congress intended to minimize Trust Fund payments, the Federal Emergency Management Administration (FEMA) underwrites the National Flood Insurance Program by reimbursing participating private insurers when their claims payments exceed net premium income. *Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 947 (6th 2002) (quoting *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 166-67 (3d Cir.1998)). These private insurers thus act as the federal government's fiscal agents. *Id*. Similarly, the Federal Crop Insurance Corporation (FCIC) under the Federal Crop Insurance Act "reinsure[s] crop insurance contracts between producers and private insurance companies . . . and will pay the private insurance companies' operating and administrative costs with respect to those policies which the FCIC reinsures." *State of Kan. ex rel. Todd v. United States*, 995 F.2d 1505, 1508 (10th Cir. 1993) (internal citations omitted). Rather than being agents of the Trust Fund, black lung insurers are its adversaries when trying to overturn OWCP's designation of liability.[15]

[15] Both FEMA and FCIC have programs to issue insurance directly to homeowners or agricultural commodity producers. *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 183 (2d Cir. 2006); *State of Kan.*, 995 F.2d at 1508. Although authorized to do so, the Secretary of Labor has not established a federal black lung insurance program for coal mine operators. *See* 30 U.S.C. § 943(a). Such a program was contingent

Moreover, if the Trust Fund were a guarantor, liability would pass directly to the Trust Fund when the operator and carrier became insolvent. *See Intercargo Insurance Co. v. B. W. Farrell, Inc.*, 89 S.W.3d 422, 426 (Ky. Ct. App. 2002) ("A guaranty agreement is one in which the promisor protects his promisee from liability for a debt resulting from the failure of a third party to honor an obligation to that promise – thus creating a secondary liability"). But that is not what typically happens under the black lung regulations. When the most recent operator is not financially capable, OWCP is authorized to name and hold liable an operator that employed the miner earlier. 20 C.F.R. § 725.495(a)(3). And the underlying reason for this power is to hold employers, not the Trust Fund, liable to the maximum extent feasible. *Arkansas Coals*, 739 F.3d at 313.

KIGA's own actions belie its contention that black lung insurance is excluded under the State Guaranty Act. KIGA pays covered claims in part by making assessments on the premiums of workers' compensation policies issued to coal mine operators in Kentucky. By law, these coal company workers' compensation policies include the federal black lung insurance endorsement. *Supra* at 6-7, 12. KIGA is thus funded in part by federal black lung insurance. If black lung insurance is excluded under the Act, as KIGA claims, it cannot collect

---

on the unavailability of reasonably priced insurance, and Congress intended that the program "not be operated solely as an insurer of a high-risk pool." H.R. Conf. Rep. 95-864 (Feb. 2, 1978).

these monies. *See supra* at 12-13 (explaining KIGA makes assessments on covered lines of insurance.).

Finally, as a policy matter, KIGA, not the Trust Fund, should be held responsible. The Kentucky legislature expressly tasked KIGA with the duty to detect and prevent insolvencies, or to absorb their costs. KY Rev. Stat. 304.36-130, 304, 36-080(1)(a) (West). By contrast, OWCP (and ultimately the Trust Fund) has no control over the insurers that Kentucky authorizes to write workers' compensation policies. *See* 30 U.S.C. § 933. If an insurer fails, liability should fall on KIGA, whose job it is to prevent insolvencies, not the Trust Fund.

b. Black lung insurance is not ocean marine insurance.

KIGA also argues (Pet. Bf. 39) that insurance purchased to pay federal black lung benefits is actually "ocean marine insurance," and as such, is excluded from coverage under the State Guaranty Act. KY Rev. Stat. 304-030(1)(f) (West). This contention is meritless. The risks associated with breathing coal mine dust (often underground) are far afield from the perils of operating a vessel on open waters. Moreover, the requirement to purchase federal black lung insurance arises directly from the BLBA, not the Longshore Act, as KIGA contends.

The State Guaranty Act defines "ocean marine insurance" as "any form of insurance . . . that insures against maritime perils or risks and other related perils or risks, that are usually insured against by traditional marine insurance such as hull

and machinery, marine builders risk, and marine protection and indemnity." KY Rev. Stat. 304.36-050(10) (West). It further specifies that "[o]cean marine insurance" includes coverage written for "(a) The Jones Act (46 U.S.C. sec. 688); (b) The Longshore and Harbor Workers' Compensation Act D (33 U.S.C. secs. 901 et seq.); or (c) Any other similar federal statutory enactment, or any endorsement or policy affording protection and indemnity coverage[.]".[16] KY Rev. Stat. 304.36-050(10)(a)-(c) (West).

