U.S. Department of Labor

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

BRB No. 20-0467 BLA

CLYDE D. McKNIGHT, SR. Claimant-Respondent v. EASTERN ASSOCIATED COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 3/24/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits (2019-BLA-05763) rendered on a subsequent claim filed on September 6, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier because it self-insured Eastern on the last day of Claimant's coal mine employment. She also determined Claimant established at least twenty-three years of coal mine employment and that he suffers from complicated pneumoconiosis arising out of that employment. 20 C.F.R. §§718.304, 718.203. Thus, the ALJ found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, and awarded benefits. 30 U.S.C. §921(c)(3) (2018).

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable insurance carrier.[2] Claimant and the Director, Office of Workers' Compensation Programs (the Director), each respond urging the Benefits Review Board to affirm the ALJ's determination that Eastern is the responsible operator and that Peabody Energy is liable for the payment of benefits.

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

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[1] Claimant filed four previous claims, each of which the district director denied. Director's Exhibit 4.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §725.309(c); Decision and Order at 14.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14.

Responsible Insurance Carrier

Claimant last worked in coal mine employment from 1968 to 1991 for Eastern, a subsidiary of Peabody Energy. Director's Exhibits 9 at 5, 11 at 3-4. In 2007, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). In 2011, the Department of Labor (DOL) authorized Patriot to self-insure for black lung liabilities relating to the Peabody subsidiaries it purchased, including Eastern, retroactive to July 1, 1973. Director's Exhibit 37; Employer' Brief at 9; Director's Brief at 9. This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15 million. *Id.* In 2015, Patriot went bankrupt. Director's Exhibit 40.

Employer admits Eastern is the correct responsible operator and was self-insured through Peabody Energy on the last day Eastern employed Claimant.[4] Employer's Brief at 5-6. However, it contests Peabody Energy's liability as the responsible carrier. *Id.* at 5-18. Employer maintains Patriot is the responsible carrier because it last insured Eastern's black lung liabilities, the DOL released Peabody Energy from liability,[5] and the Director is equitably estopped from imposing liability on Peabody Energy. *Id.* at 5-15. It further maintains Black Lung Benefits Act (BLBA) Bulletin Nos. 12-07 and 14-02 place liability

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[4] Eastern qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Eastern; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Eastern is capable of assuming liability for the payment of benefits through Peabody Energy's self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ Claimant, the ALJ designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 18.

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

> This is not a case in which two companies agreed between themselves which company would bear the insurance responsibility. It is instead a case in which the [DOL] itself made Patriot Coal the insurer for all claims of Eastern employees retroactive to 1973.

Employer's Brief at 9-10.

on the Black Lung Disability Trust Fund (Trust Fund) when a private insurer is unable to assume liability. *Id.* at 14.

The Director counters that the Act's implementing regulations do not support Employer's last-to-insure theory of liability, and neither Patriot's self-insurance authorization nor any other agreement relieved Peabody Energy of liability for benefits of miners whose last day of employment with Eastern was covered by Peabody Energy's self-insurance. Director's Brief at 10-14. Further, he contends there is no basis for Employer's equitable estoppel argument, and that BLBA Bulletin Nos. 12-07 and 14-02 do not support transferring liability to the Trust Fund. *Id.* at 14-18. The Director maintains Patriot could no longer pay claims after its self-insurance failed in 2015, and Peabody Energy remained liable for the claims of miners who last worked for Eastern while Peabody Energy owned and self-insured Eastern. *Id.* at 9-10.

District Director Proceedings

Following receipt of Claimant's claim on June 6, 2017, the district director identified Eastern, self-insured through Peabody Energy, as the "potentially liable operator" in the Notice of Claim issued on November 16, 2017. Director's Exhibit 32. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id.* In response, Employer denied liability, asserting Patriot is the proper responsible carrier and requesting that the district director dismiss Peabody Energy as the liable carrier. Director's Exhibit 37. In support of its contention, Employer submitted the following documentary evidence: (1) a November 23, 2010 letter from the Division of Coal Mine Workers' Compensation (DCMWC) to Patriot requiring $22.5 million for authorization to self-insure; (2) a March 4, 2011 letter from the DCMWC granting Patriot authorization to self-insure retroactive to July 1, 1973, and releasing Peabody Energy's $13 million letter of credit; (3) a March 4, 2011 indemnity agreement between the DOL and Bank of America; (4) an undated letter from Michael Chance, the Director of the DCMWC, regarding Patriot's self-insurance reauthorization audit; (5) documentation dated November 16-18, 2015, showing authorization to transfer, and transfer of $15 million from Patriot to the Trust Fund; and (6) Peabody Energy's April 29, 2013 indemnity bond. Director's Exhibit 37.[6]

