U.S. Department of Labor

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

BRB Nos. 19-0337 BLA
and 19-0338 BLA

GAYLE C. GREGORY (Widow and o/b/o BOBBY E. GREGORY)	)	
Claimant-Respondent	)	
v.	)	
HERITAGE COAL COMPANY, LLC	)	DATE ISSUED: 09/30/2020
and	)	
UNDERWRITERS SAFETY CLAIMS	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Darrell Dunham, Carbondale, Illinois, for Claimant.

Tighe Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer/carrier.

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

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

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05978 and 2017-BLA-05979) of Administrative Law Judge Clement J. Kennington issued pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a Miner's claim filed on November 21, 2013 and a survivor's claim filed on November 10, 2015.[1]

The administrative law judge determined Employer is the responsible operator liable for payment of benefits. On the merits, he found the Miner had twenty years of underground coal mine employment and a totally disabling respiratory impairment. Thus, he found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined Employer did not rebut the presumption and awarded benefits in the Miner's claim. Because the Miner was entitled to benefits at the time of his death, the administrative law judge found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

On appeal, employer contends the awards of benefits must be vacated and the case remanded, as both the district director and the administrative law judge are inferior officers who were not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[3] Employer also argues the procedure used to adjudicate the

[1] Claimant is the Miner's widow who is pursuing the Miner's claim on behalf of his estate and a survivor's claim on her own behalf.

[2] Under Section 411(c)(4), there is a rebuttable presumption the Miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

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

responsible operator issue violated its right to due process and the administrative law judge erred in finding it meets the responsible operator criteria. Employer further maintains the administrative law judge erred in applying the Section 411(c)(4) presumption and in finding employer did not rebut it. Employer also contends the award of benefits must be vacated based on the administrative law judge's bias against Employer.

Claimant responds, urging affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to hold Employer's Appointments Clause challenges are without merit and to affirm the determinations that Employer is liable for benefits and the Section 411(c)(4) presumption is applicable to the miner's claim.[4]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Appointments Clause – District Director

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

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

[5] Because the Miner's coal mine employment was in Illinois, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Living Miner's (LM) Claim Director's Exhibit 3.

Employer argues for the first time in this appeal that the district director lacked the authority to identify the responsible operator and process this case because she is an "inferior Officer" of the United States not properly appointed under the Appointments Clause. Employer primarily relies on *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), in which the United States Supreme Court held administrative law judges employed by the Securities and Exchange Commission are officers who must be appointed in conformance with the Appointments Clause. Employer's Brief at 12-18.

The Appointments Clause issue is "non-jurisdictional" and subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture."). *Lucia* was decided seven months prior to the administrative law judge's Decision and Order Awarding Benefits, but Employer failed to raise its challenge to the district director's appointment while the case was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case remanded - the remedy it seeks here. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. Based on these facts, we conclude Employer forfeited its right to challenge the district director's appointment.[6] Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its arguments. *See Powell v. Service Employees Int'l, Inc.*, __ BRBS __, BRB No. 18-0557 (Aug. 8, 2019); *Kiyuna*, BRB No. 19-0103, slip op. at 4; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging).

Appointments Clause – The Administrative Law Judge

Employer also alleges "the matter must be remanded due [to] the Court's . . . violation of *Lucia*." Employer's Brief at 12, 47-48. Employer maintains that by issuing a Notice of Hearing, the administrative law judge took significant action before his appointment was ratified by the Secretary of Labor. *Id*. at 47-48. We disagree.

[6] In an April 2, 2018 letter addressed to the administrative law judge and served on all parties, Employer preserved its challenge to the validity of the administrative law judge's appointment.

On December 21, 2017, the Secretary of Labor, exercising his power as the Head of a Department under the Appointments Clause, ratified the appointment of the administrative law judge. Administrative Law Judge's Exhibit 1. As employer acknowledges, the only action the administrative law judge took before his appointment was ratified was the issuance of a Notice of Hearing on December 13, 2017. Employer's Brief at 47-48. The Notice of Hearing alone does not involve any consideration of the merits, nor would it be expected to influence the administrative law judge's consideration of the case. It simply reiterates the statutory and regulatory requirements governing the hearing procedures. *See Noble v. B & W Resources, Inc.*, BLR , 18-0533 BLA, slip op. at 4 (Jan. 15, 2020). Thus, unlike *Lucia*, in which the judge presided over a hearing and issued a decision while not properly appointed, the issuance of the Notice of Hearing in this case would not be expected to affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand. *See Noble*, BRB No. 18-0533 BLA, slip op. at 4. We therefore reject Employer's request that this case be remanded for a new hearing before a different and validly appointed administrative law judge.