Resting on subsection (b), KIGA asserts that BLBA coverage is excluded because the BLBA is "empowered and authorized" by the Longshore Act. Pet. Bf. 39. KIGA paints with too broad a brush. While it is true that the BLBA incorporates some Longshore Act provisions, it is far more telling that the BLBA *expressly excludes* from adoption the Longshore Act *insurance* provisions. 30 U.S.C. § 932(a) (excluding Longshore Act Section 4 ("Liability for Compensation"), Section 32 ("Security for Compensation"), Section 36 ("Insurance Policies") and Section 38 ("Penalty for Failure to Secure Payment of Compensation"), respectively 33 U.S.C. §§ 904, 932, 936, and 938)). Instead, the

[16] The Longshore Act, of course, concerns injuries "occurring upon the navigable waters of the United States" and certain adjoining areas. 33 U.S.C. § 903; *Day v. James Marine, Inc.*, 518 F.3d 411, 414 (6th Cir. 2008). The Jones Act allows a "seaman," *i.e.*, a master or member of a crew of a vessel," to bring suit for injuries incurred in the course of employment. 33 U.S.C. § 902(3)(G); 46 U.S.C. § 30104; *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 415 (2009).

BLBA delineates its own particular insurance measures and requirements. 30 U.S.C. § 933(a)-(d). Thus, KIGA's attempt to tie BLBA insurance coverage to the Longshore Act is refuted by the BLBA's plain text. *See e.g., Rote v. Zel Custom Manufacturing LLC*, 816 F.3d 383, 392 (6th Cir. 2016), *reh'g en banc denied* (April 14, 2016).

Grasping at straws, KIGA also argues that subsection (c)'s catch-all provision includes BLBA insurance because it "provides claimants with statutory protection and indemnity coverage." Pet. Bf. 39. Here too KIGA misconstrues the statute. The catch-all is intended to encompass other types of federal enactments (or insurance policies) that are "similar" to the Jones Act and Longshore Act and which relate to maritime risks and perils in the first instance. BLBA insurance does not cover maritime perils and risks – it secures liability for pulmonary or respiratory diseases arising from employment in United States coal mines. *See* 20 C.F.R. § 726.203(a), (c). KIGA's tortured reading of the catch-all provision, which expands it beyond any plausible understanding of "ocean," "marine," or "maritime," is nonsensical.

C. The 20 C.F.R. § 725.310(b) evidentiary limitations did not deprive KIGA of due process.

KIGA complains that the evidence limitations set forth in 20 C.F.R. § 725.310(b) violated its due process rights. Pet. Bf. 41-46. This argument is

meritless for two reasons: first, KIGA never sought to admit evidence in excess of the limitations; second, the limitations are valid.

1. KIGA voluntarily complied with the evidence limitations by withdrawing the excess x-ray reading that undermined its case.

In the course of a modification proceeding, Section 725.310(b) permits each party to submit, *inter alia*, one x-ray reading in support of its affirmative case and one rebuttal x-ray reading to counter the other party's affirmative reading. *See supra* at 15. Here, KIGA initially submitted into evidence Dr. Broudy's *positive* reading of a March 16, 2010 x-ray. AX 6. It then had this same x-ray reread as *negative* by Dr. Wheeler. AX 7. Not surprisingly, at the ALJ hearing (where evidence is formally admitted into the record), KIGA voluntarily sought to withdraw Dr. Broudy's positive reading and replace it with Dr. Wheeler's negative reading. SA 67-68. The ALJ granted KIGA's request. SA 68; *see also* A&R's post-hearing Second Revised Employer's Evidence Summary Form at 7 (deleting Dr. Broudy's reading). SA 62.

Under these circumstances, KIGA's due process objection must fall on deaf ears. Not only did it not seek to exceed the limitations, it voluntarily withdrew the excess x-ray reading because it was positive for pneumoconiosis and undermined its case. Due process cannot cure a party's self-inflicted wounds or allow it to second guess its litigation strategy. At a minimum, KIGA waived any possible due

process violation by not objecting to the evidence limitations before the ALJ.[17] *Hayward v. Cleveland Clinic Foundation*, 759 F.3d 601, 615 (6th Cir. 2014) (court will not consider argument not raised before trial judge).