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[6] The record also includes a copy of a bankruptcy court settlement order between Patriot, the United Mine Workers' of America, and Peabody, relating to employee health benefits and pension plans, *In re Patriot Coal Corp.*, Case No. 12-51502-659 (Bankr. E.D. Mo.) (Nov. 7, 2013). Employer, however, does not discuss the settlement order in its brief or explain how it relates to its arguments that Peabody Energy is not the liable carrier.

On March 21, 2018, the district director issued the Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern as the designated responsible operator and Peabody Energy as its insurer. Director's Exhibit 41. The district director informed Eastern and Peabody Energy that they had until May 20, 2018 to submit additional documentary evidence relevant to liability and should identify any witnesses they intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id.* The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the [OALJ]." *Id.* at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on March 26 and April 2, 2018, and contested liability. Director's Exhibits 42, 43. Thereafter, it requested multiple extensions to submit medical evidence. Director's Exhibits 44, 46. The district director gave Employer until November 15, 2018, to submit evidence. Director's Exhibit 47. It did not submit additional evidence to the district director to support its controversion of liability or designate any liability witnesses.

The district director issued a Proposed Decision and Order (PDO) on January 17, 2019, awarding benefits and designating Eastern as the responsible operator and Peabody Energy as its insurer. Director's Exhibit 49. On January 30, 2019, Employer responded to the PDO, denying liability, seeking to designate two former DCMWC employees, Steven Breeskin and David Benedict, as potential liability witnesses, and requesting a hearing. Director's Exhibits 58.

ALJ Proceedings

After the case was transferred to the OALJ, Employer submitted documentary evidence pertaining to its liability. Specifically, it submitted Employer's Exhibits 1 through 4, transcripts of depositions of Messrs. Breeskin and Benedict that it conducted as part of other black lung claims, which it had not previously submitted to the district director in this claim. Hearing Transcript at 23-24. Employer also submitted Employer's Exhibit 5, containing documents previously submitted to the district director. *Id.*; *see* Director's Exhibit 37. The ALJ excluded Employer's Exhibits 1 through 4 because Employer failed to timely identify Messrs. Benedict and Breeskin as liability witnesses and did not establish extraordinary circumstances for failing to do so. 20 C.F.R. §725.456(b)(1); Order Addressing Liability Evidence at 2-3; Hearing Transcript at 25-26.

In her Decision and Order, the ALJ found Claimant entitled to benefits. She determined Employer satisfied the responsible operator criteria at 20 C.F.R. § 725.494, and that it had not shown its self-insurer, Peabody Energy, was incapable of paying benefits pursuant to 20 C.F.R. §§725.494(e) and 725.495(b). Decision and Order at 17-18.

Specifically, she rejected Employer's argument that the Director had released Peabody Energy from liability by authorizing Patriot to self-insure and releasing Peabody Energy's surety bond. *Id.* at 19. She found Employer incorrectly relied on 20 C.F.R. §726.203 as a basis for shifting liability as the regulation applies only to commercial insurance, not to self-insurance. In addition, the ALJ rejected Employer's arguments that the Director was estopped from imposing liability on it or that the Director committed affirmative misconduct or misrepresentation. *Id.* at 19-20. She disagreed that Patriot's self-insurance agreement with DOL relieved Peabody Energy of liability and she considered the status of Patriot's surety bond to be irrelevant to the responsible carrier analysis. *Id.* at 22. Thus, the ALJ rejected Employer's argument that Patriot is the liable carrier, and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. *Id.* at 16-23.