Responsible Operator/Carrier – Due Process

Employer next alleges the awards of benefits are invalid, as the procedure for adjudicating responsible operator liability makes the Department of Labor (DOL) responsible for both identifying the operator liable for the payment of benefits and administering the Black Lung Disability Trust Fund (Trust Fund).[7] Employer's Brief at 18-23. Employer maintains this creates a conflict of interests that violates its right to due process. We disagree.

As the Director notes, Congress explicitly intended that "individual coal mine operators rather than the [Trust Fund] bear the liability for claims arising out of such operators' mines to the maximum extent feasible." Director's Response Brief at 18, *quoting* S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. on Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979). Thus, as the Director avers, when identifying an Employer that meets the responsible operator criteria, DOL is acting in a manner consistent with congressional intent. Director's Response Brief at 18. Furthermore, Employer

[7] The Black Lung Disability Trust Fund assumes liability in claims where there is no responsible operator capable of paying benefits or where the Department of Labor (DOL) fails to accurately identify the responsible operator when the matter is pending before the district director.

maintains incorrectly that a district director makes the final determination as to which operator is the responsible operator. Although the regulations require all relevant documentary evidence to be submitted before the district director, and require him or her to name the correct responsible operator, they also allow the putative responsible operator to challenge its designation by requesting a *de novo* hearing before an administrative law judge. 20 C.F.R. § 725.419; *see Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018); *Rockwood Casualty Ins. Co. v. Director, OWCP*, 917 F.3d 1198, 1215 (10th Cir. 2019) (district director's designation of a responsible operator is not binding on the administrative law judge). The operator can then seek review of the administrative law judge's finding[8] before the Board and a United States Court of Appeals.[9] 20 C.F.R. §§ 725.481; 725.482; *see Acosta*, 888 F.3d at 497.

Finally, employer argues the district director may deny requests for extensions of time to obtain evidence or designate a responsible operator solely to protect the Trust Fund. Employer's Brief at 20-21. Because Employer's contention is speculative and is unsupported by any evidence, we decline to address it. 20 C.F.R. §§802.211(b), 802.301(a); *see Cox*, 791 F.2d at 446.

Responsible Operator/Carrier – Designation of Employer/Carrier

The Miner last worked in coal mine employment for Peabody Coal Company (Peabody Coal) in 1994. Living Miner (LM) Director's Exhibit 3. Peabody Coal was a subsidiary of and self-insured for black lung liabilities through Peabody Energy Corporation (Peabody Energy).[10] *See* Director's Response Brief at 2. Peabody Coal changed its name to Heritage Coal Company (Peabody Coal/Heritage) after the Miner

[8] If the responsible operator named by the district director is dismissed, the DOL has no recourse other than to transfer liability to the Black Lung Disability Trust Fund. 20 C.F.R. 725.418(d).

[9] Contrary to Employer's contention, rather than giving the Director, Office of Workers' Compensation Programs (Director), the final say, the provision in 20 C.F.R. § 725.465(b) barring the administrative law judge from dismissing a named responsible operator without the approval of the Director prevents premature dismissal of the named operator. 65 Fed. Reg. 79,920, 80,005 (Dec. 20, 2000) (the regulation "ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests").

[10] The record reflects the Miner was employed by Peabody Coal Company from 1973 to 1994. LM Director's Exhibits 3, 5-8, 31 at 10-18.

retired.[11] *Id*. In 2007, Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot). Survivor's Claim (SC) Director's Exhibit 37. In 2011, DOL authorized Patriot to self-insure for black lung liabilities, including for claims filed by employees of Peabody Energy subsidiaries before Patriot purchased them. SC Employer's Exhibit 2. This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15,000,000. *Id*.

Following receipt of the Miner's claim on November 21, 2013, the district director identified Patriot as the potentially liable operator in the Notice of Claim issued on November 22, 2013. LM Claim Director's Exhibits 1, 16. In a subsequent Schedule for the Submission of Additional Evidence (SSAE), the district director designated Peabody Coal as the responsible operator and Patriot as the responsible carrier. LM Director's Exhibits 19, 23.

The Miner died on October 17, 2014. SC Director's Exhibit 11. Claimant filed a claim for survivor's benefits on November 3, 2015. SC Director's Exhibit 3. On November 11, 2015, Patriot's counsel in the Miner's claim notified the district director of Patriot's recent bankruptcy and withdrew as its representatives. LM Director's Exhibit 41. The district director issued a second revised Notice of Claim on August 12, 2016, designating Peabody Coal as a potentially liable operator and Peabody Energy as the potentially liable carrier. LM Director's Exhibit 44. On January 6, 2017, the district director issued a Proposed Decision and Order awarding benefits in the Miner's claim and designated Peabody, "[now known as] Heritage" as the responsible operator. LM Director's Exhibit 47. In the survivor's claim, the district director issued a Proposed Decision and Order awarding benefits on January 12, 2017, making the same responsible operator designation. SC Director's Exhibit 14. By letter dated May 24, 2017, the district director granted Employer's request for a hearing in both the Miner's claim and the survivor's claim. LM Director's Exhibit 55.

