No.

In the Supreme Court of the United States

ARCH RESOURCES, INC., AND APOGEE COAL COMPANY LLC,

Petitioners,

V.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR AND DAVID M. HOWARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit err in not applying the rule from *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93 (1943), which requires courts to evaluate agency action on "the grounds upon which the agency acted," to cases arising under the Black Lung Benefits Act, in direct conflict with the Fourth and Seventh Circuits?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Parties to the Proceeding

Petitioner: Arch Resources, Inc and Apogee Coal Company LLC.;

Respondent: Director, Office of Workers Compensation Programs, U.S. Department of Labor and David M. Howard;

Case Name: Apogee Coal Company, et al v. Director, Office of Workers Compensation Programs, U.S. Department of Labor and David M. Howard.

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29.6, Applicant Arch Resources states that there is no parent or publicly held company owning 10% or more of its stock.

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* Respondent identified Apogee Coal, which was previously a subsidiary of Petitioner, as the responsible operator. Nevertheless, Respondent held Arch responsible for Apogee's liabilities in a decision that is the subject of this Petition.

RELATED PROCEEDINGS

This appeal is related to the following pending actions in the Sixth Circuit:

- *Apogee Coal v. Director, OWCP [Melton]*, Case No. 23-3297;
- *Apogee Coal v. Director, OWCP [Cash],* Case No. 23-3437;
- *Arch of Kentucky v. Director, OWCP [M. Ison],* Case No. 23-3536;
- *Arch of Kentucky v. Director, OWCP [R. Ison],* Case No. 23-3537;
- *Apogee Coal v. Director, OWCP [Creech],* Case No. 23-3541;
- *Apogee Coal v. Director, OWCP [Johnson],* Case No. 23-3612;
- *Apogee Coal v. Director, OWCP [Woods],* Case No. 23-3644;
- *Apogee Coal v. Director, OWCP [Holbrook],* Case No. 23-3645; and
- *Apogee Coal v. Director, OWCP [Hall],* Case No. 23-3662.

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INTRODUCTION

Rarely do the circuit courts split as sharply and in such a short span of time as they have on whether *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), applies to the Department of Labor's assignment of liability for benefits under the Black Lung Benefits Act ("BLBA"). This case and another decided by the Seventh Circuit just 14 days later typify the circuits' divergent approaches to this question. The Sixth Circuit does not apply *Chenery* to BLBA cases; the Seventh and Fourth Circuits do.

This case arose in response to the Department of Labor ("DOL" or the "Department") searching for a basis to hold a viable mining company liable for the black lung obligations of a different, now-bankrupt mine operator. DOL settled on a theory that the former owner of a bankrupt subsidiary can be liable as its former subsidiary's self-insurer. The Department's rationale was that the former parent (Petitioner Arch) was authorized to self-insure when its former subsidiary last employed Respondent David Howard. The problem is that nothing in the BLBA's text, structure, or past implementation supports treating a corporation as self-insuring a former subsidiary. This is especially true when DOL approved a new parent corporation to self-insure the subsidiary's black lung liabilities.

Presented with DOL's flimsy arguments, the Sixth Circuit looked for its own justification, a task it accomplished by seizing on two regulatory provisions—20 C.F.R. §§ 726.4(b) and 726.110(a)—that formed no part of the Department's rationale. In fact, the Department affirmatively (and rightly) disclaimed those provisions as a basis for imposing liability. Undeterred, the Sixth Circuit adopted them as the sole basis for holding Arch responsible as an insurer. App. 16a–17a. That decision runs headlong into this Court's holding in *Chenery*, 318 U.S. at 87–88, which limits judicial review to the agency's contemporaneous rationale for its actions.

Fourteen days later, the Seventh Circuit reached the opposite conclusion and declared the decision below "wrong" and a deviation from this Court's precedent. App. 45a–46a. The circuits are reaching different conclusions on this issue because of their different understanding of whether *Chenery* applies to restrict the Department to the rationale it adopted before arriving in court.

Both courts declined to reconsider their decisions *en banc*. App. 24a, 47a. The division in these cases reflects a broader split on the applicability of *Chenery* to agency adjudications. The Seventh and Fourth Circuits hold that *Chenery* "applies with full force." App. 42a; *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421 (4th Cir. 2006). The Sixth Circuit ignored

Chenery, reasoning that it can affirm DOL's assignment of liability on any theory that the record supports, App. 16a–17a, rather than "those upon which the record discloses that its action was based," *Chenery*, 318 U.S. at 87–88. This is precisely the scenario *Chenery* forecloses, as the Fourth and Seventh Circuits recognize. This Court should grant the Petition or summarily reverse the decision below to resolve the split and prevent further erosion of the *Chenery* doctrine.

OPINIONS BELOW

The order from the United States Court of Appeals for the Sixth Circuit denying rehearing *en banc* is unpublished but reproduced at App. 24a. The opinion of the Sixth Circuit panel is reported at 112 F.4th 343 (6th Cir. 2024) and reproduced at App. 1a. The decision of the Benefits Review Board is reported at 25 BLR 1-301 (2022) and reproduced at App. 126a. The administrative law judge's ("ALJ") decision is reproduced at App. 49a.

JURISDICTION

The Sixth Circuit denied Arch's petition for rehearing en banc on October 15, 2024. App. 24a. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The BLBA authorizes the Secretary of Labor to impose liability on mine operators under the following provision:

> During any such period each such operator shall be liable for and shall secure the payment of benefits, as provided in this section and section 933 of this title. An employer, other than an operator of a coal mine, shall not be required to secure the payment of such benefits with respect to any employee of such employer to the extent such employee is engaged in the transportation of coal or in coal mine construction. Upon determination by the Secretary of the eligibility of the employee, the Secretary may require such employer to secure a bond or otherwise guarantee the payment of such benefits to the employee.

30 U.S.C. § 932(b).

The two regulatory provisions on which the Sixth Circuit relied as a source of liability provide as follows:

> Section 422(i) of the Act clearly recognizes that any individual or business entity who is or was a coal mine operator may be found liable for the payment of pneumoconiosis

benefits after December 31, 1973. Within this framework it is clear that the Secretary has wide latitude for determining which operator shall be liable for the payment of part C benefits. Comprehensive standards have been promulgated in subpart G of part 725 of this subchapter for the purpose of guiding the Secretary in making such determination. It must be noted that pursuant to these standards any parent or subsidiary corporation, any individual or corporate partner, or partnership, any lessee or lessor of a coal mine, any joint venture or participant in a joint venture, any transferee or transferor of a corporation or other business entity, any former, current, or future operator or any other form of business entity which has had or will have a substantial and reasonably direct interest in the operation of a coal mine may be determined liable for the payment of pneumoconiosis benefits after December 31, 1973. The failure of any such business entity to self-insure or obtain a policy or contract of insurance shall in no way relieve such business entity of its obligation to pay pneumoconiosis benefits in respect of any case in which such business entity's responsibility for such payments has been

> properly adjudicated. Any business entity described in this section shall take appropriate steps to insure that any liability imposed by part C of the Act on such business entity shall be dischargeable.

20 C.F.R. § 726.4(b).

> In addition to the requirement that adequate security be procured as set forth in this subpart, the applicant for the authorization to self-insure shall, as a condition precedent to receiving such authorization, execute and file with the Office an agreement and undertaking in a form prescribed and provided by the Office in which the applicant shall agree:
>
> (1) To pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners;
>
> (2) To furnish medical, surgical, hospital, and other attendance, treatment, and care as required by the Act;
>
> (3) To provide security in a form approved by the Office (see § 726.104) and in an amount established by the Office (see § 726.105), as elected in the application;

> (4) To authorize the Office to sell any negotiable securities so deposited or any part thereof, and to pay from the proceeds thereof such benefits, medical, and other expenses and any accrued penalties imposed by law as the Office may find to be due and payable.

20 C.F.R. § 726.110(a).

STATEMENT OF THE CASE

I. Regulatory Background

Congress enacted the BLBA to create a nationwide system for paying benefits to coal miners disabled by pneumoconiosis and their survivors. 30 U.S.C. § 901 *et seq*. The BLBA and its regulations assign responsibility for payment of benefits to the mine operator that last employed the miner and then, if no operator that employed the miner possesses sufficient assets to secure those payments, to the Black Lung Disability Trust Fund ("Trust Fund"), which is funded in part by an excise tax on coal mined and sold in the United States. *Id.* at 901(a); 26 U.S.C. § 9501(d)(1)(B). Both the tax and the available benefits are the same across the country.

DOL is responsible for designating a responsible operator and its insurer. 20 C.F.R. § 725.407. The designation process begins with a district director who identifies potentially responsible operators based on

five criteria set forth in DOL's regulations. 20 C.F.R. § 725.408(a). Among those criteria is the mine operator's capacity to pay, *id.* § 725.408(a)(2)(v), which can be met if the operator either has commercial insurance or has been approved by DOL to self-insure, *id.* § 725.494. DOL's final designation of the responsible operator occurs through a proposed decision and order ("PDO"). 20 C.F.R. § 725.418. After a PDO is issued, an adversely affected party may request a hearing before an ALJ. 20 C.F.R. § 725.421. If the responsible operator named by the district director lacks the ability to pay and no other operator meets the criteria, the Trust Fund pays the claim.