Issues on Appeal

Exclusion of Deposition Transcripts

Employer initially contends the ALJ erred in excluding the deposition transcripts of Messrs. Breeskin and Benedict, identified as Employer's Exhibits 1 through 4. Employer asserts it properly identified Messrs. Breeskin and Benedict as potential liability witnesses on January 30, 2019, while the claim was before the district director. Employer's Brief at 4. Employer further contends the ALJ lacked an adequate foundation for her liability determination because she excluded evidence allegedly relevant to Patriot's liability. We disagree.

Witness testimony relating to an operator's or carrier's liability is not automatically admissible before the ALJ. Rather, an employer must designate potential liability witnesses "in accordance with the schedule issued by the district director." 20 C.F.R. §725.414(c). "Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances." *Id.*

The district director's SSAE informed Employer that it had until May 20, 2018, to designate potential liability witnesses in support of its affirmative case. Employer, however, did not identify its liability witnesses until January 30, 2019, after the district director had issued his Proposed Decision and Order. The ALJ found Employer did "not properly identif[y] Messrs. Benedict and Breeskin as potential liability witnesses in accordance with the district director's SSAE" or show that extraordinary circumstances

excuse its failure to do so.[7] Order Addressing Liability Evidence at 2; Hearing Transcript at 24-25. Employer does not dispute that it failed to timely designate Messrs. Benedict and Breeskin as liability witnesses before the district director. Nor does it assert extraordinary circumstances exist to excuse its failure. Rather, Employer asserts only that the excluded evidence is relevant because it supports Employer's s assertion that Peabody Energy is not liable for Claimant's benefits. Employer's Brief at 4. Because the ALJ acted within his discretion in excluding Employer's Exhibits 1 through 4 as untimely submitted, we affirm that ruling. 20 C.F.R. §725.414(c); Hr. Tr. at 25-26; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ has broad discretion over procedural matters); *see also generally Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d. 278, 297, n.18 (4th Cir. 2007) (relevancy alone is insufficient to establish good cause for admission of evidence in excess of evidentiary limitations into the record).

Letter of Credit, Indemnity Agreement and Undated Michael Chance Letter

Employer next contends the ALJ erred in deeming Peabody Energy liable because the DOL relieved it from liability when it authorized Patriot to self-insure Peabody Energy's liabilities for claims dating back to July 1, 1973. Employer's Brief at 8-11. Employer cites the DCMWC's March 4, 2011 letter to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program and enclosing a signed indemnity agreement with Bank of America.[8] *Id.* at 8-9; Director's Exhibit 37. Employer

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[7] Even if we were to consider the deposition transcripts to be "documentary evidence," rather than testimony, it also would be subject to an extraordinary circumstances standard for admission by the ALJ. *See* 20 C.F.R. §725.456(b)(1) ("Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances."). The SSAE required Employer to submit its documentary evidence to the district director by May 20, 2018. Employer did not submit the deposition transcripts at that time and did not seek or obtain an extension to do so. Its subsequent submission of the deposition transcripts was rejected as untimely and Employer did not argue extraordinary circumstances existed to justify their admission. As noted, Employer does not now allege the existence of extraordinary circumstances.

[8] The letter provided:

> In recognition of Patriot's authority to act as a self-insurer, we have released the $13,000,000 letter of credit you financed under the Peabody Energy self-insurance program. In regards to this letter of credit, this office has executed

contends that, in releasing Peabody Energy's security, the DOL terminated Eastern's self-insurance liability under the Act and recognized Patriot as the responsible self-insurer for Eastern employee claims filed after March 4, 2011. *Id.* at 8-9. Employer asserts the applicable regulations authorize the DOL to determine which company has self-insured an operator's liabilities, and in this case the DOL determined Patriot, not Peabody Energy, is liable for Eastern's claims. *Id.* at 10-11.