Before the administrative law judge, Employer argued Peabody Energy's separation agreement with Patriot effectuated a "shift of complete liability [for black lung claims] from Peabody to Patriot," including claims such as this where the Miner's last coal dust exposure predated the transfer. Employer's Closing Brief at 13. It further argued the complete shift of liability "was understood and endorsed by the [DOL] during the approval of Patriot's self-insurance application." *Id*.

[11] The administrative law judge noted Peabody Coal and Heritage are the same company and Employer does not contest this characterization. Decision and Order at 7.

In his decision, the administrative law judge determined "Employer has offered no evidence to dispute that it met all five requirements to qualify as a potentially responsible operator, including its ability to assume liability for the payment of benefits." Decision and Order at 7, *citing* 20 C.F.R. §§725.494(e)(4), 725.495(b). He further rejected Employer's allegation Patriot is liable for the Miner's claim, therefore making the Trust Fund responsible for the payment of benefits in light of Patriot's bankruptcy. The administrative law judge found the Miner's last employment was with Peabody Coal/Heritage in 1994 and Peabody Coal/Heritage was a subsidiary of Peabody Energy, which self-insured for black lung claims. Decision and Order at 7. He further found the October 22, 2007 separation agreement between Peabody Coal/Heritage and Patriot established Patriot as a successor operator. *Id*., *citing* LM Director's Exhibit 49. The administrative law judge determined Peabody Coal/Heritage satisfies the criteria for a potentially liable operator and therefore, retained liability despite Patriot being its successor. *Id*., *citing* 20 C.F.R. §§725.492(d), 725.494.

The administrative law judge also rejected Employer's arguments that the status of bonds paid by Patriot and Peabody Energy, Peabody Coal/Heritage's self-insurer, required transfer of liability to the Trust Fund. He dismissed as "nothing more than speculation" Employer's contention the Director did not establish Patriot's self-insurance bond had been exhausted in the payment of claims in which benefits were actually awarded. Decision and Order at 8. Similarly, the administrative law judge found without merit Employer's allegation a March 4, 2011 letter from Stephen Breeskin, then the Director of Coal Mine Workers' Compensation, releasing Peabody Energy's letter of credit, precluded Employer from being named the responsible operator. *Id*. at 9. Finally, he determined Employer did not establish transfer to the Trust Fund is required because it relied to its detriment on the Director's alleged mishandling of Patriot's bond. *Id*. at 9-10. The administrative law judge therefore concluded Employer is the responsible operator. *Id*. at 10.

Employer argues that the administrative law judge's finding it is the responsible operator is erroneous because: he misapplied the successor-operator rule to Peabody Coal/Heritage and Patriot; Peabody Energy was released from liability when it transferred black lung liabilities to Patriot; the regulation at 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; the Director is equitably estopped from imposing liability; and there has been no finding Patriot's bond has been exhausted on finally awarded claims. Employer's Brief at 23-47. Employer's arguments are without merit.

Although the administrative law judge indicated Peabody Energy is also liable under the successor-operator rules,[12] this did not affect his permissible finding Employer meets

[12] The Director states: "we disagree with the [administrative law judge's] suggestion that Patriot was a 'successor' to Peabody Energy. But . . . any error in that regard does not

all the requirements of a potentially liable operator: The Miner's presumed total disability arose at least in part out of his coal mine work for Employer; Employer was an operator after June 30, 1973; the Miner worked for Employer for a cumulative period of not less than one year; the Miner's employment with Employer included at least one working day after December 31, 1969; and Employer is able to pay benefits through Peabody Energy. 20 C.F.R. § 725.494; Decision and Order at 9-10. In addition, the administrative law judge accurately determined Employer did not submit any evidence establishing it is not the operator that most recently employed the Miner or that it is unable to assume liability for the payment of benefits. 20 C.F.R. §725.495(c); Decision and Order at 8, 10.

Employer's argument that the administrative law judge was required to find DOL exhausted Patriot's bond in paying awards of benefits is also without merit. The administrative law judge permissibly determined "[t]he Employer's argument is based on nothing more than speculation that the Director paid benefits from the Patriot bond in violation of the law and regulations, an assumption for which it has provided absolutely no support."[13] Decision and Order at 8; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 275-76 (1994). Moreover, as the administrative law judge recognized, Employer's contention is misplaced, as the issue before him involved the identification of the financially solvent potentially liable operator to last employ the Miner.[14] 20 C.F.R. §§ 725.494(e), 725.495(a)(1); Decision and Order at 9. As previously indicated, the administrative law judge permissibly found Peabody/Heritage satisfied those criteria. Slip op. at 13; Decision and Order at 8, 10.

affect the [administrative law judge's] ultimate finding that Employer is liable." Director's Response Brief at 27 n.20.

