Case No. 18-1738

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FREESTONE COAL COMPANY, INC., *et al.*

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and HERBERT W. ROBERTS,

Respondents.

On Petition for Review of a Final Decision of the Benefits Review Board

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BRIEF FOR THE FEDERAL RESPONDENT

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INTRODUCTION

This case involves a claim for benefits filed by Herbert W. Roberts under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44. A Department of Labor (DOL) administrative law judge (ALJ) awarded benefits, and DOL's Benefits Review Board affirmed the ALJ's decision. Mr. Roberts' former employer, Freestone Coal Co., Inc., and its insurance carrier, Old Republic Insurance Co. (collectively Freestone), have petitioned the Court to review the Board's decision. Freestone does not challenge the ALJ's finding that Mr. Roberts is entitled to benefits, but rather only the ALJ's finding that Freestone is liable for those benefits. The Director, Office of Workers' Compensation Programs (OWCP), is satisfied with Freestone's statement of jurisdiction and responds in support of the decision below.

STATEMENT OF THE ISSUE

Does liability for this claim rest with Freestone because it failed to prove, as required by 20 C.F.R. § 725.495(c)(2), that any of Mr. Roberts' more recent coal mine employers possess assets sufficient to secure the payment of Mr. Roberts' benefits?

STATEMENT OF THE CASE

1. Legal Background

1.1 Identifying "Potentially Liable Operators"

Black lung claims must be filed with, and are initially processed by, an OWCP district office. On receipt of a claimant's work history, the district director investigates whether any coal-mine operator may be held liable for benefits. If so, the district director may identify one or more "potentially liable operators" and must notify each of the claim and provide each with an opportunity to respond. 20 C.F.R. §§ 725.407, 725.408.

To qualify as a "potentially liable operator," an operator must meet five conditions, 20 C.F.R. § 725.494, including, as relevant to this case, that the operator employed the miner for at least one cumulative year, 20 C.F.R. § 725.494(c), and that the operator is "capable of assuming liability for the payment of benefits," 20 C.F.R. § 725.494(e). To be capable of assuming liability, an operator must: (i) have a policy or contract of insurance, (ii) have the Director's approval to self-insure, or (iii) have sufficient assets to secure the payment of benefits. *Id.*

1.2 Designating the "Responsible Operator"

The "responsible operator" liable for benefits is "the potentially liable operator . . . that most recently employed the miner." 20 C.F.R. § 725.495(a)(1). If the operator "that most recently employed the miner" does not qualify as a "potentially liable operator," the responsible operator is "the potentially liable operator that next most recently employed the miner." 20 C.F.R. § 725.495(a)(3).

When, as here, the district director designates an employer other than the miner's most recent employer as the responsible operator, the district director must provide a written statement explaining the reasons for the designation. 20 C.F.R. § 725.495(d). When, as here, the reasons include the most recent employer's inability to assume liability for the payment of benefits, the district director must provide a statement that OWCP has searched the insurance files it maintains pursuant to 20 C.F.R. Part 726, and has not found any record of insurance coverage or authorization to self-insure. *Id.*

If any party requests a *de novo* hearing before an ALJ, the district director's section 725.495(d) statement is *prima facie* evidence that the most recent employer is incapable of assuming liability for benefits. *Id.*

During such adjudication, the Director bears the burden of proving that the designated responsible operator is a "potentially liable operator," except the operator's capability of assuming liability for benefits will be presumed in the absence of contrary evidence. 20 C.F.R. § 725.495(b).[1]

The designated responsible operator bears the burden of proving either that it does not possess sufficient assets to secure the payment of benefits, or that a more recent employer qualifies as a "potentially liable operator." 20 C.F.R. § 725.495(c). The designated responsible operator may meet that burden by proving that a more recent employer of at least one year is capable of assuming liability for benefits. 20 C.F.R. § 725.495(c)(2). It can do so by, *inter alia*, proving that the more recent employer possesses—directly or through its owner, partners, or (in the case of an uninsured corporation) corporate officers—"sufficient assets to secure the payment of benefits, provided such assets may be reached in a proceeding" to enforce an award of benefits. *Id.* "[S]ufficient assets to secure the payment of benefits" means the ability to post at least $175,000 in security. *Id.*; 20 C.F.R. § 725.606(b); *see* JA 38.