The ALJ conducts a hearing and issues a decision and order on all contested issues of law and fact. An aggrieved party may appeal from the ALJ's decision and order to the Benefits Review Board ("Board"), which "determines appeals raising a substantial question of law or fact." 20 C.F.R. § 801.102(a). A party may then appeal the Board's decision to the federal court of appeals with jurisdiction over the State where the miner last worked. 33 U.S.C. § 921(b). Unsurprisingly, BLBA appeals tend to arise in a few circuits that cover America's coal deposits.

An operator can secure the payment of benefits in two ways: either through commercial insurance or self-insurance backed with financial security

approved by DOL on an annual basis. Although they serve the same goal, commercial insurance and self-insurance are different animals. Different regulatory subparts govern each of them. Compare Part 726, Subpart B ("Self-Insurers," §§ 726.101-726.115) with Subpart C ("Insurance Contracts," §§ 726.201-726.213). Subpart C includes an endorsement that must appear in any commercial insurance contract. 20 C.F.R. § 726.203(a). The endorsement establishes coverage for "disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease ***occurs during the policy period***." *Id.* (emphasis added). This is known as an "occurrence trigger" because coverage depends on when the injury occurred—specifically, during the policy period—regardless of when the claimant files a claim. The result is perpetual liability for claims by miners whose last day of work occurred during the policy period.

Alternatively, DOL may approve a mine operator to self-insure. Self-insurance entails its own set of conditions, but the endorsement establishing an occurrence-based trigger is not among them. Instead, authorization to self-insure follows an extensive application process and provision of financial instruments, typically bonds, to secure the self-insurer's potential liability. See 20 C.F.R. §§ 726.102 (application), 726.105 (calculating security). Following an initial approval, DOL may renew the

self-insurance authorization at annual intervals, possibly with adjustments to the amount of financial security required. *Id.* § 726.114(a). Among the items an applicant must provide to DOL is a current "list of the mine or mines to be covered." *Id.* § 726.102(b)(3). An operator must have sufficient assets to cover the "annual" cost of obtaining security plus the estimated benefits it "may be expected to be required to pay during the ensuing year." *Id.* § 726.101(b)(3). Notably, these financial assurance requirements—like the authorization—are defined in terms of the single year for which a self-insurance application is granted. Beginning on January 12, 2025, DOL will require self-insured mine operators to obtain security to cover 100% of their potential liability. 89 Fed. Reg. 100304 (Dec. 12, 2024). At all relevant times for this case, the Department opted for a lower level of security.

For self-insurers, there is nothing akin to the commercial endorsement covering all claims arising "during the policy period." Instead, BLBA self-insurance (before the events at issue in this case) had a "claims-made trigger" that makes the self-insurer liable for claims filed during a period of self-insurance. This is one of the primary differences between commercial and self-insurance, not only under the BLBA, but in the insurance industry generally. See *President & Fellows of Harvard Coll.* v. *Zurich Am. Ins. Co.*, 77 F.4th 33, 39 (1st Cir. 2023) (noting "the

critical distinction . . . between occurrence-based and claims-made policies"). The claims-made trigger also matches the annual approval process noted above, including the updated list of mines for which a self-insurer is liable. 20 C.F.R. §§ 726.102(b)(3), 726.104(a).

II. Procedural Background

David Howard worked for Apogee Coal Company ("Apogee") in Kentucky at the time he retired from mining in 1997. At that time, Apogee was Arch's wholly owned subsidiary, and Arch was an approved self-insurer. On December 31, 2005, Arch sold Apogee and all its past, present and future black lung liabilities. The ultimate buyer was Patriot Coal, which DOL approved as a self-insurer for Apogee's liabilities.

When Mr. Howard filed his claim for federal black lung benefits in November 2014, Apogee was owned by Patriot. Thus, the district director correctly designated Apogee as the responsible operator and Patriot as the responsible self-insurer. App. 162a. Patriot agreed that it was responsible for paying. App. 167a.

On May 12, 2015, Patriot, along with its subsidiaries including Apogee, declared bankruptcy. At that point, DOL should have concluded that Apogee was not "capable of assuming liability for the payments," 20 C.F.R. § 725.408(a)(2)(v). That is what

the Department had done before when an operator declared bankruptcy, including in earlier cases related to the Patriot bankruptcy. In *Adkins* v. *Hobet Mining*, Case ID: B7MHB-2015209 (Charleston DOL February 16, 2016), for example, the miner worked for a different former subsidiary of Arch (Hobet Mining), which Patriot also acquired. App. 205a. When Patriot declared bankruptcy, DOL noted that the Trust Fund was liable "since the company was self-insured [and] a previous employer cannot be named liable in this matter." App. 213a–214a. That result should have occurred in this case as well.

But Patriot's bankruptcy was a disaster for DOL. It exposed the Department's failure to ensure that certain self-insurers were adequately capitalized to avoid draining the Trust Fund. The GAO described DOL's mismanagement of the BLBA self-insurance program as responsible for shifting over $200 million in Patriot's black lung liabilities to the Trust Fund. *See* GAO, Black Lung Benefits Program: Improved Oversight of Coal Mine Operator Insurance Is Needed (GAO-2021, Feb. 2020), App. 224a.

Facing a reckoning, DOL changed its policy regarding self-insurers' liability for former subsidiaries. It memorialized the change in a guidance document called Bulletin 16-01. App. 215a. DOL declared that, as of November 2015, claims against nearly fifty bankrupt Patriot subsidiaries

would now be chargeable to those subsidiaries' former, self-insured parents based on an occurrence trigger—the last day of the miner's employment with the later-sold subsidiary. In this change, DOL imported the rules governing commercial insurance and operator liability into the self-insurer context. DOL did not require any instrument creating this liability (*e.g.*, a contract) or any representation to DOL indicating that the former owner was still self-insuring a business that was no longer part of its "self." Thus, on December 8, 2015, DOL issued a second notice of claim now declaring Arch—rather than the bankrupt Patriot—liable as the insurer of Apogee's liability for Howard's claim. App. 191a.

An ALJ embraced DOL's new policy and relied on the regulations governing responsible ***operators***, 20 C.F.R. §§ 725.494 and 725.495, to hold Arch responsible ***as an insurer***. App. 113a–116a. Neither DOL nor the ALJ identified any source of law—a statutory or regulatory provision, or a contract—that bound Arch, as a self-insurer, to continue paying claims against a subsidiary that it sold and that a later owner covered with its own self-insurance as required and approved by DOL.

Arch appealed to the Benefits Review Board, which affirmed the ALJ's reliance on sections 725.494 and 725.495 to impose liability on Apogee's former parent. App. 149a. Arch appealed to the Sixth

Circuit, which affirmed but pivoted to a different regulatory justification. That rationale looked to 20 C.F.R. §§ 726.4 and 726.110(a)(1) as authority for DOL treating Arch's former self-insurance of Apogee as extending indefinitely. App. 16a–18a. The Sixth Circuit relied on these provisions even though DOL never argued that they authorized its actions and the ALJ affirmatively ***disclaimed*** Part 726 as forming any basis of Arch's liability. App. 122a–123a. As part of its appeal, Arch also challenged a number of agency actions that are not the subject of this Petition: DOL's regulations limiting evidence in the administrative process, DOL's failure to properly notify Arch of the claim, and whether Bulletin 16-01 was required to undergo notice-and-comment rulemaking.

Simultaneously, Arch was litigating an identical case in the Seventh Circuit. There, the court held that "[t]here must be some source of law (or perhaps combination of sources) that the Department can point to that affirmatively requires Arch to satisfy benefits owed" to the claimant. *Apogee Coal Co* v. *Director, OWCP [Grimes],* 113 F.4th 751, 759 (7th Cir. 2024), App. 41a. It concluded that "the ALJ and the Board have failed to justify their conclusions that Arch can be compelled to satisfy the black lung liability of Apogee." *Id.* at 45a. It then responded to the Sixth Circuit's decision in the present case, which had been decided just 14 days before: "*Chenery* precludes us from affirming the Board on the Sixth

Circuit's theory" because no one ever relied on 20 C.F.R. §§ 726.4(b) and 726.110(a)(1) to justify imposing liability on Arch. *Id.* at 46a (citing *Chenery*, 318 U.S. at 87–88). The Seventh Circuit also observed that even without *Chenery*, "it is hard to see how either provision" the Sixth Circuit cited "could support a finding of liability." *Id.*

Because the Seventh Circuit recognized that it was "creating a conflict with the Sixth Circuit," the court conducted an *en banc* poll, and no judge voted to reconsider. *Id.* at 47(a). Arch filed a petition for rehearing *en banc* with the Sixth Circuit, citing the same conflict with *Grimes* and at least two decisions from this Court—*Chenery* and *United States* v. *Bestfoods*, 524 U.S. 51 (1998). On October 15, 2024, the Sixth Circuit denied the petition. App. 24a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates an Acknowledged Split with Decisions in the Fourth and Seventh Circuits.