[13] Employer argued before the administrative law judge that the Director could use Patriot bond funds only to pay claims in which there was a final award of benefits. Employer's Post-Hearing Brief at 21-22. Employer maintained because the Director did not produce records confirming the funds were being properly spent, she did not satisfy her duty as custodian of documents related to Black Lung claims and thus deprived Employer of due process. *Id*. Employer contended the Trust Fund should therefore retain liability for this claim. *Id*.

[14] For this reason, we decline to address Employer's allegation it was denied due process when the Director did not produce evidence regarding the administration and status of Patriot's indemnity bond. Employer's Brief at 45.

Also unavailing is Employer's argument that Director Breeskin's return of the letter of credit Patriot financed through Peabody Energy released it from liability.[15] Employer's Brief at 28-31; Employer's Exhibit 2. As the Director maintains, Peabody Energy's liabilities were secured by an indemnity bond in addition to the letter of credit, and DOL did not release the indemnity bond. Director's Response Brief at 24; LM Employer's Exhibit 1. Accordingly, even assuming release of the instruments securing liability results in the release of an operator or carrier from liability, Employer's liability remained as its indemnity bond was not released.

Additionally, we agree with the Director's position that Employer is "simply wrong" in alleging liability turns on the existence of a "security deposit." *Id*. at 25. 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 an operator's liability stems from its obligation to pay federal black lung benefits, rather than whether it has complied with the requirements that it provide security for the payment of benefits.

We also reject Employer's contention Director Breeskin's execution of an "Indemnity Agreement" constituted a release of Employer and Peabody Energy from liability. Employer's Brief at 30. In contrast to Employer's characterization, the Indemnity Agreement was between DOL and Bank of America, which issued the actual letter of credit. SC Employer's Exhibit 5. DOL asked Bank of America to cancel the letter of credit and agreed not to hold Bank of America responsible for not making good on the letter of

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

Survivor's Claim (SC) Employer's Exhibit 2.

credit. *Id*. Thus, DOL did not communicate with Employer in the Indemnity Agreement or include any provisions referencing Employer or releasing any party other than Bank of America from liability. The administrative law judge further correctly observed Employer continued to self-insure and to pay federal black lung claims decided against it. Decision and Order at 9.

Employer also mischaracterizes 20 C.F.R. §725.495(a)(4) in maintaining the regulation relieves it of liability because Patriot was self-insured. Employer's Brief at 31-35. Under the regulation, if the Miner's most recent Employer is self-insured but does not have sufficient funds to pay benefits, the next most recent Employer cannot be named as the responsible operator, thereby shifting liability to the Trust Fund. 20 C.F.R. §725.495(a)(4). In this case, however, the Miner's "most recent employment by an operator" was in 1994 for Peabody/Heritage when it was self-insured by Peabody Energy. LM Director's Exhibits 3, 5-8, 31 at 10-18. As the administrative law judge correctly noted, there is no evidence that Peabody/Heritage, through self-insurance by Peabody Energy, cannot assume liability for the payment of benefits. Decision and Order at 7.

Employer further argues DOL is equitably estopped from naming it as the responsible operator, as it reasonably relied to its detriment on Director Breeskin's alleged representation DOL released Employer from liability. Employer's Brief at 35-45. We disagree. To establish the applicability of the doctrine of equitable estoppel against DOL, the party asserting it must prove affirmative misconduct on the part of DOL, i.e., the agency acted with malicious intent. *Reich v. The Youghiogheny and Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995); *Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992) (drawing the distinction between specific intent to mislead and inadvertent misrepresentation). In this case, the administrative law judge reasonably found Employer's allegations regarding Director Breeskin's letter and DOL's failure to secure adequate funding when qualifying Patriot as a self-insurer do "not establish affirmative misconduct [or] . . . that [DOL] engaged in any affirmative misrepresentation or concealment of material fact." Decision and Order at 9; *see Keener*, 954 F.2d at 214 n.6; *Vahalik v. Youghiogheny & Ohio Coal Co.*, 15 BLR 1-43 (1991).

Because Employer has not raised any errors requiring remand in the administrative law judge's determination it is the responsible operator/carrier, we affirm his finding.

Adjudication of the Miner's Claim

The administrative law judge considered the Miner's claim under 20 C.F.R. Part 718 and determined the Section 411(c)(4) presumption of total disability due to pneumoconiosis was invoked and was not rebutted by Employer. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b), (d); Decision and Order at 22-25, 26-34. Employer initially

contends the administrative law judge's bias requires the Board to vacate the award of benefits in both the Miner's claim and the survivor's claim and remand the case to a different administrative law judge. Employer's Brief at 48-49. This allegation has no merit.

Employer cites an excerpt from the May 1, 2018 hearing transcript, in which the administrative law judge addressed its request for an extension of time to obtain a record review from Dr. Rosenberg. Claimant's counsel objected on the ground Employer should have obtained such evidence before the hearing. Hearing Transcript at 15. Employer's counsel explained it requested Dr. Rosenberg's report on March 13, 2018 and receipt of the report was expected soon. *Id*. The administrative law judge granted Employer's request for an extension of time and engaged in the following colloquy with Claimant's counsel:

> JUDGE KENNINGTON: All right. Well, I'll – I'll leave the record open to receive his report. And then, any objection from the Claimant.
>
> MR. DUNHAM: So, you're not ruling on the – the objection at this time, Your Honor; is that correct?
>
> JUDGE KENNINGTON: That's correct because I don't know what the report is going to say. And if you haven't seen it, you don't know what they're going to say either.
>
> MR. DUNHAM: I have a pretty good idea, Your Honor. I dealt with Dr. Rosenberg before.
>
> JUDGE KENNINGTON: So, he has one of these telepathic abilities to tell what's wrong with the employee without examining him?
>
> MR. DUNHAM: Well, I wouldn't say I'm a prophet, but my prediction level is approaching a hundred percent.

Hearing Transcript at 16. Employer alleges "Judge Kennington's statement deriding Dr. Rosenberg based on his 'telepathic abilities' clearly demonstrated a pre-judgement of evidence and abuse of discretion." Employer's Brief at 49.

A charge of bias against an administrative law judge is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). The statement to which Employer refers does not constitute such evidence as it can reasonably be understood as an attempt at humor regarding Claimant's counsel's objection to the

admission of Dr. Rosenberg's report prior to seeing its contents, rather than an indictment of Dr. Rosenberg's professionalism. Moreover, Employer points to no concrete evidence establishing the administrative law judge exhibited bias against Dr. Rosenberg based on his status as a non-examining Employer's physician when weighing his opinion on the existence of pneumoconiosis and total disability causation. It merely asserts the administrative law judge's finding that Dr. Rosenberg did not provide an adequately reasoned opinion to rebut the Section 411(c)(4) was the product of such bias.[16] Employer's Brief at 50. We therefore reject Employer's request that the award of benefits be vacated and the case remanded for assignment to a different administrative law judge.

Citing *Texas v. United States*, 340 F.Supp.3d 579 (N.D. Tex. 2018), Employer further contends the Board must vacate the administrative law judge's award of survivor's benefits because the Affordable Care Act (ACA), which included a provision reinstating the rebuttable presumption of total disability due to pneumoconiosis, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 49-50. Employer alleges that because the United States Department of Justice supports this ruling, DOL must accept the district court's declaration its ruling invalidated all of the provisions of the ACA, thereby invalidating the Section 411(c)(4) presumption. *Id*. These contentions are without merit.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Supreme Court upheld the constitutionality of the

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[16] Employer contends:

> The Administrative Law Judge improperly criticized Dr. Rosenberg's opinion regarding legal pneumoconiosis. Employer has already addressed the bias exhibited by the Administrative Law Judge prior to having received Dr. Rosenberg's opinion. That bias was on full display when the Court actually analyzed the opinion. Essentially, the Court found that Dr. Rosenberg was hostile to the Act. This finding affected the Administrative Law Judge's determination on legal pneumoconiosis and causation.

Employer's Brief at 50. Based on our holding the administrative law judge provided valid rationales for discrediting Dr. Rosenberg's opinion, *see* discussion *infra*, Employer's contention does not establish bias. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992).

ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010).[7] We therefore reject Employer's argument that Section 411(c)(4) as implemented by 20 C.F.R. §718.305 is unconstitutional.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[17] or "no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that Employer did not establish either method of rebuttal.[18]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered and discredited the medical opinions of Drs. Rosenberg and Selby that the Miner did not suffer from legal pneumoconiosis. Decision and Order at 32; LM Director's Exhibit 40; SC Employer's Exhibits 11, 15, 16. He therefore found Employer failed to rebut legal pneumoconiosis. Decision and Order at 32. Employer contends the administrative law judge mischaracterized Dr. Rosenberg's opinion and erred in finding it "hostile to the Act" because it conflicts with language in the preamble to the 2001 regulations. Employer's Brief at 50-53. Employer's allegations do not have merit.

Dr. Rosenberg reviewed reports of examinations of the Miner and various medical records. Employer's Exhibits 15 at 1-8, 16 at 9. He opined the Miner did not have clinical pneumoconiosis but suffered from totally disabling respiratory and pulmonary impairments based on the results of his pulmonary function studies and blood gas studies. SC Employer's Exhibits 15 at 8, 16 at 12-14. He stated these impairments were caused by obesity hypoventilation and were unrelated to coal dust exposure. *Id*. In support of his opinion, Dr. Rosenberg cited scientific literature addressed by DOL in the preamble to the 2001 regulations reporting the development and progression of legal pneumoconiosis after

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[18] The administrative law judge found Employer rebutted the existence of clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order at 28, 32.

coal dust exposure ends is rare. SC Employer's Exhibits 15 at 8, 16 at 25-26. He also noted the Miner's "spirometry in 2004 . . . a decade after he left the mines" showed only a mild reduction in function and "there is no foundation that one will develop progressive impairment, as displayed by [the Miner] without parenchymal changes in relationship to past coal mine dust exposure." Employer's Exhibit 15 at 8. Dr. Rosenberg further stated the Miner's normal A-a gradient on blood gas studies was inconsistent with parenchymal lung disease related to clinical pneumoconiosis and chronic obstructive pulmonary disease related to legal pneumoconiosis. *Id*. at 8-9.

Contrary to Employer's contention, the administrative law judge did not determine Dr. Rosenberg's opinion is hostile to the Act. Rather, he permissibly accorded it little weight because it conflicted with the authoritative statement of the medical principles accepted by DOL in the preamble to the 2001 regulatory revisions. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 31-32. Specifically, the administrative law judge accurately found Dr. Rosenberg concluded the Miner's obstructive impairment was entirely unrelated to coal dust exposure because it developed ten years after the Miner retired from mining and there were no parenchymal changes associated with clinical pneumoconiosis.[19] Decision and Order at 31-32; SC Employer's Exhibit 15 at 8. The administrative law judge then reasonably determined the premises Dr. Rosenberg relied on conflict with DOL's views that legal pneumoconiosis is latent and progressive and can occur in the absence of x-ray evidence of clinical pneumoconiosis.[20] *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,937,

[19] Employer maintains Dr. Rosenberg's reference to the absence of parenchymal abnormalities did not reflect a belief that radiological evidence of parenchymal changes consistent with clinical pneumoconiosis confirm a diagnosis of legal pneumoconiosis. Employer's Brief at 52. In Dr. Rosenberg's record review, however, he used "parenchymal" when indicating whether the Miner's x-rays and CT scans were interpreted as positive for clinical pneumoconiosis. SC Employer's Exhibit 15 at 1, 3. He also stated, "[t]here is no foundation that one will develop progressive impairment, as displayed by [the Miner] without parenchymal changes in relationship to past coal mine dust exposure" and the Miner's normal A-a gradient "supports the fact that he did not have parenchymal lung disease related to clinical [coal workers' pneumoconiosis] or [chronic obstructive pulmonary disease] related to legal [coal workers' pneumoconiosis]." *Id*. at 8, 9. Furthermore, the regulations recognize as positive for clinical pneumoconiosis an x-ray classified as containing parenchymal abnormalities in a proliferation of 1/0 or higher. 20 C.F.R. §718.102(d), 718.202(a)(1). The administrative law judge is entitled to make reasonable inferences from the record and he did so in this case.

[20] Because the administrative law judge gave a valid reason for rejecting Dr. Rosenberg's opinion, we need not address Employer's remaining arguments regarding why

79,971 (Dec. 20, 2000); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490 (7th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001); Decision and Order at 31-32.

The administrative law judge must weigh the evidence, draw appropriate inferences, and determine credibility. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because it is supported by substantial evidence we affirm the administrative law judge's discrediting of Dr. Rosenberg's opinion and his finding Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Young*, 947 F.3d 399, 405; *Barrett*, 478 F.3d at 356; Decision and Order at 30-32. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011).

Disability Causation

The administrative law judge next considered whether Employer established "no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32-34. He permissibly rejected Dr. Rosenberg's opinion on the cause of the Miner's respiratory disability because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding Employer did not disprove the existence of the disease.[21] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890 (7th Cir. 2002); Decision and Order at 34. We therefore affirm the administrative law judge's finding that Employer failed to establish that no part of the Miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34-35.

Adjudication of the Survivor's Claim

Having awarded benefits in the Miner's claim, the administrative law judge found Claimant established each element necessary to demonstrate entitlement under Section

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his opinion should have been found credible regarding legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[21] Dr. Rosenberg did not offer an explanation as to why legal pneumoconiosis played no part in the Miner's disability, apart from his conclusion the Miner did not have the disease. SC Employer's Exhibits 15, 16.

422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 34. Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the administrative law judge's determination that Claimant is entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); 20 C.F.R. §802.211(b); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

GREG J. BUZZARD
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to affirm the administrative law judge's liability determination and the award of benefits. I write separately, however, to express my view that, even if Employer had preserved the argument, *Lucia v. SEC*, 585 U.S. , 138

S.Ct. 2044 (2018) does not establish that black lung district directors are inferior officers subject to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

Employer argues district directors are similar to the Securities and Exchange Commission (SEC) administrative law judges *Lucia* held are inferior officers because they "exercise 'significant discretion' in carrying out 'important functions' such as determining the proof allowed in the record, conducting conferences, and issuing decisions which can become final in awarding or denying benefits." Employer's Brief at 13-14 (citation omitted). It also argues district directors issue binding orders and compel the production of documents by subpoena, thus "critically [shaping] the administrative record." *Id*. at 14, citation omitted. Finally, it alleges the district director's role as "final decision-maker" generally creates "an Appointments Clause issue." *Id*. at 15. From this, it concludes *Lucia* establishes district directors as inferior officers subject to the Appointments Clause, and it asserts the case must be remanded and reassigned to a properly appointed district director. *Id.* at 17-18.[22]

I agree with the Director, however, that a more accurate examination of their authority reveals district directors instead perform "routine administrative functions." Director's Brief at 10. They do not have "significant adjudicative" capacity, possessing none of the four powers *Lucia* held make administrative law judges akin to federal district court judges. *Id*. Moreover, the regulations cabin their ability to identify a responsible operator and determine entitlement -- subject to de novo appellate review -- eliminating any remaining Appointments Clause issues. Like the vast majority of federal employees, district directors thus are not members of the very small subset of inferior officers who must be appointed by the head of an agency. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 & n.9 (2010) (noting that in 1879 about 90% of federal employees were lesser functionaries and the percentage of those functionaries has dramatically increased over time).[23]

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

[23] Notably, the distinction in authority possessed by district directors and administrative law judges is by design. When Congress incorporated the administrative scheme of the Longshore and Harbor Workers' Compensation Act into the Act, it split the powers of the then deputy commissioner, vesting the claim-processing and administrative responsibilities in newly created officials now known as district directors and adjudication authority in administrative law judges. 30 U.S.C. § 932(a); 33 U.S.C. § 919(d), as incorporated. The formal adjudicative authority the *Lucia* Court found dispositive of the Appointments Clause issue -- convening adversarial hearings, finding facts, and issuing

Two features determine officer status under the Appointments Clause: holding a continuing position established by law and exercising "significant authority" pursuant to it. *Lucia,* 138 S.Ct. at 2051 (citing *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). After noting they hold continuing positions, the *Lucia* Court identified four powers administrative law judges possess establishing significant authority comparable to "a federal district judge conducting a bench trial": 1) to conduct trials and regulate hearings; 2) to take testimony and administer oaths; 3) to rule on the admissibility of evidence; and 4) to enforce compliance with discovery orders. *Id.* at 2049 (citation omitted). A "point-by-point" analysis reveals district directors meaningfully possess none of these expansive adjudicatory powers. *Id.* at 2053.[24]

First, black lung district directors never conduct formal hearings. Thus, as the Director notes, the paramount factor the *Lucia* Court found to justify officer status, the authority to hold an adversarial hearing, "is simply missing from the district director's portfolio." Director's Brief at 13. Indeed, the remedy the *Lucia* Court fashioned for an Appointments Clause violation -- a new hearing before a properly appointed administrative law judge -- demonstrates the vital significance the court ascribed this missing adjudicatory function. 138 S.Ct. at 2055.

Second, district directors do not "take testimony," examine witnesses at hearings, or take pre-hearing depositions -- because they do not conduct hearings at all. Similarly, unlike administrative law judges, district directors do not "administer oaths." *See, e.g.*, 20 C.F.R. § 725.351(a), (b) (differentiating between authorities of district directors and administrative law judges).

Third, district directors do not "critically shape" the administrative record by making evidentiary rulings akin to administrative law or federal district court judges. Although they may compile routine documents and forms at the outset of a case, the "official" (and final) record is created at the formal hearing, after significant additional discovery subject to an administrative law judge's continuing oversight. 20 C.F.R. § 725.421(b) (specifying documents that must be transmitted to OALJ, and noting they "shall

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binding decisions on claims -- was absorbed by administrative law judges. *See, e.g.*, *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090 (9th Cir. 2000), *cert. denied*, 531 U.S. 956 (2000); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

[24] The Director concedes that black lung district directors hold "a continuing office established by law," satisfying the first feature. Director's Brief at 11 n.9.

be placed in the record at the hearing subject to the objection of any party"). Fundamentally, parties are not required to submit medical evidence to the district director; they may submit it to the administrative law judge until twenty days before a formal hearing. *Id.*; 20 C.F.R. § 725.456(b)(2). Thus, in most cases, the basic record relevant to a Claimant's entitlement will not be developed until the formal administrative law judge hearing, long after the district director has transferred the case to the OALJ. 20 C.F.R. §§ 725.456(b)(3), 725.457; 65 Fed. Reg. 79,920, 79,991 (Dec. 20, 2000) ("[T]he Department expects that parties generally will not undertake the development of medical evidence until the case is pending before the administrative law judge.").

Fourth, district directors do not enforce compliance with discovery orders like administrative law or federal district court judges. No formal discovery takes place before them, only "informal discovery proceedings." 20 C.F.R. § 725.351(a)(2). And the district director's "enforcement" power in those limited proceedings is not "especially muscular" -- having nothing remotely similar to "the nuclear option" federal courts possess "to toss malefactors in jail," or "the conventional weapons" to sanction wielded by administrative law judges. *Lucia*, 138 S. Ct. at 2054. Instead, where a Claimant fails to prosecute a claim, the only (and necessary) remedy is a simple denial by reason of abandonment. 20 C.F.R. § 725.409. But even then dismissal is limited to four specific circumstances in which a Claimant refuses to go forward with her case and is predicated on a district director first notifying the Claimant and giving her an opportunity to cure the defect. 20 C.F.R. § 725.409(b). Moreover, any dismissal order may be reviewed by an administrative law judge. 20 C.F.R. § 725.409(c). No similar provisions penalize a responsible coal mine operator for like conduct. A district director may only certify the facts to federal district court. 20 C.F.R. § 725.351(c).[25]

Unlike DOL administrative law judges, the four factors the *Lucia* Court identified under the "unadorned authority test" (taken "straight from *Freytag's* list") thus establish district directors are not "near-carbon copies" of SEC judges: their "point for point" application does not come close to establishing "equivalent duties and powers" in "conducting adversarial inquiries." *Lucia*, 138 S.Ct. at 2053 (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)). DOL administrative law judges possess nearly identical authority as SEC administrative law judges. By design, district directors do not.

[25] The district director can sanction in one narrow circumstance: when a party fails to comply with the medical information disclosure requirements. 20 C.F.R. § 725.413(e). But any sanction imposed by a district director is subject to review by an administrative law judge, 20 C.F.R. § 725.413(e)(4), and the possibility parties receive medical information before the claim is transferred to the OALJs mandates the requirement. 20 C.F.R. § 725.413(c).

On its face, *Lucia* therefore does not establish district directors as among the small category of inferior officers. *Id.* at 2052 (holding no reason existed to go beyond *Freytag's* "unadorned authority test" to determine officer status because SEC ALJs hold formal authority nearly identical to *Freytag's* STJs).

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

First, district directors lack independent discretion in designating responsible operators given the comprehensive regulatory scheme. Evidence relevant to a responsible operator designation must be initially submitted to the district director to streamline administrative proceedings by restricting the district director's authority. 65 Fed. Reg. at 79,990. As the Director notes, "the district director gets only one chance at identifying the liable operator: the goal of the rule is to allow the district director to make the most informed choice possible, but also to limit the district director's discretion." Director's Brief at 13. If the district director chooses incorrectly, the Trust Fund must pay any benefits awarded in the claim. *Id.*

Moreover, specific rules govern which operators may be considered as potentially liable and ultimately designated as the responsible operator. 20 C.F.R. §§ 725.494, 725.495. The program rules require that various types of liability evidence must be submitted at specific times and during a defined period. *See, e.g.*, 20 C.F.R. § 725.408(b) (evidence relating to status as a potentially liable operator must be submitted within 90 days after receiving the Notice of Claim); 20 C.F.R. § 725.410 (evidence that another operator may be liable must be submitted within 60 days of the Schedule for the Submission of Additional Evidence with 30 additional days for submission of rebuttal evidence). These programmatic constraints show the district director lacks significant independent authority in claims processing relevant to the responsible operator designation.[26]

[26] Moreover, as the Director notes:

Second, the district director's ability to resolve either responsible operator status or entitlement issues with finality depends largely on the power to persuade rather than on any programmatic authority. The district director issues a Proposed Decision and Order (PDO) purporting to resolve all claim issues, but that decision does not become effective if any party timely requests a hearing or revision. 20 C.F.R. § 725.419(d). And, most fundamentally, the district director's PDO findings do not constrain administrative law judge oversight in any way: *they review all issues de novo*. 20 C.F.R. § 725.455(a).

District directors do not have formal adjudicative authority anywhere near that of DOL or SEC administrative law judges (by design) under *Lucia's* significant authority test. 138 S.Ct. at 2053. *Lucia* therefore does not dictate they qualify as inferior officers. *Id.* Moreover, Employer has not demonstrated how district directors' claims processing duties -- subject to de novo review by an administrative law judge and further review by the Board and the federal courts of appeals -- independently transforms them. Accordingly, had Employer preserved its Appointments Clause argument, I would find district directors are

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> The rule that prohibits ALJs from dismissing the named operator without the Director's consent, 20 C.F.R. § 725.465(c), does not expand the district director's power in any way. The rule is intended to prevent a premature dismissal of the named operator; it does not give the district director "veto power over an ALJ's decision" but "simply protects the interests of the Trust Fund, and ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests." 65 Fed. Reg. 80005 (Dec. 20, 2000).

Director's Brief at 13 n.11.

not inferior officers but "part of the broad swath of 'lesser functionaries' in the Government's workforce." *Id.* at 2051 (citation omitted).

JONATHAN ROLFE
Administrative Appeals Judge