[1] Freestone does not dispute that it satisfies all the requirements of a potentially liable operator, including the capacity to assume liability for benefits. *See* Joint Appendix at 6.

Only when no operator may be held responsible for a claim does the Black Lung Disability Trust Fund—which is financed by an excise tax on coal—pay benefits. 30 U.S.C. § 932(j); 20 C.F.R. § 725.490(a); *see* 26 U.S.C. § 9501(d)(1)(B).

1.3 Securing the Payment of Benefits

The BLBA requires "each operator of a coal mine" to "secure the payment of benefits for which he is liable" either by qualifying as a self-insurer in accordance with regulations promulgated by the Secretary, or by obtaining workers' compensation insurance covering liability under the BLBA. 30 U.S.C. § 933(a). An operator that fails to obtain such insurance or permission to self-insure is subject to a civil monetary penalty assessed by the Secretary. 30 U.S.C. § 933(d)(1). Where such an operator is a corporation, the president, secretary, and treasurer are severally liable for that penalty, as well as jointly liable with the corporation for payment of benefits that accrue under the BLBA. *Id.*

The Secretary promulgated regulations governing self-insurance and insurance policies and contracts. 20 C.F.R. Part 726. In order to self-insure, an operator must obtain the Director's approval and deposit the amount and type of security established by the Director. 20 C.F.R.

§§ 726.101-726.106. When an operator chooses to obtain an insurance policy, the policy or contract must contain a "black lung endorsement" or its equivalent covering liability under the BLBA. 20 C.F.R. §§ 726.203, 726.205. Additionally, the obligation of reporting the issuance of an insurance policy or contract to the Director falls on the insurance carrier: "Each carrier shall report to the [Director] each policy and endorsement issued, canceled, or renewed by it to an operator." 20 C.F.R. § 726.208.

2. Statement of Relevant Facts

Mr. Roberts undisputedly worked as a coal miner for multiple coal mine operators for thirty-two years. He worked for Freestone from 1981 to 1985. Joint Appendix ("JA") at 15. Freestone does not dispute that it qualifies as a "potentially liable operator" under 20 C.F.R. § 725.494. Thus, Freestone admits (*inter alia*) that Mr. Roberts' totally disabling black lung disease "arose at least in part out [his] employment" with Freestone, and that it "is capable of assuming . . . liability for the payment of continuing benefits" to Roberts. 20 C.F.R. § 725.494(a), (e).

Mr. Roberts subsequently worked for sixteen other coal-mine operators for periods ranging from two months to just over two years.[2] With respect to each operator that subsequently employed or allegedly employed Mr. Roberts for the requisite one year, the Director determined that she had neither approved self-insurance nor received a report that a carrier had issued a policy or contract for federal black lung insurance. JA 38-44.

3. Proceedings Before the OWCP District Director

Mr. Roberts filed the instant claim on July 8, 2010. *See* JA 11.[3] The district director notified Freestone of its potential liability. *See* Freestone's Brief ("FB") at 6. Freestone contested its liability for the claim, contending that Mr. Roberts' later coal mine employers, or the employers' officers, were capable of assuming liability for benefits. *See* FB at 6-7. The only evidence that Freestone submitted in support of

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[2] Director's Exhibits (DX) 5 at 2-3 (Roberts' self-reported employment history); DX 7-8 (Roberts' Social Security employment records); *see* JA 15-19 (summarizing Roberts' employment history).

[3] Mr. Roberts filed claims in 1997 and 1999. In each, the district director found that Roberts suffered from pneumoconiosis arising out of his coal-mine employment, but denied benefits on the ground that he was not yet totally disabled by the condition. DX 1-2; *see* JA 11.

that contention was its deposition of Mr. Roberts. JA 90-147. Mr. Roberts stated that he or his relatives had ownership interests in several of those more recent employers. JA 23, 25, 32, 37-38, 41. He also testified that several of his more recent employers had state workers' compensation insurance but did not have federal black lung insurance. JA 30-31, 37, 42.