We reject Employer's contention that liability turns on the existence of a security deposit or a DOL authorization to self-insure. The ALJ correctly found neither the Act nor the regulations support Employer's arguments that a self-insurer's liability is established when an operator posts a security or that its liability is dissolved when the DOL subsequently releases the security. Decision and Order at 19-20. The Act and the regulations require an operator to "secure the payment of benefits by (1) qualifying as a self-insurer . . . or (2) insuring and keeping insured [with a commercial carrier] the payment of such benefits . . . ." 30 U.S.C. §933(a), as implemented by 20 C.F.R. §726.110. To qualify as a self-insurer, operators must "execute and file with the Office [of Workers' Compensation Programs (OWCP)] an agreement and undertaking . . . in which the applicant shall agree . . . [t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-Miners." 20 C.F.R. §726.110(a)(1). An operator is also required to "provide security in a form approved by the [OWCP] . . . and in an amount established by the [OWCP]." 20 C.F.R. §726.110(a)(3). These provisions establish that an operator's liability stems from its obligation to pay federal black lung benefits, rather than its compliance with security requirements or the DOL's authorization of it or another operator to self-insure. The ALJ thus properly found "[n]either the Department's failure to authorize an operator to self-insure, nor an operator's lack of compliance with the self-insurance program precludes [a properly designated responsible operator's] liability." Decision and Order at 20.

Further, we reject Employer contention that the DOL's execution of the March 4, 2011 indemnity agreement with Bank of America released Eastern and Peabody Energy from liability. The indemnity agreement was between the DOL and Bank of America, which issued the letter of credit on behalf of Peabody Energy. Director's Exhibit 37. In the agreement, the DOL requested Bank of America to cancel the letter of credit and agreed to hold Bank of America harmless under it. *Id.* The indemnity agreement did not include any provisions referencing Employer or releasing any party other than Bank of America

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> the enclosed indemnity agreement as we do not possess the original document . . . issued by Bank of America.

Director's Exhibit 37.

from liability. *Id*. Moreover, as the Director argues, Eastern "continued to self-insure and be responsible for its black lung obligations" after the DOL returned Peabody Energy's security deposit and executed the indemnity agreement.[9] Director's Brief at 13.

We also reject Employer's assertion that Mr. Chance's undated letter to Patriot establishes the DOL released Peabody Energy from its liabilities. Employer's Brief at 13. Employer notes this letter does not state that liability would rest with Peabody Energy should Patriot's self-insurance be discontinued. *Id.* However, Employer's conclusion that the absence of such a statement indicates the DOL in fact released Peabody Energy from liability is illogical and unsupported. As the letter simply outlines the conditions necessary for Patriot to be reauthorized to self-insure, the ALJ did not err in finding it does not also constitute a release of Peabody Energy's liabilities under the Act.

Based on the foregoing, we reject Employer's arguments that the DOL absolved Peabody Energy of liability by either releasing the letter of credit to Patriot or executing the indemnity agreement with Bank of America.

Equitable Estoppel

Employer next asserts it should be relieved of liability under the doctrine of equitable estoppel. To invoke equitable estoppel, Employer must show both that the DOL engaged in affirmative misconduct and that Employer reasonably relied on the DOL's action to its detriment. *See Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite intent." *U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116. Employer has not met its burden.

Employer alleges the Director's release of Peabody Energy from liability without securing proper funding from Patriot constitutes affirmative misconduct. Employer's Brief

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

at 11-12. As discussed above, however, it identifies no evidence establishing the DOL released Peabody Energy from liability or made a representation of such a release, or that such allegations, even if true, constitute affirmative misconduct. It further does not challenge the ALJ's finding that "there is no evidence in the record whatsoever regarding the intent of the Department or those acting on its behalf." Decision and Order at 21; *see Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's rejection of Employer's equitable estoppel argument because it has failed to establish the necessary elements. Decision and Order at 20-21; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116.

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

Referencing 20 C.F.R. §725.495(a)(4),[10] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability and places it on the Trust Fund. Employer's Brief at 14-15. This argument has no merit.

Section 725.495(a)(4) transfers liability to the Trust Fund in certain cases in which "the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability" and that operator no longer possesses sufficient funds to pay benefits. 20 C.F.R. §725.495(a)(4). In this case, however, the Miner's "most recent employment by an operator" for over one year was in 1991 when he worked for Eastern, which was self-insured by Peabody Energy. As Patriot never employed Claimant, the ALJ correctly found Section 725.495(a)(4) cannot apply by its unambiguous language.[11]

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[10] The regulation states:

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495(a)(3)] shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

20 C.F.R. §725.495(a)(4).

[11] We affirm, as unchallenged, the ALJ's finding that Eastern satisfies the definition of a responsible operator under the Act and that Eastern has not shown its carrier, Peabody Energy, is financially incapable of assuming liability. Decision and Order at 18; 20 C.F.R. §§725.494(e), 725.495(a)(3); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R.