Patriot Coal's bankruptcy has generated over 500 cases across three circuits in which DOL has named Arch liable as an insurer. Two of those cases—this one and the *Grimes* case in the Seventh Circuit—arose contemporaneously and ended in antipodal decisions two weeks apart. And because both courts declined to rehear their cases *en banc*, hundreds of future BLBA cases will arrive at irreconcilable outcomes based

solely on the circuit in which a claimant last worked. That might be an acceptable outcome for DOL in its effort to avoid Trust Fund liability, but it is intolerable for a statute Congress adopted to have nationwide effect and that collects the Black Lung Excise Tax at the same rate nationwide. *Glen Coal Co.* v. *Seals*, 147 F.3d 502, 513 (6th Cir. 1998) (cautioning against adopting different rules from one circuit to another because it "destroy[s] the desired uniformity of application of the Black Lung Benefits Act."). The core of the split is a divergent approach to *Chenery*. Arch argued both on the merits and in seeking rehearing *en banc* that *Chenery* prevents affirmance based on regulations that did not form the basis "upon which the record discloses that its action was based." *Chenery,* 318 U.S. at 87–88.

Those regulations include a pair of provisions that played no part in DOL's decision, but which the Sixth Circuit cited on appeal: 20 C.F.R. §§ 726.4(b) and 726.110(a)(1). The merits of treating those provisions as a source of liability are discussed below, see Part II *infra*, but in broad terms, they define who must obtain insurance for potential BLBA liability and reiterate that payment on such insurance policies is due when required elsewhere in the Act. They are not themselves a source of liability or a reason to treat Arch as if it still owned the subsidiary for which Mr. Howard worked. But, regardless of the regulations'

content, they were not the Department's contemporaneous reason for holding Arch liable.

In fact, DOL never argued that the provisions provided a basis for Arch's liability, and the ALJ and Board affirmatively ***disclaimed*** the notion that liability was based on Part 726. The ALJ instead concluded that Part 726 "governs only ***how*** an operator must secure its existing liability; it does not ***create*** liability." App. 122a (emphases in original). The Board agreed. App. 149a. Both the ALJ and the Board instead relied on rules for operator liability, even though DOL never designated Arch as the responsible operator. Again, however, the specifics of the ALJ's and Board's affirmative (and mistaken) reasoning are less important than the fact that they did not rely on Part 726 and, in fact, affirmatively rejected it as a basis for requiring Arch rather than the Trust Fund to pay Mr. Howard's benefits.

None of that prevented the Sixth Circuit from relying on 20 C.F.R. §§ 726.110(a)(1) and 726.4(b) to justify any changes to a former parent's self-insurance obligations. App. 16a–17a. In a single paragraph, the panel below quoted the general rule that a self-insurer must pay "as required by the Act," 20 C.F.R. § 726.110(a)(1), and noted that liability can extend to prior owners, 20 C.F.R. § 726.4(b). *Ibid*. From those premises, it rejected Arch's argument for corporate separateness and declared that Arch was

liable as self-insuring a subsidiary it sold long ago. *Ibid*. It went on to reject various other challenges Arch raised, but the only affirmative bases for extending Arch's self-insurance obligations to a former subsidiary were the two provisions from Part 726 rejected explicitly by the ALJ and the Board below.

This is not the first time that the Sixth Circuit ignored *Chenery* in the black lung context. In acknowledging the circuit split, the Seventh Circuit pointed to *Arch of Kent.* v. *Director, OWCP*, 556 F.3d 472, 477 (6th Cir. 2009), to show the Sixth Circuit's long-running refusal to apply *Chenery*. App. 42a; see also *Crockett Colleries, Inc.* v. *Barrett*, 478 F.3d 350 (6th Cir. 2007). The justification for the Sixth Circuit's entrenched approach is difficult to discern, since *Chenery* turned on general principles of administrative and constitutional law rather than a distinguishable statutory provision. And nothing in the BLBA indicates that Congress intended to break with the legal backdrop already in place at the time of the Act's adoption. See *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 697–700 (1979) (explaining that Congress is presumed to legislate against the backdrop of this Court's precedent).

The Seventh Circuit meanwhile devoted significantly more analysis to the Sixth Circuit's theory of liability. It explained that "[a]lthough

§§ 726.110(a)(1) and 726.4(b) found passing mention in the decisions of the ALJ and the Board below, neither decisionmaker intimated, let alone held, that Arch's liability as a third-party self-insurer sprung from those regulations. *Chenery* thus precludes us from affirming the Board on the Sixth Circuit's theory." App. 46a. It went on to discuss the substance of those provisions, see Part II *infra*, but the reason for refusing to follow the Sixth Circuit was *Chenery* and the requirement that courts consider only an agency's contemporaneous rationale for its actions.

The Fourth Circuit understands *Chenery* in the same way. In *American Energy, LLC* v. *Director, OWCP*, 106 F.4th 319 (4th Cir. 2024), the Fourth Circuit considered the two ways in which a miner can qualify for black lung benefits: a disabling respiratory impairment caused by an observable fibrotic reaction to coal dust exposure ("clinical" pneumoconiosis), and one based on a chronic pulmonary condition assumed to arise out of coal mine employment ("legal" pneumoconiosis). After concluding that the Board erred in finding legal pneumoconiosis, the court reviewed the evidence of clinical pneumoconiosis and concluded that "the ALJ's clinical pneumoconiosis findings" can "support the award of benefits." *Id.* at 335. But the Board did not consider clinical pneumoconiosis. *Ibid.* Therefore, "under our precedent, in black lung cases, 'affirming the Board's decision on an alternative ground not actually relied

upon by the Board is prohibited under the *Chenery* doctrine.'" *Ibid.* (quoting *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421, 426 (4th Cir. 2006) (modifications omitted)); see also *Gulf & W. Indus.* v. *Ling*, 176 F.3d 226, 230 (4th Cir. 1999) (*Chenery* requires a court to look to the Board's decision to "ascertain the bases underlying the DOL's exercise of its power.")

Like the Seventh Circuit's decision in *Grimes*, the Fourth Circuit's holding in *American Energy* is impossible to reconcile with the decision below. The fact that all three of these decisions issued in the past 12 months only underscores the clarity of the split over whether *Chenery* applies to BLBA cases. Add to that the refusal of both the Sixth and Seventh Circuits to rehear their cases *en banc*, and the need for resolution by this Court becomes impossible to ignore. Moreover, coal mining does not occur in every corner of the country, meaning that not every circuit will have occasion to pass on the question presented. The Fourth, Sixth, and Seventh Circuits hear the majority of BLBA claims. And they could not be more sharply divided.

II. The Sixth Circuit's Approach Is Irreconcilable with this Court's Precedent and Warrants Review or Summary Reversal.

A. The Decision Below Is Incompatible with *Chenery*.

For over eighty years, *Chenery* has supplied "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015). The reason for that rule is the constitutional separation of powers. While *Chenery* noted that an appellate court can affirm a district court's judgment on alternative legal grounds, it distinguished the Article II context: "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. The decision below lays waste to the rule from *Chenery* and invites further erosion of the principles behind it.

In *Chenery*, the SEC "professed to decide the case before it according to settled judicial doctrines," which the Court quickly concluded the agency had misapplied to the particular stock transaction before it. *Id.* at 89. As an alternative, the Commission invoked its broad authority to evaluate the fairness of insider transactions under the Securities Exchange Act. *Id.* at 91–92. The Court appeared to accept the merits of the Commission's alternative argument,

"[b]ut the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based." *Id.* at 92.

Like the current case, *Chenery* was an agency adjudication. And, like the current case, the agency not only declined to base its decision on the rationale later advanced in court, but "such a claim against the respondents was ***explicitly disavowed*** by the Commission." *Id.* at 93 (emphasis added). That is precisely the situation here. The ALJ expressly rejected Part 726 as a basis for liability, and the Board affirmed that conclusion. App. 122a–123a, 149a.

Likewise in *Michigan*, "EPA said that cost was *irrelevant*" to its determination that regulation was appropriate—the equivalent of the ALJ disavowing Part 726 as a source of liability here—before offering different ways in which it might have satisfied the statutory requirement to consider cost. 576 U.S. at 758. Applying *Chenery*, the Court insisted on reviewing only the agency's contemporaneous rationale, not a later-developed alternative justification. *Ibid.*

Even if the regulatory provisions the Sixth Circuit cited were persuasive (and they are not, see Part II.B *infra*), the Court does not balk at "[r]equiring a new decision before considering new reasons." *Dept. of Homeland Sec.* v. *Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1909 (2023). Doing so assures "agency

accountability." *Bowen* v. *American Hospital Assn.*, 476 U.S. 610, 643 (1986). The current case is the antithesis of accountability. The Department disregarded both the Administrative Procedure Act and the Constitution by adopting a new policy without notice-and-comment rulemaking that applied retroactively to long-settled transactions. When its feeble justifications wilted after merits briefing, the Sixth Circuit engineered its own justification—never endorsed by the agency and untested through the adversarial process. In many ways, this judicial salvage operation is even more troubling than the *Chenery* fact pattern in which the agency attempts a different justification, which at least affords the opposing party a chance to respond.