In response to Freestone's contest, OWCP again searched its insurance records and again found no record of any BLBA insurance or approval to self-insure for any of the operators that Mr. Roberts testified had workers' compensation insurance. JA 38-44. The district director therefore designated Freestone as the "responsible operator." *Id.* As required by 20 C.F.R. § 725.495(d), the district director provided written statements explaining, as discussed above, why Mr. Roberts' more recent coal mine employers were not designated as the responsible operator. JA 47-89. The district director also determined that Mr. Roberts was entitled to benefits. *See* JA 11. Freestone did not accept the district director's recommended decision and requested a *de novo* hearing before an ALJ.

4. The ALJ's Decision

An ALJ conducted a hearing and issued a decision and order awarding benefits commencing July 2010, and finding Freestone to be the responsible operator. JA 10-36. At the hearing, Freestone failed to submit any evidence purporting to show that any of Roberts' subsequent employers had the ability to assume liability for benefits in this claim. The ALJ found that Mr. Roberts worked less than the requisite one year for twelve of the fourteen coal-mine operators that employed him after Freestone according to the miner's Social Security Earnings Report (SSER). JA 19. The ALJ found that Mr. Roberts worked at least one year for two of the subsequent operators listed on the SSER, *i.e.*, U.S. Mining and RS&R Mining, but accepted the Director's statements that neither of those operators remained in existence and neither had BLBA insurance. JA 16, 19. The ALJ also addressed Mr. Roberts' deposition testimony that he was self-employed for at least one year as a coal miner between 1990 and 1995 for companies called DVR and Hilo (which were not listed on his SSER), but accepted the Director's statements that neither of those companies remained in existence or

had BLBA insurance. JA 19. Accordingly, the ALJ found that Freestone was the responsible operator. *Id.*

On the merits, the ALJ found that Roberts had established all of the necessary elements of entitlement and was therefore entitled to BLBA benefits. JA 35. Freestone timely appealed to the Benefits Review Board, challenging only the ALJ's responsible operator finding.

5. The Benefits Review Board's Decision

The Board affirmed the ALJ's decision. JA 3-8. It affirmed the ALJ's finding that Mr. Roberts was entitled to benefits as unchallenged. JA 4 n.3. Turning to the responsible operator issue, the Board observed that Freestone conceded that it was a "potentially liable operator," and noted that Freestone did not challenge the ALJ's finding that Mr. Roberts worked for less than one year for most of his subsequent employers. JA 6.

With respect to RS&R Mining, U.S. Mining, DVR Mining, and Hilo Energy, the Board held the Director's statements pursuant to 20 C.F.R. § 725.495(d) that these operators had neither insurance nor approval to self-insure were "prima facie evidence that the companies are not capable of providing for the payment of benefits." JA 7. Once the

Director designated Freestone as the responsible operator, the Board explained, Freestone bore "the burden to demonstrate that the more recent employers were financially capable of assuming liability for benefits." JA 8. The Board held that Freestone "did not submit any evidence to support its burden." JA 8.

Freestone also argued that the ALJ had failed to address conflicts in the evidence regarding the length of Roberts' employment with Southbound and Claudette Mining, both of which the ALJ had found employed Mr. Roberts for less than one year. The Board held that any error the ALJ may have committed on that score was harmless in light of (1) the Director's section 725.495(d) statements that neither had insurance, and (2) Freestone's failure to submit any evidence suggesting that either company had the wherewithal to assume liability for the claim. JA 7.

Finally, the Board rejected Freestone's assertion that the Trust Fund must assume liability for benefits where, as here, the miner's most recent coal mine employer of at least one year failed to obtain the required insurance. JA 7. The Board cited this Court's rejection of that argument in *Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002),

and noted Freestone's failure to cite any statutory or regulatory language supporting its argument. JA 7. The Board further noted Freestone's attempt to distinguish *Martin* on the ground that Mr. Roberts had an ownership interest or corporate officer status in some of the subsequent employers and was capable of assuming liability for his own benefits, but held that Freestone "has not offered any proof to support its assertion." JA 7-8 n.6.

Accordingly, the Board affirmed the ALJ's finding that Freestone was the responsible operator. JA 8. This appeal followed.