Decision and Order at 21. Rather she found Eastern met the requirements for a responsible operator under the Act and that Eastern did not allege its carrier, Peabody Energy, is financially incapable of assuming liability. Decision and Order at 18; 20 C.F.R. §§725.494(e), 725.495(a)(3). Employer identifies no error in these findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

Employer alternatively asserts the ALJ failed to properly determine whether DOL exhausted Patriot's surety bond before holding Peabody Energy the responsible insurance carrier. Employer's Brief at 11. This argument incorrectly presumes Patriot, rather than Peabody Energy, meets the requirements for primary liability under the Act because it was the last self-insurer for Eastern. 20 C.F.R. §§725.494(e), 725.495(a)(1). However, Peabody Energy's liability is not based on a specific regulation but "flows from the facts that (1) Peabody Energy provided self-insurance to Eastern on the last day of [Claimant's] employment; (2) Patriot was liquidated and thus incapable of assuming liability [despite any agreement with Peabody Energy]; and (3) the Director never released Peabody Energy from liability." Director's Brief at 12; *see* 20 C.F.R. §725.495(c).

Additionally, we reject Employer's contention that the Director failed to present evidence to show Peabody Energy self-insured Eastern. Employer's Brief at 4-5. Having identified Eastern as a potentially liable operator, the burden shifted to Employer to prove it is incapable of assuming liability. 20 C.F.R. §725.495(b), (c). As discussed above, Eastern has never alleged it was not self-insured by Peabody Energy on the last day of Claimant's employment with it and does not even argue that it is financially incapable of paying benefits.

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

DOL Bulletins

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§802.211(b). As the Director correctly notes, "[a]lthough Peabody Energy disputes it was authorized to self-insure Eastern's obligations on [Claimant's] last date of coal mine employment in 1991, that contention is based solely on its flawed theory that it was absolved from liability when [DOL] authorized Patriot to self-insure claims of Eastern miners retroactively." Director's Brief at 9. Peabody Energy does not dispute it was the self-insurer of Eastern on the miner's last day of employment nor deny it is financially capable of paying benefits, but only contends that it should not be required to self-insure claims of Eastern miners.

Finally, Employer contends BLBA Bulletins 12-07 and 14-02 establish that the Trust Fund must assume liability based on Patriot's inability to pay benefits as a bankrupt self-insurer for Eastern. We disagree. First, Employer's argument again improperly presumes Eastern, as self-insured by Peabody Energy, does not meet the requirements for primary liability. 20 C.F.R. §§725.494(e), 725.495(a)(1). Second, the Director correctly notes these Bulletins do not establish a policy applicable to all bankrupt self-insurers but are specific to two self-insured coal mine operators unrelated to Peabody Energy's liability under the facts of this case. BLBA Bulletin 12-07 concerns a settlement between the Director and Frontier Insurance Company over an expired surety bond.[12] BLBA Bulletin 14-02 concerns a settlement between the Director and Travelers Casualty and Surety Company (Travelers), a private self-insurer, rather than a policy applicable to all self-insured coal mine operator and its bankrupt self-insurers.[13] Thus, Employer's argument regarding the significance of these Bulletins is rejected.

For all of the above reasons, we conclude the ALJ properly excluded Employer's liability evidence, Exhibits 1 through 4; properly found Eastern is the responsible operator, 20 C.F.R. §§725.494(e), 725.495(a)(1); and properly determined that Peabody Energy is the responsible carrier. Thus, we affirm the ALJ's finding that Eastern self-insured by Peabody Energy is liable for benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

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

[13] The Bulletin states that in claims involving Travelers, liability transfers to the Trust Fund in "claims in which the date of last employment was with a coal mine operator during the period of self-insurance covered by New Horizons Holdings (parent of Great Western Resources) whose surety bond was issued by Travelers[.]" The Bulletin is specific to Travelers, and thus does not cover Peabody Energy or Patriot.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge