BRB Nos. 23-0333 BLA
and 23-0399 BLA

HILDA F. MILLER (o/b/o and Widow of EDGAR H. MILLER)	)	
Claimant-Respondent	)	
v.	)	
HOBET MINING INCORPORATED	)	**NOT-PUBLISHED**
and	)	DATE ISSUED: 03/07/2025
ARCH COAL COMPANY, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in the Miner's Claim and the Errata Decision and Order Awarding Benefits Correcting Onset Date in the Survivor's Claim of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Michael A. Pusateri and Patricia C. Karppi (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Kathleen H. Kim, (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Awarding Benefits in a Miner's Claim (2018-BLA-06043) and Errata Decision and Order Awarding Benefits and Correcting Onset Date in a Survivor's Claim[1] (2019-BLA-06167) rendered on claims filed pursuant to the Black Lung Benefits Act as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 19, 2017, and a survivor's claim filed on June 6, 2018.[2]

The ALJ found Hobet Mining, Incorporated (Hobet) is the responsible operator and Arch Coal Company, Incorporated (Arch Coal) is the responsible carrier in both claims. In the miner's claim, she found the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, she determined Claimant[3] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). She further found Employer

[1] On May 11, 2023, the ALJ issued a Decision and Order Awarding Benefits in the Survivor's Claim as of June 2018. In the ALJ's June 13, 2023 Errata Decision and Order Awarding Benefits, she corrected the benefits commencement date to April 2018.

[2] Initially, the appeal in the miner's claim was assigned BRB No. 23-0333 BLA and the appeal in the survivor's claim was assigned BRB No. 23-0334 BLA. The Benefits Review Board consolidated these appeals for purposes of decision. *Miller v. Hobet Mining, Inc.*, BRB Nos. 23-0333 BLA and 23-0334 BLA (July 5, 2023) (Order) (unpub.). However, in light of the ALJ's June 13, 2023 Decision and Order, Employer's initial appeal of the award of benefits in the survivor's claim (BRB No. 23-0334 BLA) was dismissed, Employer's appeal of the modified award was assigned BRB No. 23-0399 BLA, and the case was consolidated with BRB No. 23-0333 BLA for appeal. *Miller v. Hobet Mining, Inc.*, BRB Nos. 23-0333 BLA, 23-0334 BLA, and 23-0339 BLA (Nov. 29, 2023) (Order) (unpub.).

[3] Claimant is the widow of the Miner, who died on August 27, 2018. Survivor's Claim Director's Exhibit 3. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

did not rebut the presumption and awarded benefits. Based on the award of benefits in the miner's claim, she found Claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[5]

On appeal, Employer argues the ALJ erred in finding Arch Coal to be liable for the payment of benefits in both claims.[6] Claimant responds urging affirmance of the award. The Acting Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the ALJ's finding that Arch Coal is liable for the payment of benefits. Employer has filed replies to both the Director's and Claimant's response briefs, reiterating its arguments on appeal.

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.[7] 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).

Employer does not challenge the ALJ's findings that Hobet is the correct responsible operator and it was self-insured by Arch Coal on the last day Hobet employed the Miner; therefore, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Miner's Decision and Order at 12; Survivor's Decision and Order at 6. In 2005, Arch Coal sold Hobet to Magnum Coal, and in 2008 Magnum Coal was sold to Patriot Coal Corporation. Director's Brief at 2; Employer's Brief at 9, 46. In 2011, Patriot was authorized to insure itself and its subsidiaries. Director's Brief at 10. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Hobet, Patriot later went bankrupt and can no longer provide those benefits. *Id.* at 2, 10. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of paying

[5] Under Section 422(*l*) of the Act, the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] We affirm, as unchallenged on appeal, the ALJ's award of benefits in the miner's claim under Section 411(c)(4) and the derivative award in the survivor's claim under Section 422(*l*). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Miner's Decision and Order at 52; Survivor's Decision and Order at 21.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 3.

benefits to miners last employed by Hobet when Arch Coal owned and provided self-insurance to that company, as the Director states. *Id.*

Exclusion of Evidence

In both claims, Arch Coal sought discovery to establish the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[8] was an arbitrary and capricious change in policy. The ALJ denied this request as untimely in the miner's claim and in the survivor's claim as untimely, unduly burdensome, and, in part, as a request for information protected by the deliberative process privilege. ALJ's April 22, 2021 Omnibus Order at 5-6, 15-19. On appeal, Employer does not challenge the denial of its discovery requests in the survivor's claim, so it is affirmed. *See Skrack*, 6 BLR at 1-711; ALJ's April 22, 2021 Omnibus Order at 15-19. However, in the miner's claim it argues that the ALJ erred in denying its discovery request. Employer's Brief at 22-30. We disagree.

Employer contends that its requests for discovery relevant to Bulletin No. 16-01 should not be considered liability evidence that must be submitted while the case is before the district director. Employer's Brief at 27-28. For the reasons set forth in *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-308-18 (2022), we reject this argument.[9]

Employer also asserts the regulations limiting the submission of liability evidence to the ALJ violate provisions of the Longshore Act incorporated into the BLBA, and the Administrative Procedure Act (APA), 5 U.S.C. §556(d), because they allegedly divest the ALJ of authority to conduct the hearing and give district directors substantive powers that belong to the ALJ. Employer's Brief at 22-26. We disagree, as the BLBA incorporates the provisions of the Longshore Act and the APA "except as otherwise provided . . . by regulations of the Secretary . . . ." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulations limiting the submission of liability evidence under the BLBA, the Secretary of Labor has the authority to adopt regulations that differ

[8] BLBA Bulletin No. 16-01 is a memorandum the Director of the DOL Division of Coal Mine Workers' Compensation (DCMWC) issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[9] As the Director points out, the ALJ determined that Arch Coal's liability is established under the Act and regulations, not BLBA Bulletin No. 16-01, and therefore Bulletin No. 16-01 is immaterial. Miner's Decision and Order at 13 n.25; Survivor's Decision and Order at 11-12 n.17; Director's Brief at 13. Thus, even if Employer's contentions are true, we consider any error to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see also Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-308-18 (2022) (rejecting similar challenges to BLBA Bulletin No. 16-01).

from the APA and the Longshore Act.[10] *Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, 70 (D.D.C. 2001), *rev'd in part on other grounds*, *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002).

Employer further argues that the failure to allow discovery related to Bulletin No. 16-01 breaks a promise made in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018), that Arch Coal would be able to engage in meaningful discovery on liability issues in administrative proceedings. Employer's Brief at 16-20. In *Acosta*, the court deemed premature Arch Coal's argument that without district court relief it will not obtain a meaningful judicial review because the DOL will not afford it adequate discovery in administrative proceedings. *Acosta*, 888 F.3d at 502. The court noted that employers and carriers are entitled to "reasonable discovery . . . to the full extent allowed by the BLBA and its implementing regulations" and that failure to obtain this discovery is a matter for appeal. *Id.* Here, Employer's request for discovery relating to Bulletin No. 16-01 was denied as untimely in the miner's claim in accordance with the Act and its implementing regulations, which limits when liability evidence may be submitted. 20 C.F.R. §§725.408(b), 725.410(b), 725.414, 725.456(b), 725.457(c)(1); ALJ's April 22, 2021 Omnibus Order at 5-6. Thus, Employer has not shown how it was denied discovery to the full extent allowed by the Act.

Consequently, we affirm the ALJ's finding that extraordinary circumstances did not exist for Employer's failure to timely submit evidence regarding its liability or designate liability witnesses before the district director in the miner's claim, which precluded its requested discovery and admission of the evidence before the ALJ. ALJ's April 22, 2021 Omnibus Order at 5-6.

Arch Coal's Liability

Before the Board, the parties have set forth a single set of arguments relating to liability, treating the ALJ's findings as the same in both claims and based on the same evidence. However, in the miner's claim, Arch Coal's liability evidence was excluded as untimely while some liability evidence[11] was admitted in the survivor's claim. ALJ's April

[10] Further, the Board and the Fourth Circuit have upheld evidentiary limitations that might otherwise run afoul of the Longshore Act and APA as reasonable and valid exercises of the Secretary of Labor's authority to regulate evidentiary development in BLBA proceedings. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004) (en banc). Existing precedent binds this panel.

[11] In the survivor's claim, Employer timely submitted the depositions of Steven Breeskin, the former Director of the DCMWC, Michael Chance, the current Director of

22, 2021 Omnibus Order at 5-19. The ALJ rejected Arch Coal's liability arguments in the miner's claim and, after reviewing the evidence in the survivor's claim, again rejected its arguments. Miner's Decision and Order at 8-18; Survivor's Decision and Order at 6-20. As Employer's arguments in the miner's claim must fail if its arguments in the survivor's claim fail, we address the arguments together.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in both claims and thus the Black Lung Disability Trust Fund (Trust Fund), not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. It argues the ALJ erred in finding Arch Coal liable for benefits because: (1) the Trust Fund is liable for the benefits because there is no evidence that shows that Arch Coal is responsible for this claim;[12] (2) without proof of coverage, the DOL improperly pierced Arch Coal's corporate veil in holding it liable; (3) the ALJ treated Arch Coal as a commercial insurer under the regulations rather than as a self-insurer; and (4) no regulation imposes liability on a prior self-insurer like Arch Coal. Employer's Brief at 30-34, 52-53. The Board previously considered and rejected similar arguments under the same material facts in *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-332-39 (2022) (en banc); *Howard*, 25 BLR at 1-308-18; and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments in this case.

Employer also contends the trigger for self-insured claims is dictated by the dates of its surety bonds used to secure its self-insurance program. Employer's Brief at 36-37; Survivor's Claim Employer's Exhibits 21. It further contends that the DOL has retroactively changed the trigger date to the day of the miner's last employment, as reflected in Bulletin No. 16-01, and that this policy imposes new liability on self-insured

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DCMWC, David Benedict, a former employee of DCMWC, Robert Briscoe, a senior consultant at Milliman, Inc., an actuarial and consulting firm, and Kim Kasmeier, a workers' compensation specialist in DCMWC, along with related documentary exhibits. Survivor's Claim Director's Exhibits 7, 9, 15; Survivor's Claim Employer's Exhibits 9-18.