SUMMARY OF THE ARGUMENT

The BLBA imposes liability on the "operator of a coal mine . . . with respect to death or total disability due to pneumoconiosis arising out of employment in such mine[.]" 30 U.S.C. § 932(a). It does not, however, specify how to determine which operator is liable when a miner's pneumoconiosis arises out of his or her employment in multiple mines. The Secretary promulgated regulations answering this question. 20 C.F.R. §§ 725.494, 725.495. Since they were amended in 2001—in response to a 1995 decision of this Court—those regulations have specifically delineated the Director's and the designated responsible operator's respective burdens of proof in resolving liability disputes.

Under the revised regulation, when the district director designates an operator other than the miner's most recent employer as the responsible operator, she must explain why. If the reason is the more recent employer's inability to assume liability for the payment of benefits, the district director must provide a statement that OWCP has searched its insurance records and has no record of either having approved the more recent employer to self-insure or having received a

report from an insurance carrier that it issued BLBA insurance coverage to the operator. 20 C.F.R. § 725.495(c)(1).

The burden of proof then shifts to the designated responsible operator to show that a more recent employer of the miner possesses the ability to assume liability for benefits. 20 C.F.R. § 725.495(c)(2). This burden can be satisfied by proving that the later employer itself or, if the later employer was an uninsured corporation, that its president, secretary, or treasurer have sufficient assets to secure the payment of benefits. *Id.*

The Director undisputedly met her burden of proof under section 725.495(c)(1). Freestone, in contrast, did not meet its burden under section 725.495(c)(2) of proving that any of Mr. Roberts' later employers were capable of assuming liability for the claim. Freestone attempts to avoid the consequences of that failure by foisting its burden onto the Director under various legal theories, all of which have obvious flaws.

Freestone relies on case law applying a previous version of the liability regulations, which did not specifically allocate the burden of proof. But this Court has recognized that the Secretary subsequently revised the regulation to specifically allocate the respective parties'

burdens of proof. Freestone further asserts that shifting the burden of proof violates the Administrative Procedure Act (APA), ignoring the fact that this Court has applied the revised regulation and the D.C. Circuit explicitly held that it does not violate the APA.

Freestone also asserts that the Director was obligated to ensure that Mr. Roberts' later employers obtained the insurance required by the BLBA. Her failure to do so, in Freestone's view, should transfer liability to the Trust Fund. However, neither the statute nor the regulations support such a result; they contain no defense to operator liability of the type that Freestone asserts. Moreover, the company's argument is premised on an erroneous and unrealistic view of how enforcement works under the BLBA. In essence, the company argues that the Director is required to identify every mining operation in the country, determine if each one has satisfied its obligation to secure its BLBA liability, and bring enforcement actions against any operators who are not in compliance. Not only do the statute and the regulations fail to suggest this result, but Freestone's argument overlooks both the fact that the Director has no means at her disposal to systematically

identify uninsured operators and the broad discretion she possesses in deciding how to allocate OWCP's finite enforcement resources.

Freestone next argues that, just as the self-insurance regulations place liability on the Trust Fund if an authorized self-insurance arrangement fails, the same principle should apply in the case of an uninsured operator. But there is no analogous regulation shifting liability to the Trust Fund if later employers are uninsured. Nor should there be, because the rationale for shifting liability in the self-insurance context has no application in the case of an uninsured operator.

Finally, Freestone argues that the carriers who issued state workers' compensation policies to Mr. Roberts' subsequent employers should have been held liable for this claim. According to Freestone, all state workers' compensation policies necessarily include BLBA coverage as a matter of law. But that claim is simply incorrect. The case law Freestone cites stands only for the limited proposition that BLBA coverage must cover all of the operator's potential BLBA liabilities. But the subsequent employers that allegedly obtained state workers' compensation policies did not obtain BLBA coverage at all, as Freestone's deposition of Mr. Roberts shows.

ARGUMENT

1. Standard of Review

The issue addressed in this brief is legal. This Court reviews legal questions *de novo. Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 310 (4th Cir. 2012) (citation omitted). The Court defers to the Secretary's reasonable interpretation of the BLBA as embodied in a duly-promulgated regulation. *Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs,* 480 F.3d 278, 292 (4th Cir. 2007) (quotation and citation omitted).