2. Section 725.310(b)'s evidence limitations do not violate due process.

As detailed above, *supra* at 14-15, Sections 725.310(b) and 725.414 work together to limit the amount of evidence the parties can submit in black lung adjudications. In an initial proceeding, each party may submit, *inter alia*, two x-ray readings as part of its affirmative case and one rebuttal reading of each x-ray submitted as part of the opposing parties' affirmative case. 20 C.F.R. §§ 725.414(a)(2)(i), (ii), 725.414(3)(i),(ii). This evidence remains in the record and must be considered in later modification proceedings. *Rose v. Buffalo Min. Co.*, 23 BLR 1-221, 1-227, 2007 WL 1644033 (Ben. Rev. Bd. 2007); *Worrell*, 27 F.3d. at 230-31 (explaining that on modification all the evidence must be considered in determining whether a mistake of fact or change in conditions has occurred). In addition, the parties may submit on modification a new affirmative x-ray interpretation as well as rebuttal readings. 20 C.F.R. § 725.310(b). Furthermore, if a party does not submit its full complement of evidence in the initial proceedings,

[17] For these same reasons, the Court should reject KIGA's contention that the ALJ erred in not considering whether it had established "good cause" under 20 C.F.R. § 725.456(b)(1) to exceed the evidentiary limitations. Pet. Bf. at 47. KIGA never made such a request to the ALJ, and the Board accordingly declined to consider this argument. AX 1-12.

it may complete the slate on modification. *Rose*, 2007 WL 1644033 at *4. Thus, in any one modification proceeding, multiple readings of multiple films – including an unlimited number of x-rays embedded in medical treatment records, 20 C.F.R. § 725.414(a)(4) – may be considered (as happened here). And finally, the parties may exceed the limitations by establishing good cause. 20 C.F.R. § 725.456(b)(1); *cf. Cumberland River Coal Co. v. Jent*, 506 Fed. Appx. 470 (6th Cir. 2012) (ALJ did not abuse her discretion by refusing to consider excess evidence).

Despite the fact that numerous x-ray readings may be considered on modification, KIGA nonetheless argues that these procedures are "so restrictive" as to violate due process. Pet. Bf. at 16. We disagree, and every court (and the Board) to consider this argument has rejected it.

In *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the District of Columbia Circuit held that the evidence limiting rules, including the limitations contained in Section 725.310(b), were not arbitrary and capricious, and thus did not violate due process. *Id*. at 873-74. Similarly, the Fourth Circuit, while not addressing section 725.310(b) specifically, held that the Section 725.414(a) evidentiary limitations "are a reasonable and valid exercise of the Secretary's authority to regulate evidentiary development in Black Lung Act proceedings, they are based on a permissible construction of the Act, and they are neither 'arbitrary,

capricious, [nor] manifestly contrary to the statute.'" *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 297 (4th Cir. 2007) (citation omitted); *accord Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 – 1-59, 2004 WL 3252297 (Ben. Rev. Bd. 2004) (en banc). Indeed, the genesis of the evidentiary limitations can be found in this Court's decision in *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993), where the court observed that the superior financial resources of some parties allowed the development of a greater quantity of evidence with the result that the "truth-seeking function of the administrative process is skewed and directly undermined." 991 F.2d at 321; *see also* 62 FR 3356–61 (Jan. 22, 1997) (citing *Woodward* in first public notice proposing evidentiary limitations).

In sum, the Director added the limitation on modification evidence not only "to correspond to similar changes in § 725.414," but to "ensure that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder."[18] 65 Fed. Reg. 79975, 79976 (Dec. 20, 2000). The Court should follow the lead of the District of Columbia and Fourth Circuits and uphold the limitations.

[18] Because modification may be requested repeatedly, *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1364 (4th Cir 1996), it is easy to envision a coal company's superior financial resources eventually overwhelming a claimant. Limiting a party's affirmative-case evidence to one per category diminishes this possibility.

D. The ALJ properly declined to consider that part of Dr. Broudy's medical opinion that was based on his withdrawn x-ray reading.

As discussed previously, *supra* at 17, the ALJ granted KIGA's request to replace Dr. Broudy's positive x-ray reading with Dr. Wheeler's negative reading. Notwithstanding KIGA's complaints to the contrary, Pet. Bf. 46-48, the ALJ permissibly declined to consider that part of Dr. Broudy's medical opinion that was based on his withdrawn x-ray reading. *See Cumberland River Coal*, *supra*.