[12] Employer argues there is no insurance policy or self-insurance agreement establishing Arch Coal's liability. Employer's Brief at 31. However, the Notice of Claim specifically identifies Arch Coal as Hobet's insurance carrier, Miner's Director's Exhibit 20, and Employer's other arguments tend to acknowledge that Arch Coal was Hobet's self-insurer at the time of the Miner's last date of employment. *See, e.g.*, Employer's Brief at 35-36 (framing the decision to name Arch Coal liable instead of Patriot as involving a choice between Hobet's last insurer or its insurer on the date of the Miner's last exposure to coal mine dust).

mine operators that bypasses traditional rulemaking under the APA and is a regulatory taking.[13] Employer's Brief at 35-50. We disagree.

Arch Coal contends that its surety bonds used as security for its self-insurance authorization create a trigger for liability that applies only while the bond is in force. Employer's Brief at 37. However, as explained in *Bailey*, liability is created by the Act and not by the DOL's authorization to self-insure or by the security itself. *See Bailey*, 25 BLR at 1-335; *see also United States v. Ins. Co. of N. Am.*, 83 F.3d 1507, 1513 (D.C. Cir. 1996) (holding that the principal is liable for claims arising during the period that a bond is in effect). For the same reasons, Employer's argument that the DOL changed its policy must fail, as it is the Act and regulations that dictate liability. *Id.*

Moreover, the ALJ considered, and found unsupported, Employer's argument that the DOL has historically used the date the claim was filed in self-insured operator cases to determine the responsible operator and has only recently applied the miner's last date of employment as the operative date. Survivor's Decision and Order at 14. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Mr. Briscoe, a senior consultant with Milliman, Inc., an actuarial and consulting firm, testified that the liabilities of parent companies who self-insure subsidiaries "drop away and go to the buyer" when the subsidiary is sold. Survivor's Claim Director's Exhibit 7 at 34 (transcript page 32). However, the ALJ found it was unclear whether he was testifying about self-insurance under the Act or about private contracts, a finding Employer does not challenge. Survivor's Decision and Order at 13 n.18. The ALJ further noted that Mr. Chance, the Director of the DOL Division of Coal Mine Workers' Compensation (DCMWC), testified that past DOL practice was to determine, on a case-by-case basis, "whether or not there are pockets of existing potential liable sources," and that self-insured parent companies are "fairly routinely" held liable for claims related to previously sold subsidiaries. *Id.* at 15; Survivor's Claim Employer's Exhibit 12 at 63-64. The ALJ also accurately noted that, while Ms. Kasmeier, a workers' compensation specialist in DCMWC, was unable to identify another specific claim with these same circumstances,

[13] Employer argues the DOL's policy is a retroactive change that amounts to an unlawful taking of its property in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 50-52. As the Director correctly points out, a private contract did not release Employer from liability and requiring Employer to pay benefits under the Act does not constitute an unconstitutional taking of property. Director's Brief at 11 (citing *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) ("mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause")).

she also testified that in her experience when an operator goes out of business and their liabilities are covered by a surety bond, that bond covers legacy or future claims and that "liability cannot really be transferred." *Id.*; Survivor's Claim Employer's Exhibit 13 at 37. The ALJ further accurately noted that when asked whether he was aware of any other cases where the DOL applied "occurrence coverage" to a self-insurance agreement, Mr. Benedict, the former Director of DCMWC, responded that the DOL has in the past gone after the securities of prior owners, citing the bankruptcy of Horizon Natural Resources Company as an example. *Id.* at 16; Survivor's Claim Employer's Exhibit 14 at 32.

The ALJ rationally found that the witness testimony admitted in the survivor's claim does not credibly establish that the DOL had a past practice of not holding former self-insured parent companies liable or that the Act and regulations limit self-insurance claims to the time when a claim is filed. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Survivor's Decision and Order at 15-16. We therefore reject Employer's arguments and affirm the ALJ's finding that Employer is liable for the payment of benefits.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in the miner's claim and her Errata Decision and Order Awarding Benefits Correcting Onset Date in the survivor's claim.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with the majority in the result. However, I would first address Employer's liability in the miner's claim, as it is primary. Employer did not timely submit any evidence relevant to its liability in the miner's claim. Its arguments in the miner's claim have been previously considered and rejected in similar cases. *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323, 1-332-39 (2022) (en banc); *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-308-18 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). Thus, for the

reasons set forth in *Bailey*, *Howard*, and *Graham*, I would reject Employer's arguments in the miner's claim and affirm the ALJ's determination that Employer is the properly named responsible operator and carrier.

Further, as Claimant's case is a derivative claim, I would hold that she is automatically entitled to benefits to be paid by Employer as the responsible operator and carrier in the miner's claim pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) ("In no case shall the eligible survivors of a miner who was determined to be eligible to receive

benefits under this subchapter at the time of his or her death be required to file a new claim for benefits . . . .").

JUDITH S. BOGGS
Administrative Appeals Judge