2. Freestone Failed to Meet Its Burden of Proving That a Later Employer of Mr. Roberts is Capable of Assuming Liability for Benefits

Freestone concedes that it was a "potentially liable operator" within the meaning of 20 C.F.R. § 725.494. *See* JA 6. It argues instead that Mr. Roberts' later coal mine employers should have been designated as the responsible operator. FB at 14-15. The Director, however, produced the requisite evidence to show that those later employers were not "potentially liable operators" because they did not have BLBA insurance or approval to self-insure. 20 C.F.R. §§ 725.494(e), 725.495(d). As such, Freestone bore the burden, under section

725.495(c)(2), of proving that Mr. Roberts' later coal mine employers were capable of assuming liability for benefits.

Freestone made no serious attempt to meet that burden. The company had an array of discovery tools at its disposal, including depositions, interrogatories, and document requests, compelled by subpoena if necessary. *See* 20 C.F.R. §§ 725.351, 725.450-58.[4] It could have used those tools to investigate whether any of Mr. Roberts' subsequent employers in fact had an insurance policy that covered BLBA claims or to uncover evidence that their corporate officers possessed assets sufficient to personally assume liability for the payment of benefits. Instead, Freestone submitted only Mr. Roberts' deposition testimony stating that some of the later employers had state workers' compensation coverage but not black lung insurance. But that testimony does Freestone no good. To the contrary, it provides further

[4] These tools include discovery against nonparties. *See, e.g.*, 29 C.F.R. §§ 18.56(c)(3)(B), 18.62(c); *Mugerwa v. Aegis Defense Services et al.*, BRB No. 17-0407, 2018 WL 2085885, *2 (Ben. Rev. Bd. Apr. 27, 2018) ("a party generally is able to use subpoenas to obtain documents in the possession of a third party").

support for the Director's position that none of the later employers have the capacity to assume liability here.[5]

On appeal, Freestone asserts various legal theories to avoid the consequence of its failure of proof, all of which lack merit, as discussed below.

3. Section 725.495(c)(2) Shifts the Burden of Proof to the Designated Responsible Operator to Demonstrate That a Later Employer is Capable of Assuming Liability for Benefits

The BLBA authorizes the Secretary of Labor to promulgate regulations implementing the Act, including regulations identifying the operator or operators responsible for the payment of benefits. 30 U.S.C. §§ 932(a), 932(h), 936(a). The Secretary promulgated such regulations, and the Director did precisely what those regulations require in designating Freestone as the responsible operator in this case.

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[5] To the extent Freestone suggests that the Director was obligated to notify Hilo Energy of its potential liability for this claim because the Director notified Hilo, along with Freestone, in Roberts' initial claim for BLBA benefits, *see* FB 14, it is incorrect. The initial claim was denied for lack of proof that Mr. Roberts was totally disabled, without resolving the responsible operator issue. DX 1. In any event, responsible operator rulings can be reconsidered in subsequent black lung claims. *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 316-321 (6th Cir. 2014).

Freestone clings to the notion that it does not bear the burden of proving that the later employers lacked the ability to assume liability for benefits under section 725.495(c)(2). For this dubious proposition, Freestone relies on case law arising under an outdated version of the responsible operator regulations. FB at 18-21, citing *Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503 (4th Cir. 1995), and *Sterling Smokeless Coal Co. v. Director, OWCP*, 72 Fed. Appx. 942, 2003 WL 21983730 (4th Cir. 2003). This Court has recognized that the Secretary's 2001 revisions to the responsible operator regulations—unlike those in effect at the time of *Trace Fork*—squarely place the burden of proof on the designated responsible operator. *Daniels Co., Inc. v. Mitchell*, 479 F.3d 321, 329 n.5 (4th Cir. 2007). And it has recently applied section 725.495(c)'s burden-shifting provision. *Westmoreland Coal Co. v. Director, OWCP*, 696 Fed. Appx. 604, 608 n.7 (4th Cir. 2017) (noting that the burden-shifting provision was promulgated in response to this Court's observation in *Trace Fork* that the responsible operator regulations in effect at that time "did not address burdens of proof").