The resulting procedural unfairness is palpable. Arch never had an opportunity to brief the issue of Part 726's applicability, and DOL's brief in the Sixth Circuit never cited 20 C.F.R. § 726.4 and only once referenced 20 C.F.R. § 726.110(a) in its statement of the case for the uncontroversial proposition that self-insured mine operators must file certain paperwork with the Department. Federal Respondents' Br., *Apogee Coal* v. *Director, OWCP*, No. 23-3332 at 6 (6th Cir. filed Jan. 2, 2024). Arch had no reason to think that these provisions would later form the basis for a ruling against it, especially after litigating the case for over eight years. Nor were any of the other mining companies impacted by DOL's policy change alerted to

the potential for liability under Part 726 until after the Sixth Circuit ruled.

Ultimately, the Sixth Circuit's decision contravenes *Chenery*'s holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. at 95. That inconsistency with this Court's precedent is a reason for granting the Petition, S. Ct. R. 10(c). The Sixth Circuit's error is also "obvious in light of [*Chenery*]," such that summary reversal is appropriate. *Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006).

B. The Regulations on which the Sixth Circuit Relied Have Nothing to Do with Liability.

Even on its own terms, the Sixth Circuit's side of the circuit split is indefensible. After concluding that "*Chenery* . . . precludes us from affirming the Board on the Sixth Circuit's theory," the Seventh Circuit went on to consider the decision below on its own terms. App. 46a. It rightly concluded that "[e]ven if we could overlook *Chenery*, it is hard to see how either [20 C.F.R. §§ 726.110 or 726.4] could support a finding of liability on the facts before us." *Ibid.* That conclusion is correct and supports summary reversal.

20 C.F.R. § 726.4(b) notes that a variety of entities "***may*** be determined liable for the payment of

pneumoconiosis benefits," and therefore directs that such entities "shall take appropriate steps to insure" BLBA liability. No one disputes that Arch complied with the requirements of Section 726.4 by obtaining DOL's approval to self-insure at all relevant times. As noted above, that approval entailed disclosure of the list of mines that Arch was insuring—a list that changed upon the fully disclosed sale of Apogee on December 31, 2005.

But the Sixth Circuit read Section 726.4 to do more than impose a duty to either self-insure or obtain commercial insurance. It read the provision as a source of liability rather than simply requiring insurance. App. 16a–17a. The plain text of the regulation refutes that construction. It notes that "[c]omprehensive standards have been promulgated in subpart G of part 725 of this subchapter" for identifying the responsible party. 20 C.F.R. § 726.4(b). "[P]ursuant to ***these standards*** any parent or subsidiary corporation . . . may be determined liable for the payment of pneumoconiosis benefits." *Ibid.* (emphasis added). Far from imposing liability, Section 726.4(b) refers to Part 725 as the source of liability. It merely lists the many entities that could potentially be on the hook if the liability-imposing regulations in Part 725 applied and DOL made the necessary findings.

The Seventh Circuit recognized the Sixth Circuit's error. It explained that Section 726.4 "appears to do no more than give the Secretary of Labor flexibility in determining which entities can be designated as the responsible operator. But remember that the district director designated Apogee—not Arch—as the responsible operator for Mrs. Grimes's benefits." App. 47a. The Seventh Circuit did not reach the question of whether the Department would have been justified in designating Arch as the responsible operator "because that is not the decision that was actually made by the agency." *Ibid.*

Likewise, 20 C.F.R. § 726.110(a)(1) provides that a self-insurer must "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). The Sixth Circuit never explained how this provision creates liability for Arch, which was never required to make payment "by the Act" or by contract, or under any other source of law. A self-insurer only violates Section 726.110(a) "when [payment is] due, as required by the Act," and the company fails to pay. That, however, is not a basis for finding a company liable in the first place, which is the purpose for which the Sixth Circuit proposed to use this regulation.

The Seventh Circuit confirmed that the phrase "as required by the Act" means that "§ 726.110(a)(1) is not

an independent source of liability—a self-insurer's promise to pay benefits kicks in only if a provision elsewhere in the Act makes it liable on a claim." App. 46a–47a. No other circuit has construed Section 726.110(a) as an independent source of liability. The Sixth Circuit's self-guided quest for a source of law that would make Arch responsible as the self-insurer of a different business ended in a construction of the regulations that no party advanced and no court has ever adopted. In the absence of a "basis in positive law" for holding Arch responsible, courts should follow "the time-honored principle 'that a parent corporation . . . is not liable for the acts of its subsidiaries.' App. 44a (quoting *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998)).

The Sixth Circuit's transparent error illustrates one of the reasons for *Chenery*. Had the ALJ or the Board proposed to hold Arch responsible under Part 726, they would have had the benefit of briefing explaining the error in doing so. And had they held Arch responsible under these two provisions, Arch would have explained the error in its briefs before the Sixth Circuit. Instead, the introduction of a new theory by the appellate court has led to an untested and indefensible construction of the law over eight years after this litigation started. Among its many virtues, *Chenery* prevents this outcome.

CONCLUSION

The Court should grant the Petition.

January 10, 2025

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 5, 2024

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 23-3332

APOGEE COAL COMPANY, LLC;
ARCH COAL, INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; DAVID M. HOWARD,

Respondents.

Decided and Filed: August 5, 2024

Before: GIBBONS, McKEAGUE, and STRANCH, Circuit Judges.

OPINION

JANE B. STRANCH, Circuit Judge.

This petition concerns Arch Resources and Apogee Coal Company's challenge of Black Lung Benefits Act (BLBA) liability for a claim submitted by David Howard.

Howard mined from 1978 to 1997, and his last employer was Apogee Coal (at that time, owned and self-insured by Arch). The parties, referred to collectively as "Arch," do not contest Howard's entitlement to benefits for legal pneumoconiosis, but do dispute being identified as the liable insurer on Howard's claim. Petitioners ask this court to review the Benefits Review Board's decision affirming the Administrative Law Judge's finding that Arch was the liable insurer for Howard's benefits claim under the BLBA. Arch likewise asks this court to grant its motion to supplement the administrative record on appeal. For the reasons stated below, we **DENY** the petition for review and Arch's motion.

I. BACKGROUND

A. The Black Lung Benefits Act

The Black Lung Benefits Act provides benefits to miners suffering from pneumoconiosis, a lung disease caused by prolonged exposure to coal dust. *See* 30 U.S.C. §§ 901(a), 922. As an administrative act providing employment injury benefits, it incorporates the Longshore and Harbor Workers' Compensation Act (the "Longshore Act"), *see* 30 U.S.C. § 932(a), which, in turn, incorporates the Administrative Procedure Act (APA). *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 271, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994). BLBA hearings are to be conducted in accordance with the requirements of both the Longshore Act and the APA, which vest Administrative Law Judges with the power to hold hearings, make credibility judgments, and award benefits. *See* 33 U.S.C. §§ 919(d), 927.

Operating within the APA and Longshore Act frameworks, the BLBA "ensure[s] that coal mine operators are liable 'to the maximum extent feasible' for awarded claims" by implementing a specific, sequential process for determining a liable operator and adjudicating the merits of a claim. *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014) (quoting *Dir., OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989)). The process is triggered when a miner files a claim. That claim goes to a district director, who "is responsible for identifying those operators that are potentially liable and for issuing an initial order designating the responsible operator." *Id.* The district director must then "investigate whether any operator may be held liable for the payment of benefits" and notify any potentially liable parties through a Notice of Claim. 20 C.F.R. §§ 725.407, .495. Under the BLBA, a miner's last employer is presumed "capable of assuming its liability" for BLBA claims if it either obtained commercial insurance or was self-insured "during the period in which the miner was last employed by the operator, provided that the operator" either still qualifies as a self-insurer or has provided a security deposit "sufficient to secure the payment of benefits in the event the claim is awarded." *Id.* § 725.494. A district director may presume an operator's ability to pay so long as that operator was the claimant's last mining employer. *See id.* § 725.495(d). If the operator contests liability, as Arch does, then it bears the burden of proving that it is not liable. *See id.* §§ 725.103, .408(a). The operator has 90 days from the date it receives the Notice of Claim to submit any documentary evidence that may show it was not properly identified. *Id.* § 725.408(b).