20 C.F.R. § 725.414(a)(3)(i) mandates that any chest X-ray interpretations "that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." This requirement was inserted to prevent parties from evading the evidence-limiting rules by embedding excess evidence in medical reports. 65 Fed. Reg. 80001-02 (Dec. 20, 2000) ("Because the Department has now limited the amount of evidence in the record, it cannot allow parties to avoid that limitation by presenting an expert witness who will be free to examine additional material that may not be admitted into the record.").

The regulations do not specify what action an ALJ should take when confronted with medical reports that rely on excess evidence. 20 C.F.R. § 725.455(c), however, reiterates the general rule that "[t]he conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the [ALJ] and shall afford the parties an opportunity for a fair hearing." *See also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620 (4th

Cir. 2006) ("considerable discretion afforded to [ALJs] in conducting hearings"). Accordingly, this Court and the Board have held that fashioning an appropriate remedy is a matter within an ALJ's discretion. *Cumberland River Coal*, 506 Fed. Appx. 470, 2012 WL 5935579 at *1 (ALJ did not abuse her discretion by refusing to consider part of medical report based on excess evidence); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (BRB 2006), *aff'd on recon.*, 24 BLR 1-13 (BRB 2007).

Dr. Broudy's positive reading of the March 16, 2010 x-ray became excessive when KIGA submitted Dr. Wheeler's negative reading in its place. The ALJ's refusal to consider that part of Dr. Broudy's opinion based on his x-ray reading was thus entirely within her discretion. KIGA has provided no grounds for finding an abuse of discretion. Accordingly, the Court should find no ALJ error in this regard.

E. KIGA is not entitled to a remand to replace Dr. Wheeler's x-ray reading.

KIGA accuses the ALJ of secretly relying on BLBA Bulletin 14-09 to discredit Dr. Wheeler's reading of the March 16, 2010 x-ray. Pet. Bf. 52-54. This argument is entirely unsubstantiated and should be rejected, as the Board held. AX 1-11.

On June 2, 2014, while the claim was pending before the ALJ, OWCP issued BLBA Bulletin 14-09, which instructed district directors – not ALJs – not to

credit Dr. Wheeler's negative readings in certain circumstances. AX 3 at 2; *supra* at 15-16. This Bulletin is not mentioned or referenced in the prehearing filings in this case, at the hearing, in the post-hearing briefs, or in the ALJ's decision. Under these circumstances, it is fair to say that it played no role in the ALJ's award of benefits. *See Dixie Fuel Co., LLC v. Director, OWCP*, __ F.3d __, 2016 WL 1719117, at *5-6 (6th Cir. 2016) (characterizing Benefits Review Board reference to the Bulletin "as an aside" that had no bearing on Board's decision and was thus immaterial).

KIGA nonetheless speculates that "the ALJ was well-aware [*sic*] of this bulletin," and "went to great lengths to remain silent as to [its] existence, and to provide other reasons for discrediting Dr. Wheeler." Pet. Bf. 53. ALJs are required to set forth their findings and conclusions of law, provide the reasons for their findings, and to base them on the record. 5 U.S.C. § 557(c); 20 C.F.R. § 725.477. That's precisely what the ALJ did here. KIGA's accusation to the contrary – that the ALJ intentionally hid her true reason for discrediting Dr. Wheeler's reading – is wholly unsubstantiated conjecture. The Court should give it no credence.[19]

[19] KIGA also complains that it was never given an opportunity to replace or rehabilitate Dr. Wheeler's reading. Pet. Bf. 54. But KIGA made no such effort, even though the Bulletin was issued *before* KIGA substituted Dr. Wheeler's reading for Dr. Broudy's. This is yet another example of KIGA asking the Court to remedy its own voluntary litigation decisions.

CONCLUSION

The Court should affirm the agency decisions below that KIGA is responsible for the payment of the miner's benefits. The Court should also reject KIGA's procedural challenges to the rulings below.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
BLLS-SOL@dol.gov
Goldberg.jeffrey@dol.gov
Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to KIGA's request for oral argument, but does not think it necessary given the clarity of the facts and law.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 10,318 words, as counted by Microsoft Office Word 2010.

/s/ Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov

Goldberg.jeffrey@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

H. Brett Stonecipher, Esq.
Fogle Keller Purdy
300 East Main Street, Suite 400
Lexington, KY 40507

Joseph E. Wolfe, Esq.
Wolfe, Williams, Rutherford & Reynolds
P.O. Box 625
Norton, VA 24273

/s/ Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Goldberg.jeffrey@dol.gov