Freestone similarly misses the mark in attempting to support its position with this Court's decision in *Armco v. Martin*. There, this Court

held that where the claimant's most recent employer was uninsured, liability fell to claimant's next-most-recent employer—not the Trust Fund. *Martin*, 277 F.3d at 476. In asserting that the more recent employer in that case submitted proof that it was no longer an active corporation, and the officers of that corporation submitted proof that they lacked the financial ability to pay benefits, FB at 21, Freestone overlooks the fact that *Martin*, like *Trace Fork*, arose under the pre-2001 regulations. Under the revised regulations currently in effect, Freestone, as the designated responsible operator, bears the burden as to the financial capability of more recent employers—a burden which, as the Board held, Freestone failed to meet.[6]

[6] The Court need not, and should not, reach Freestone's contention that the district director erred in determining that imposing liability on Mr. Roberts or his relatives for his own benefits would defeat the purposes of the BLBA. *See* FB at 16-17. The district director mentioned the "defeat the purposes of the Act" rationale with respect to only five later employers, all five of which the district director also found no longer existed and had no record of insurance: RS&R Mining and U.S. Mining, JA 38-39; Southbound and Cavette Creek, JA 40; and Hilo Energy, JA 43. Neither the ALJ nor the Board relied on the "defeat the purpose of the Act" rationale. Thus, OWCP's alleged error of relying on a "defeat the purposes of the Act" theory as an alternate ground for its liability designation had no effect on the outcome of this case.

4. Section 725.495(c)(2)'s Burden-Shifting Provision is Consistent With the Administrative Procedure Act

Freestone's contention that the burden-shifting provision in section 725.495(c) violates the Administrative Procedure Act lacks merit. *See* FB at 19 n.3. The D.C. Circuit soundly rejected precisely that contention in response to the coal mining industry's challenge to the facial validity of (*inter alia*) that same burden-shifting regulation. *Nat'l Min. Ass'n v. Dept. of Labor*, 292 F.3d 849, 872 (D.C. Cir. 2002). The D.C. Circuit reasoned that the burden of proof shifts to the responsible operator only after the claimant—or, as here, the Director—"has already carried his burden of proving that an operator is liable," and that the designated operator, in seeking to be excused from liability, "becomes the 'proponent' of a remedial order of the ALJ and, therefore, the party to which [the APA] assigns the burden of proof." *Id.* (quotation and citations omitted). For the same reason, the D.C. Circuit held that section 725.495(c)(2) was consistent with *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), which held that the proponent of an order bears the burden of persuasion under the APA. *Nat'l Min. Ass'n*, 292 F.3d at 871-72.

Although this Court found it unnecessary to reach the validity of section 725.495(c)(2)'s burden-shifting provision in *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 287-88 (4th Cir. 2016), the Court should now follow the D.C. Circuit's holding on this issue. In its footnote challenging the regulation, Freestone fails to advance any reason to invalidate it beyond those unsuccessfully asserted in the facial challenge in the D.C. Circuit. *See* FB at 19 n.3 (citing *Greenwich Collieries*).

Even if this Court disagrees with the D.C. Circuit's conclusion that section 725.495(c)(2)'s burden-shifting regime is consistent with the APA, it should nevertheless uphold the regulation because the APA applies to the BLBA only in a limited way. The APA states that the proponent of a rule or order has the burden of proof "[e]xcept as otherwise provided by statute[.]" 5 U.S.C. § 556(d). The APA applies to adjudications under the BLBA unless regulations of the Secretary provide otherwise. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 919(d), which applies the APA to claim adjudications "except as otherwise provided . . . by regulations of the Secretary"); *see Greenwich Collieries*, 512 U.S. at 271. Accordingly, "[t]he burden of proof mandated by the

APA is a default rule that applies in the BLBA context only in the absence of an express statutory or regulatory provision to the contrary." *Consolidation Coal Co. v. Director, OWCP*, 864 F.3d 1142, 1149 (10th Cir. 2017) (holding that black lung regulation providing fifteen-year rebuttable presumption (20 C.F.R. § 718.305) did not violate APA) (quotations and citations omitted); *Amax Coal Co. v. Director, OWCP*, 312 F.3d 882, 893 (7th Cir. 2002) (holding that black lung onset-date regulation (20 C.F.R. § 725.503) did not violate the APA). Section 725.495(c)(2) is such an express provision to the contrary: it explicitly provides that the designated responsible operator bears the burden of proving that a later employer has the ability to assume liability for benefits (assuming the Director has supplied the required statement that she reviewed her insurance and self-insurance files and identified no coverage for those later employers). *See* 20 C.F.R. § 725.495(d).

5. Freestone Misconstrues the BLBA's Insurance Provision and its Implementing Regulations

Freestone's reliance on the BLBA's insurance requirement and regulations is misplaced. The statute states that operators that have not satisfied their obligation to obtain insurance or permission to self-insure "shall be subject to a civil penalty" and that certain officers of an

uninsured corporation "shall be severally personally liable" for the payment of any benefits awarded against the company. 30 U.S.C. § 930(d)(1). The regulations contain substantially identical language. *See* 20 C.F.R. §§ 726.300, 726.620(b). These provisions address only the liability of operators and their officers when the operators have failed to secure their BLBA obligations. They say nothing about the liability of operators, like Freestone, that have secured such obligations.

Freestone looks to these provisions for a defense to its liability, but there is no such defense to be found. Freestone's assertion that the term "shall" imposes a non-discretionary enforcement duty on DOL contradicts settled law holding that an agency's decision not to bring an enforcement action is presumptively unreviewable. *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) (the term "shall" does not mandate enforcement); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 316-17 (4th Cir. 2008).

Neither the BLBA nor its implementing regulations contain any language indicating that liability must fall to the Trust Fund, as Freestone contends, if the Director did not undertake an enforcement action to compel a more recent employer to secure insurance or provide

security for benefits. Indeed, this Court has held where the most recent employer failed to provide such security, liability does not "revert to the Trust Fund" when the next most recent employer satisfies the regulatory criteria to be a responsible operator. *Martin*, 277 F.3d at 476.[7]

It is hardly surprising that there is no language in the statute or regulations supporting Freestone's argument for Trust Fund liability. Its position is based on a completely erroneous and unrealistic view of how enforcement works under the BLBA, as well as a failure to appreciate the deference courts show to agencies regarding their decisions as to when and how to expend their limited enforcement resources.

The Secretary's black lung insurance regulations impose on insurance carriers the obligation to report to the Director "each policy and endorsement issued . . . by it to an operator." 20 C.F.R. § 726.208. But the Director has no way of systematically identifying uninsured

[7] As mentioned above, Freestone's attempt to distinguish *Martin* on the ground that the later employer and its officers proved their inability to pay benefits in that case falters on the ground that the subsequently-revised regulation places that burden of proof squarely on Freestone in this case.

operators, and often does not learn about uninsured operators until claims for benefits are filed after the company no longer exists. Nor does the Director have any effective way of enforcing the BLBA's insurance requirements against defunct operators.

The Director can only enforce these provisions when she knows that an operator has failed to obtain insurance. That could happen, for example, where an operator that has previously reported black lung insurance to the Director allows that insurance to lapse. *See, e.g., Director, OWCP v. Alabama Land and Minerals Corp.*, No. 2001-BCP-1 (DOL OALJ June 21, 2002).[8] But that is far from universal.

Finally, even when the Director learns of a mine that is operating without BLBA coverage, she has the discretion to determine whether to spend OWCP's limited resources on an enforcement action to secure compliance. As the Supreme Court explained in *Heckler*, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." 470 U.S. at 831. A primary reason that the courts do not generally second-guess an agency's enforcement decisions is that "an agency decision not to enforce often involves a complicated

[8] Available by case number (2001-BCP-00001) at www.oalj.dol.gov.

balancing of a number of factors which are peculiarly within its expertise" including the question of "whether the agency has enough resources to undertake the action at all." *Id.* In short, the fact that Mr. Roberts' later employers were not forced to secure their liability does not mean Freestone can escape the liability straightforwardly imposed on it by the regulations.