A district director then issues a Schedule for Submission of Additional Evidence (SSAE) including "the district director's designation of a responsible operator liable for the payment of benefits." *Id.* § 725.410(a)(3). The SSAE gives the parties, including the "designated responsible operator," another "60 days within which to submit additional evidence." *Id.* at § 725.410(b). The SSAE provides the last opportunity for an operator to submit evidence contesting its liability, absent extraordinary circumstances. *See id.* §§ 725.456(b)(1), .457(c)(1). This is because following the SSAE period, a district director issues a Proposed Decision and Order (PDO) for the claim. *Id.* § 725.418. The PDO serves as the final designation of a liable operator, *see id.* § 725.418(d), and if an Administrative Law Judge (ALJ) later finds that the operator was improperly identified, a different operator may not be specified and any benefits will be awarded from the federally administered Black Lung Disability Trust Fund. *See* Final Rule, 65 Fed. Reg. 79920, 79990 ¶ (b) (Dec. 20, 2000). Once a PDO is issued, an ALJ takes over the claim—at which point no further evidence contesting liability may be submitted unless the operator demonstrates extraordinary circumstances warranting admission. 20 C.F.R. §§ 725.456(b)(1), .457(c)(1).[1]

The ALJ ultimately determines the award of benefits on a BLBA claim. The BLBA provides these benefits from one

1. We refer to the BLBA regulations that specifically relate to the process of putting forth evidence to contest liability before the district director (or, in the presence of extraordinary circumstances, to the ALJ) as "liability evidence rules." *See* 20 C.F.R. §§ 725.408; 725.410(a)-(b); 725.414(b)-(d); 725.456; 725.457.

of two sources: 1) the Black Lung Disability Trust Fund, a federally administered trust fund financed by taxes on coal, or 2) the private insurance of mine operators. *See id*. §§ 725.490, .494(e). Operator insurance comes in two forms: self-insurance, (i.e., operators covering their own costs under a process regulated by DOL), or commercial insurance (i.e., insurance purchased through traditional insurance carriers). *Id.* § 726.1. An operator may appeal to the Benefits Review Board to contest the award of benefits; upon affirmance, an operator may then petition this court for review. *Id.* §§ 725.481-.482.

B. Proceedings Below

After 17 years of mining, David Howard retired from his last employer, Apogee Coal Company. On his last day of work—February 27, 1997—Apogee was self-insured through its owner, Arch Resources, formerly known as Arch Coal. Then, in 2005, Arch sold Apogee and its federal black lung liabilities to Magnum Coal Company. These interests were transferred again when Patriot Coal Company purchased Magnum and its liabilities in 2008. So, when Howard filed for benefits in 2014, the District Director investigating Howard's claim identified Apogee, self-insured through Patriot, as the potentially liable operator and issued a Notice of Claim naming it as such. The Department of Labor (DOL) then named Patriot as the presumptive insurer of Howard's claim on the SSAE issued on August 25, 2015.

On October 9, 2015, Patriot was dissolved in bankruptcy. U.S. Dep't of Labor, BLBA Bulletin No. 16-01, 1 (2015).

The following month, the DOL issued Bulletin 16-01 (the "Bulletin"), instructing that Arch should be notified as the liable insurer for Patriot's "claims pending before the District Director" that originally fell under Arch's previous self-insurance—regardless of its later transfers. *Id.* at 3-4.

Howard's claim fell under the Bulletin's guidance because Arch was Apogee's self-insurer on Howard's last day of work with Apogee. So, on December 8, 2015, the District Director issued a second Notice of Claim, this time naming Arch as the liable insurer. Later, on March 17, 2016, the District Director issued an SSAE similarly naming Arch as Apogee's insurer. Arch responded by submitting a CM-2970(a) form to the District Director contesting its designation as a liable party in Howard's claim. Arch, however, failed to submit or request evidence and failed to name any liability witnesses. Arch's deadline to submit evidence passed on May 16, 2016. With no evidence contradicting Arch's assignment of liability, the District Director issued a PDO ordering Howard's benefits to be paid from Arch's self-insurance.[2] The matter was assigned to an ALJ, and Arch filed motions to hold Howard's case in abeyance pending collateral litigation and to extend the discovery period. Both motions were denied.

2. The PDO lists Arch in its designation of certification but at a single place in the PDO cites Patriot as the self-insuring carrier. While we agree with the ALJ that this was apparently an error (as the mention of Patriot references the original notice of claim rather than the operable notice of claim), the error is irrelevant to our review due to the PDO's nonbinding effect.

While Arch was contesting its liability for Howard's claim in this case, it filed a suit in the U.S. District Court for the District of Columbia on April 8, 2016 (the "D.C. case"), seeking injunctive and declaratory relief from the Bulletin. The district court dismissed that suit for lack of jurisdiction on March 16, 2017, and Arch appealed. *See Arch Coal, Inc. v. Hugler*, 242 F. Supp. 3d 13 (D.D.C. 2017); *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018). On April 27, 2018, the D.C. Circuit affirmed the dismissal of Arch's case, explaining that Arch was "required to exhaust its administrative remedies and secure a final order from the [Benefits Review] Board" regarding its challenge to the Bulletin before seeking review in the court of appeals. *Acosta*, 888 F.3d at 501, 503. It also noted that during those administrative proceedings, Arch would be "entitled to reasonable discovery before the Department to the full extent allowed by the BLBA and its implementing regulations." *Id.* at 502.

On April 29, 2019, over a year after the ALJ's denials of Arch's discovery motions in Howard's case and the D.C. Circuit's resolution of the D.C. case, Arch requested subpoenas from the ALJ in Howard's case and served the DOL with written discovery requests. Arch alleged that this discovery would prove "the Bulletin's retroactive and arbitrary departure from established self-insurance principles." The ALJ denied Arch's subpoena requests.

On June 19, 2019, Arch moved to transfer liability to the Black Lung Disability Trust Fund, and the ALJ denied the motion, then named Arch as the insurer on Howard's awarded benefits on February 25, 2020. Arch appealed to

the Board, and the Board affirmed. Arch timely petitioned this court for review.

On petition to this court, the parties submitted a joint appendix containing the record on appeal. Arch separately moved to supplement the appellate record with evidence not considered below, including public records, non-public documents, and documents from claims unrelated to Howard's. We consider Arch's petition for review and its motion to supplement below.

II. ANALYSIS

Arch contends that it is not liable for Howard's claim arising from his employment with Apogee. The ALJ and the Board rejected this argument and explained that Arch failed to timely submit evidence to the District Director after noting that it contested liability. On petition to this court, Arch moves to supplement the appellate record, challenges the evidentiary procedures applied below, and disputes three elements of the Board's decision on the merits. Because evidence supporting Arch's arguments is critical to the remainder of the appeal, we first consider its request to supplement the record and its evidentiary challenges. After determining the scope of the evidence properly before this court, we address Arch's arguments on the merits.

A. Motion to Supplement the Administrative Record on Appeal

Arch failed to submit evidence to the District Director and the ALJ denied its request to submit evidence late because

Arch did not meet its burden to show extraordinary circumstances. *See* 20 C.F.R. §§ 725.414(c)-(d), .457. Now, Arch requests that we allow it to "expand" the record before our court.[3]

Federal Rule of Appellate Procedure 16(b) provides that "parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed." We may supplement the administrative record in circumstances such as "when an agency has deliberately or negligently excluded certain documents from the record, or when a court needs certain 'background' information to determine whether the agency has considered all relevant factors." *Latin Ams. for Social & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 756 F.3d 447, 465 (6th Cir. 2014) (citation omitted). But "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

Arch does not allege that the supplementation corrects a mistake or omission below. *See* Fed. R. App. P. 16(b).

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3. Arch moved under "Federal Rule[s] of Appellate Procedure 10 [and] 28" to supplement the record on appeal. It also cited "Circuit Rules 16, 32"—but Circuit Rule 16 does not exist in the Sixth Circuit, and Rule 32 merely governs the form of briefs. *See* 6 Cir. R. 16, 32. Under the law of our Circuit, we construe Arch's motion as a Federal Rule of Appellate Procedure 16(b) motion to supplement the administrative record.

And Arch's motion does not provide any justification for its delay; it merely argues that this case is complex with far-reaching effects, and that many of the sources it seeks to introduce are either public records or evidence explicitly excluded by the ALJ. Arch's first point is unavailing, as many cases before this court are complex and have far-reaching effects, consequences best addressed by timely provision of evidence. Arch's second point is similarly unpersuasive, as public records do not present circumstances warranting admission—indeed, publicly available materials and materials held by Arch should have been easier to introduce timely. Arch's effort to enter materials excluded by the ALJ, moreover, effectively seeks an end-run around ordinary discovery procedures. In sum, Arch failed to submit any evidence by its discovery deadline, despite having ample notice of much of the evidence it now seeks to introduce. Neither equity nor the Federal Rules of Appellate Procedure favor Arch's motion. We deny the motion.

B. Liability Evidence Rules

Arch argues that the regulatory liability evidence rules relied upon below violate both the provisions of the BLBA and the APA as incorporated by the Longshore Act. It contends in the alternative that DOL's interpretation of the rules as applied to Arch was arbitrary and capricious. We address each argument in turn.

1. The Propriety of the Liability Evidence Rules

Arch first argues that the liability evidence rules employed below impermissibly empower district directors to perform an evidentiary gatekeeping role that properly belongs to ALJs under the APA. "On petitions for review from the Benefits Review Board, we review the Board's legal conclusions de novo." *Karst Robbins Coal Co. v. Dir., OWCP*, 969 F.3d 316, 323 (6th Cir. 2020).

Arch's argument rests on the relationship between the BLBA, the APA, and the Longshore Act. The Supreme Court has explained that the BLBA "incorporates the APA (by incorporating parts of the [Longshore Act]), but it does so except as otherwise provided by regulations of the Secretary." *Greenwich Collieries*, 512 U.S. at 271, 114 S.Ct. 2251 (cleaned up).

Arch claims that the BLBA regulations' evidentiary procedures violate a provision of the Longshore Act that requires hearings administered under the Act to "be conducted in accordance with the" APA. 33 U.S.C § 919(d). The APA sets out procedural rules that govern a broad range of administrative proceedings. *See* 5 U.S.C. § 556. Its rules apply to certain hearings carried out under the Act, but those rules do "not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute." *Id.* § 556(b). The BLBA regulations then incorporate the APA's procedures "except as is otherwise provided by the Act or" DOL

regulations because certain "procedures prescribed by the" Longshore Act and the APA "must be altered to fit the circumstances ordinarily confronted in the adjudication of a black lung claim." 20 C.F.R. § 725.1(j); *see* 30 U.S.C. § 932(a). Thus, the BLBA-authorized regulations expressly authorize departing from the procedures otherwise required by the Longshore Act and APA to address the unique circumstances surrounding black lung claims. And the APA specifically contemplates such departures. *See* 5 U.S.C. § 556(b). In short, the APA and the BLBA are consistent—the BLBA regulations' evidentiary procedures do not offend the APA.

It is also not clear that the BLBA-authorized liability evidence rules conflict with the APA's analogous rules. Arch takes issue with the requirement that evidence or notice of future evidence be given to a district director, not an ALJ, on the basis that the APA and Longshore Act require an ALJ to consider evidence and award benefits. *See* 20 C.F.R. § 725.415. But the BLBA regulations do not divest the ALJ of power to take evidence. *See id.* § 725.351. Instead, the ALJ may take evidence under appropriate circumstances. *See id*; *see also id.* § 725.414(c). And the ALJ is responsible for taking certain kinds of evidence (e.g., witness testimony) that the parties noticed to the district director. *Id.* § 725.351. Ultimately, it is the ALJ who weighs evidence of each case and determines an award. *Id.*

Congress intended for this to be the case. The BLBA-authorized regulations consistently reference the requirement that evidence offered to contest liability

must be brought before a district director. *See, e.g.*, 20 C.F.R. §§ 725.410, .414, .456, .457. The language of the liability evidence rules is clear: parties contesting their identification for liability have 90 days to supply or notice any evidence supporting their position. *See* 20 C.F.R. §§ 725.407, .408(b). The liability evidence rules are consistent with the provisions of the BLBA and the APA.

2. Interpretation of the Liability Evidence Rules

Arch also takes issue with the ALJ's reliance on the BLBA regulations in denying it discovery three years after the deadline to submit evidence. Arch argues that the rules do not apply to its particular circumstance because Arch sought discovery to challenge the DOL's alleged departure from past practice with self-insurers, rather than to defend against Howard's claim.[4] Arch alleges that the ALJ's denial of its motion to issue subpoenas on two DOL employees was arbitrary and capricious. The DOL counters that Arch sought these subpoenas, and pursued

4. Arch appears to suggest that the rules should not apply to it because it challenged liability as an insurer, rather than an operator or employer. Nothing in the regulations, statutes, or caselaw supports this argument. In fact, the Board has long held that "liability evidence rules apply to carriers." *Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, 2012 WL 5267588 at *3 (Ben. Rev. Bd. Sept. 19, 2012) (citation omitted); *see also J.H.B. v. Peres Processing, Inc.*, BRB No. 08-0625 BLA, 2009 WL 2104861, at *4-5 (Ben. Rev. Bd. June 30, 2009) (per curiam) (applying liability evidence rules to a carrier contesting its liability); 20 C.F.R. §§ 725.407, .414(b)-(d).

its challenge to the Bulletin, as a mechanism for disputing liability in Howard's case, and so its discovery requests fell squarely within the liability evidence rules.

An agency's actions are arbitrary and capricious when:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). The agency must articulate a "rational connection between the facts found and the choice made." *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

"Under the Department of Labor's regulations, no operator may submit evidence regarding the operator's capability of assuming liability for the payment of benefits unless it does so within ninety days of receiving notice that it is a 'potentially liable operator.'" *Appleton & Ratliff Coal Corp. v. Ratliff*, 664 Fed. App'x 470, 475 (6th Cir. 2016) (quoting 20 C.F.R. § 725.408). A party may submit new evidence to contest liability after the 90-day period has elapsed only in "extraordinary circumstances." *See* 20 C.F.R. §§ 725.456(b)(1), .457(c)(1).

After receiving the Notice of Claim on December 8, 2015 and the subsequent SSAE on March 17, 2016, Arch contested its liability identification in April 2016, but it did not submit any evidence before the final deadline of May 16, 2016. It was not until April 29, 2019, that Arch sought discovery in support of its position that the Bulletin improperly reassigned liability from Patriot to Arch. Regarding extraordinary circumstances warranting subpoenas to be served on DOL employees, Arch argued that it could not have timely presented evidence to the District Director because the D.C. case challenging the Bulletin was ongoing and because "experience had taught it that [the] DOL would not, in fact, afford it discovery to develop its claims." But the ALJ held that neither was an impediment to seeking discovery or presenting evidence to contest liability because the regulations still bound Arch in this case.

Accordingly, the ALJ denied Arch's request. Because Arch's dispute was over its "capability of assuming liability," the ALJ rationally held Arch to the statutory 90-day or extraordinary circumstance standard. The ALJ's application of the BLBA's liability evidence rules was neither arbitrary nor capricious.

C. Bulletin 16-01

Trying a different tack, Arch contends that through Bulletin 16-01, the DOL changed "a Fifty-Year-Old Policy Retroactively and in violation of Corporate and Insurance Law Principles and the Regulations." Specifically, Arch argues that treating self-insurance the same as

commercial insurance for liability purposes, especially in light of Arch's subsequent sale, 1) ignores corporate separateness; 2) creates a new "rule" for self-insurance that is required to pass through notice and comment; and 3) departs from past practice in violation of the APA and due process principles. We address each argument below.

1. Self-Insurance, Commercial Insurance, and "Corporate Separateness"

Arch first argues that it was improperly found liable for Howard's claim because holding it accountable after its sale of Apogee violates principles of corporate separateness and the distinctions between self-insuring operators and those using commercial insurance. We review questions of law, including the interpretation of the BLBA, de novo. *See Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 243 (6th Cir. 2004). "If clear, the plain meaning of the statutory language controls." *Id.* at 246. We take the same approach when interpreting regulatory language. *See Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich.*, 32 F.4th 548, 557 (6th Cir. 2022).

A self-insurer is obligated "[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). Self-insurers, like commercial insurers, are bound by the terms of the BLBA. *Id.* § 726.1. For the purposes of BLBA liability, the pool of potentially liable parties is broad: "any transferee or transferor of a corporation or other business entity," and any "business entity which has had or will have

a substantial and reasonably direct interest in the operation of a coal mine," may be liable under the BLBA. *Id.* § 726.4(b). "The failure of any such business entity to self-insure or obtain a policy or contract of insurance shall in no way relieve" it from "its obligation to pay" BLBA benefits. *Id.*

Arch invokes the theory of successor liability, claiming that its sale of Apogee's liabilities completely severed the two businesses and insulated it from future Apogee-originated claims.[5] It thus contends that holding Arch liable for Howard's claims, predicated on his service as an Apogee employee, is unlawful. But this ignores the plain language of the regulations above. Transfers of business interests and self-insurance are expressly contemplated by the statute and its implementing regulations, so principles of "corporate separateness" found elsewhere in the law do not change the statutory obligations at play here.[6] Arch's identity as a self-insurer, rather than a corporate insurer, does not alter the statutory requirements for paying claims owed by an operator.

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5. Arch likewise argues that holding it accountable for Apogee's liabilities constitutes impermissible "veil piercing." But, as noted by the ALJ and Board, Arch was identified as the self-insurer on the claim, and it is true that Arch self-insured Apogee during Howard's employment. So, veil piercing is irrelevant to Arch's duty to perform its insurance promise, as there is no need to pierce the "veil" of Apogee to reach Arch's liability.

6. Arch argued below, as it does to this court, that commercial insurance uses an "occurrence trigger," while self-insurance uses a "claim trigger," for the purposes of determining a liable carrier. Its attempt to distinguish the two lacks support in the rules or the regulations.

After its identification, it was up to Arch to show that it was not the liable party. *See* 20 C.F.R. §§ 725.103, .410(b). As noted above, Arch failed to take any action in this claim to prove as much within the procedural requirements of the BLBA and accompanying regulations. This argument therefore fails.

2. Applicability of Notice-and-Comment

"Under the APA, whenever agencies promulgate 'a rule that "intends to create new law, rights or duties"' . . . they must engage in a process known as notice-and-comment rulemaking." *Oakbrook Land Holdings, LLC v. Comm'r of Internal Revenue*, 28 F.4th 700, 710 (6th Cir. 2022) (quoting *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018)), *cert. denied*, __ U.S. __, 143 S. Ct. 626, 214 L.Ed.2d 370 (2023). Arch claims that Bulletin 16-01 constitutes a rule under the APA and, as such, DOL violated the APA by failing to provide for notice and comment.

We look to the "content of the agency's action," not the name it ascribes to an action, to determine whether it engaged in legislative rulemaking that required notice and comment. *Arizona v. Biden*, 31 F.4th 469, 482 (6th Cir. 2022). A "hallmark[ ] of a substantive rule" is that the action "affect[s] individual rights and obligations." *Id.* (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979)).

In *Mann Construction, Inc. v. United States*, 27 F.4th 1138, 1143-44 (6th Cir. 2022), we held that a notice

promulgated by the Internal Revenue Service (IRS) had "the 'force and effect of law'" and was therefore "subject to the notice-and-comment process" because it created a new duty for taxpayers that did not arise from a statute. The notice at issue in *Mann* made taxpayers subject to penalties for failing to report transactions to the IRS that they did not previously need to report, effectively changing the law. *Id.* at 1143-44. By contrast, in *Arizona*, we held that notice and comment was not required for an administrative policy that directed immigration officers to prioritize detention and removal of certain noncitizens based on specific criteria. 31 F.4th at 473, 482. Although the effect of the guidance was to single out certain parties for potential expulsion, *Arizona* held that it did not "affect individual rights and obligations." *Id.* at 482 (brackets omitted) (quoting *Chrysler Corp.*, 441 U.S. at 302, 99 S.Ct. 1705).

Here, the Bulletin states that its purpose is to "provide guidance for district office staff in adjudicating claims in which the miner's last coal-mine employment of at least one year was with one of the . . . companies that have been affected by [Patriot's] bankruptcy." U.S. Dep't of Labor, BLBA Bulletin No. 16-01, 1 (2015). Relevant to this claim, it states that for "cases pending before district directors, in which . . . the PDO is not yet final," district directors are to find out "whether the claim is covered by Arch Coal's self-insurance," and if so, to "send a notice of claim" to Arch through its appropriate state claims address. *Id.* at 3-4.

In reviewing this Bulletin, and in addition to our precedent on notice and comment requirements, we have

the benefit of a sister circuit's decision on a comparable case challenging Bulletin 16-01 brought by Arch Coal in the D.C. Circuit. *Acosta* recognized that "[i]t is well understood that the notice-and-comment provisions of section 553 of the APA do not apply to agency bulletins, policy statements, directives, guidances, opinion letters, press releases, advisories, warnings, or manuals that do not have the force of law." 888 F.3d at 501. *Acosta* then held that unlike a rule, Bulletin 16-01 "does not 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" *Id.* (quoting *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000)).

As the D.C. Circuit explained, Bulletin 16-01 simply guided district directors to provide claim notices to Arch where potentially appropriate. Because the determination of liability remained to be made in the discretion of the district director and ALJ, Arch had the ability to contest its identification. And Arch's status relative to potential claims did not change, because it was at all times a potentially liable party under the BLBA's regulations. *See* 20 C.F.R. § 726.4(b). As was the case in *Arizona*, the Bulletin did not create new rights nor liabilities. *See* 31 F.4th at 482. Accordingly, the Bulletin did not require notice and comment rulemaking.

3. The DOL's Usual Practice with Self-Insuring Claims

Arch also contends that the Bulletin represents a departure from fifty years of DOL policy. Yet the DOL

correctly points out that Arch failed to supply any evidence showing that the DOL has historically treated self-insurers and commercial insurers differently with respect to BLBA claims. In the absence of record evidence to support this contention, we affirm the Board.

D. Due Process and Notice

Arch's final argument is that it should be dismissed from this suit because it did not receive adequate notice that it was named as Apogee's carrier. The core of Arch's argument is that the PDO issued by the District Director named only Patriot, not Arch, as the carrier. Examination of the record, however, shows that the PDO incorrectly included Patriot's name once as Apogee's self-insurer, but documents attached to the PDO otherwise named Arch as the relevant self-insurer on Howard's claim. The PDO was also certified and sent to Arch—not Patriot.

"The basic elements of procedural due process are notice and opportunity to be heard." *Arch of Ky., Inc. v. Dir., OWCP*, 556 F.3d 472, 478 (6th Cir. 2009). A carrier's due process rights in the BLBA context are protected in part by 20 C.F.R. § 725.418, which states that "no operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410." The adequacy of the notice provision in § 725.418 therefore turns on the information provided by the Notice of Claim and SSAE.

Arch invokes this court's decision in *Warner Coal Co. v. Director, OWCP*, 804 F.2d 346 (6th Cir. 1986), to argue that

"named parties, including insurers, must receive notice in the PDO as a matter of due process." But nowhere in that case was a PDO mentioned, nor the regulation requiring that it name a carrier. Instead, *Warner Coal* considered the broader issue of "whether . . . the Secretary of Labor must give written notice of the black lung claim to the insurance carrier for the claimant's employer prior to the administrative adjudication of a claim affecting the carrier's liability." 804 F.2d at 346. It held that due process in the BLBA carrier liability context required "that the carrier be given adequate notice and an opportunity to defend," and so, "carriers must receive notice in [BLBA] claim proceedings." *Id.* at 347.

Prior to the award of benefits, Arch received notice of the proceedings and an opportunity to defend through both the Notice of Claim and the SSAE's identification of Arch as the liable carrier. Arch in fact received notice and subsequently participated in the claim by filing a CM-2970(a) form contesting its liability. And Arch has made it abundantly clear that after receiving the Notice of Claim in this and other cases following the issuance of Bulletin 16-01, it understood that DOL intended to name it as the liable party in claims such as Howard's. This knowledge, moreover, is the reason Arch offers to explain its filing of the D.C. case and its refusal to submit evidence per the issued schedule in this case. Thus, Arch had "adequate notice and an opportunity to defend" against its inclusion in Howard's claim. *Id.*

Accordingly, Arch has not shown that its due process rights have been violated.

III. CONCLUSION

Because Arch has provided no extraordinary circumstances justifying its motion to expand the record, and because it has failed to make any meritorious argument on the merits of the Board's decision below, both its motion and petition before this court are **DENIED**.

APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3332

APOGEE COAL COMPANY, LLC;
ARCH COAL, INC.,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATIONPROGRAMS, U.S. DEPARTMENT OF LABOR; DAVID M.HOWARD,

Respondents.

ORDER

BEFORE: GIBBONS, McKEAGUE, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Appendix B

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 19, 2024

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

No. 23-2521

APOGEE COAL COMPANY, *et al.*,

Petitioners,

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondent.

Argued May 13, 2024
Decided August 19, 2024

Before Scudder, St. Eve, and Pryor, Circuit Judges.

OPINION

Scudder, Circuit Judge.

Harold Grimes developed black lung disease after 34 years of working in coal mines. He died of lung cancer in 2018. It is undisputed that Grimes's spouse, Susan, is eligible for survivor's benefits under the Black Lung

Benefits Act. This appeal requires us to decide who must pay those benefits. A Department of Labor administrative law judge assigned financial responsibility to Apogee Coal Company—Grimes's last employer—and the Benefits Review Board affirmed. Central to both decisions was the conclusion that Arch Resources Inc.—Apogee's former parent corporation—bore responsibility for paying the benefits on Apogee's behalf. Arch disagrees and insists that Mrs. Grimes's benefits must instead come from the Black Lung Disability Trust Fund. On the record before us, we agree with Arch. Neither the ALJ nor the Board has identified any provision (or combination of provisions) in the Act or its implementing regulations that justify holding Arch liable for the benefits obligations of Apogee. So we grant Arch's petition for review, vacate the Board's decision, and remand with instructions that Mrs. Grimes's benefits be assigned to the Trust Fund.

I

A

The Black Lung Benefits Act provides disability benefits to miners "totally disabled" due to black lung disease. See *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 108, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988); see also 30 U.S.C. §§ 901(a), 922(a), 932(c). It does so largely at the expense of the mining industry itself. Whenever possible, the statute assigns financial responsibility for a miner's benefits to one of the coal mine operators in whose service the miner developed black lung disease. See *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 693 (7th Cir. 1987); see also 30 U.S.C.

§ 932(c); 20 C.F.R. § 725.495(a)(1). When no such entity is capable of paying, the cost of benefits falls to the Black Lung Disability Trust Fund, see 26 U.S.C. § 9501(d)(1)(B), which is jointly administered by the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services, see *id.* § 9501(a)(2), and funded by an excise tax on coal, see *id.* §§ 9501(b)(1), 4121(a)(1).