6. Freestone Misconstrues the BLBA's Self-Insurance Regulations

Freestone also misconstrues the BLBA's self-insurance regulations in an attempt to evade its liability for this claim. When a self-insured operator is incapable of assuming liability for benefits, liability falls to the Trust Fund—not the next most recent employer. 20 C.F.R. § 725.495(a)(4). *See* FB at 16. Freestone argues that the same should be true of uninsured operators. The plain language of the regulation refutes Freestone's argument, inasmuch as the presence of section 725.495(a)(4) begs for an explanation of the absence of a parallel provision applying the same principle in the case of an uninsured operator. Indeed, there is none.

The Secretary explained the rationale for that principle in the preamble to the 2001 regulations: "in establishing the amount of

security required, the Department voluntarily accepts the risk that self-insured operators will not have deposited sufficient security to pay claims if they are liquidated or become bankrupt." 65 Fed. Reg. 80008 (Dec. 20, 2000). The same rationale does not apply where, as here, the claimant's more recent employers failed to obtain either a black lung insurance policy or permission to operate as a self-insurer. FB at 16.

Whereas the Director has the discretion to approve or reject an operator's request for self-insurance authorization and to set the amount and type of security to be deposited, the Director does not approve an operator's failure to obtain an insurance policy. Indeed, the Director often does not know whether an operator has failed to comply with the insurance requirement. The self-insurance regulation is simply inapposite.

7. The Fact That Some of Roberts' Subsequent Employers May Have Had State Workers' Compensation Insurance is Irrelevant

Finally, Freestone's allegation that some of Mr. Roberts' later employers had state workers' compensation coverage is beside the point. FB at 14-15; *see also id.* at 17 (describing state workers' compensation coverage that does not also cover BLBA liabilities as "illegal"). Neither *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998), nor any of the

similar cases cited by Freestone, *see* FB at 12, stand for the proposition that all state workers' compensation policies must also cover federal black lung obligations. Rather, *Williams* stands for the more modest proposition that insurance policies that cover BLBA liabilities must cover all of an operator's BLBA liabilities. *See* 143 F.3d at 322. Otherwise, the BLBA's implementing regulation explaining how state workers' compensation policies can be extended to cover BLBA claims—by including a specific endorsement expanding the definition of "workmen's compensation law" to include the BLBA, 20 C.F.R. § 726.203(a)—would be superfluous.

In *Williams*, unlike in the case at bar, it was undisputed that the operator had purchased workers' compensation insurance that specifically included federal black lung coverage. However, the owner, who was also a coal miner at the mine, excluded himself from the black lung coverage. When the owner filed a claim under the BLBA, the Seventh Circuit held that that any insurance policy issued to comply with the BLBA's insurance requirement "obligates insurers to assume a coal mine operator's entire liability; insurers are not permitted to provide partial liability, even at the request of the coal mine operator."

Williams, 143 F.3d at 323. It therefore affirmed the Board's order requiring the insurer to pay BLBA benefits to the owner/miner. *Id.* at 325. Indeed, this result is compelled by the regulations, which expressly "bind the carrier to full liability for the obligations under the [BLBA] of the operator[.]" 20 C.F.R. § 726.210.

Here, in contrast, Freestone produced no evidence suggesting that any of Mr. Roberts' later employers had federal black lung insurance. On the contrary, the Director's review of her records indicates that no such policy ever existed, and Mr. Roberts' testimony expressly supports that proposition. *Williams* is simply irrelevant.

In sum, Freestone satisfies all of the requirements of a responsible operator and failed to bear its regulatory burden of proving that any of Mr. Roberts' later employers could assume liability for the payment of benefits. It was therefore properly identified as the operator liable for the payment of Roberts' BLBA benefits.

CONCLUSION

The Director urges the Court to deny the petition for review and affirm the ALJ's finding that Freestone is the responsible operator liable for Mr. Roberts' black lung benefits.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The facts and legal arguments are well-presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. If the Court disagrees, the Director stands ready to participate.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this Response Brief for the Director, OWCP, is proportionally spaced, using Century 14-point typeface. I certify that this contains 5,959 words as determined by Microsoft Office Word, the processing system used to prepare the brief, and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

This will certify that I electronically filed the foregoing Response Brief with the Court's Clerk on November 5, 2018, by using the Court's CM/ECF electronic filing system, which will send notice to counsel of record.

/s/ Edward Waldman
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