The Department of Labor adjudicates benefits claims under the Act. See 30 U.S.C. § 932a; see also *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 717, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (describing administrative scheme). The Department's Division of Coal Mine Workers' Compensation performs this work in field offices across the nation. 30 U.S.C. § 903(a); see also DCMWC Offices and Leadership, https://www.dol.gov/agencies/owcp/dcmwc/districtoffices, archived at [perma.cc/8EVQ-CETS].

The processing of black lung claims occurs in three stages. The district director for the field office that received the claim undertakes the initial review, including by examining the applicant's employment history, see 20 C.F.R. § 725.404(a), and notifying those coal mine operators, if any, that are potentially responsible for paying benefits under the statute. See *id.* § 725.407(a)–(b); see also *Rockwood Cas. Ins. Co. v. Director, Off. of Workers' Compensation Programs*, 917 F.3d 1198, 1205–06 (10th Cir. 2019) (discussing notification process). Absent the requisite notice, liability for benefits obligations cannot be imposed on a coal mine operator. See 20 C.F.R. § 725.360(a)(3). In addition to fulfilling these threshold

functions, district directors have substantial authority to gather evidence, see *id.* § 725.404, develop the medical record, see *id.* § 725.414, and hear argument from interested parties, see *id.* §§ 725.408(a)(2), 725.412(a)(1), 725.416(a).

The work of the district director culminates in the issuance of a decisional document called a preliminary decision and order (or PDO for short) that "resolve[s] [the] claim on the basis of the evidence submitted to or obtained by the district director." *Id.* § 725.418(a). In any case in which the district director awards benefits, it must designate the coal mine operator, if any, that the Act and its implementing regulations make liable for the miner's benefits. See *id.* § 725.418(d). Absent such a designation, the district director must assign the claim and attendant payment obligation to the Trust Fund. See 26 U.S.C. § 9501(d)(1)(B).

The Act and its regulations establish a two-step procedure for determining which employer, if any, is liable for awarded benefits. A district director first identifies each of the miner's previous employers that qualify as a so-called potentially liable operator under five criteria enumerated in 20 C.F.R. § 725.494(a)–(e). Only the fifth of these criteria is contested in this appeal—that "[t]he operator [be] capable of assuming [] liability for the payment of continuing benefits . . . ." *Id.* § 725.494(e). After identifying the pool of potentially liable operators, the district director must then select a single responsible operator according to the formula prescribed by a neighboring regulation, § 725.495. As a general rule, that regulation makes liable

"the potentially liable operator . . . that most recently employed the miner." *Id.* § 725.495(a)(1).

Parties dissatisfied with a district director's PDO may seek referral to an ALJ for a formal hearing to resolve any contested issue. See *id.* §§ 725.450, 725.451. In most respects, the district director's findings do not bind the ALJ. The ALJ may not, however, revisit the district director's decision to designate a particular employer as the financially liable operator under the Act's liability rules. See *Rockwood Cas. Ins. Co.*, 917 F.3d at 1215. If the ALJ determines that the district director designated the wrong entity, "a new responsible operator may not be named." *Id.* The benefits are instead paid out of the Trust Fund. See Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79990 (Dec. 20, 2000) ("In the event the responsible operator designated by the district director is adjudicated not liable for a claim, the Black Lung Disability Trust Fund will pay any benefit award.").

A party that disagrees with an ALJ's decision may challenge it before the Benefits Review Board. See 33 U.S.C. § 921(b); 20 C.F.R. § 802.205(a). The Board's authority is strictly appellate—it may not "engage in a *de novo* proceeding or unrestricted review of a case brought before it." 20 C.F.R. § 802.301(a). Board decisions may be appealed to the court of appeals "for the circuit in which the [claimant's] injury occurred." 33 U.S.C. § 921(c).

Appendix C

B

To ensure that potentially liable operators have the financial ability to pay benefits, Congress has mandated that all operators either acquire a commercial insurance policy covering their black lung liability or receive the Department of Labor's approval to self-insure. See 30 U.S.C. § 933(a); 20 C.F.R. § 726.1; see also *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 319– 20 (7th Cir. 1998) (explaining that operators that fail to do one or the other "may be punished by civil penalty").

The self-insurance option permits an operator to satisfy its financial obligations under the Act by demonstrating to the Department's satisfaction that it has sufficient resources to forgo the procurement of commercial insurance coverage.

An operator seeking to self-insure must, at a minimum, satisfy several threshold requirements enumerated in 20 C.F.R. § 726.101(b), including that its "average current assets over the preceding 3 years" be sufficient to cover "black lung benefits . . . which such operator may expect to be required to pay during the ensuing year," *id.* § 726.101(b)(3), and that it "obtain security" in a form and amount approved by the Department, *id.* § 726.101(b)(4). Even then, the Department of Labor has discretion to deny an application for self-insurance. See *id.* § 726.101(a).

Upon approving an application for self-insurance, the Department sets the required amount of security at a level sufficient "to guarantee the payment of benefits and the

discharge of all other obligations which may be required of such applicant under the Act." *Id.* § 726.104(a). That security can take many forms, including (1) "an indemnity bond with sureties satisfactory to the [Department]," (2) "a deposit of negotiable securities with a Federal Reserve Bank," (3) "a letter of credit issued by a financial institution satisfactory to the [Department]," and (4) a trust fund established "pursuant to section 501(c)(21) of the Internal Revenue Code." *Id.* § 726.104(b)(1)–(4).

The approval of a self-insurance application reflects no more than a determination by the Department that an operator has sufficient assets to cover expected black lung liabilities at the time of approval. This explains why self-insurers must receive renewed authorization at periodic intervals, as financial health is not static. See *id.* § 726.110(a). All along the Department wields substantial authority to examine an operator's books and records, see *id.* § 726.112(b), to adjust the required level of security to reflect the evolving financial health of the operator, see *id.* § 726.109, and to withdraw self-insurance authorization entirely if circumstances come to warrant, see *id.* § 726.115.

II

With this statutory background in place, we turn to the dispute before us.

A

Harold Grimes worked as a coal miner from 1965 to 1999 in both underground and surface mines. That work brought

Grimes into regular contact with coal and rock dust as well as other gases and fumes. In retirement he developed emphysema and in 2016 was diagnosed with lung cancer. Believing that these conditions stemmed at least in part from his work in the mines, Grimes filed a claim for black lung benefits with the Department of Labor.

That filing set into motion the regulatory scheme we just described, beginning with the assigned district director examining Mr. Grimes's employment history to determine if any of his former employers satisfied § 725.494's requirements for potential liability. It found and notified just one—Apogee Coal Company. This was an interesting choice. Grimes, it is true, had worked for Apogee from 1972 until his retirement from the coal industry in 1999. But Apogee went bankrupt in 2015, alongside its parent company at the time, Patriot Coal Corporation. What is more, Apogee did not appear to resume operations following that bankruptcy.

In light of that history, the question before us comes into focus: how could § 725.494's fifth requirement be satisfied—that Apogee be "capable of assuming . . . liability for the payment of continuing benefits"—if the company was defunct. *Id.* § 725.494(e). This is where Apogee's parent company at the time of Grimes's retirement—Arch Resources Inc.—enters the mix.

In designating Apogee as a potentially liable operator, the district director, as it turns out, was simply following administrative protocol. Apogee was one of 50 Patriot Coal subsidiaries to go under in 2015. That wave of bankruptcies

placed tremendous financial pressure on the Black Lung Disability Trust Fund. See U.S. Gov't Accountability Off., GAO-20-438T, Black Lung Benefits Program: Oversight Is Needed to Address Trust Fund Solvency Strained By Bankruptcies, p. 2 (2020) (estimating that Patriot Coal's bankruptcy resulted in the transfer of $230 million of benefits responsibility from mining companies to the Trust Fund). In response to this development, the Department of Labor issued an internal bulletin instructing its claims processing staff to notify bankrupt subsidiaries of potential liability in situations where the Department believed solvent third parties could be required to pay benefits on the subsidiaries' behalf. See Div. of Coal Mine Workers' Comp., Off. of Workers' Comp. Programs, Dep't of Labor, BLBA Bull. No. 16-01 (2015).

This was most obviously the case for miners who worked for one of Patriot's bankrupt subsidiaries at a time when the subsidiary was covered by a commercial black lung insurance policy. That is because 20 C.F.R. § 726.203(a) requires all such policies to include an endorsement making the insurer liable for any black lung claim that accrues against its insured during the policy period, regardless of when the benefits claim is ultimately filed. See *Director, Off. of Workers' Compensation Programs v. Trace Fork Coal Co.*, 67 F.3d 503, 505 n.4 (4th Cir. 1995). What this means is that commercial insurers remain contractually obligated to pay black lung benefits on their insured's behalf, even when the insured has ceased operating. By extension it also means that bankrupt operators remain "capable of assuming liability for the payment" of insured claims under § 725.494(e), so long as the insurance company itself is solvent.

Here, however, Apogee was not covered by a commercial insurance policy during Mr. Grimes's employment. It instead obtained self-insurance authorization through its then-parent corporation, Arch Resources. On these factual points, everyone agrees.

So far as we can tell, the Act's regulations do not expressly contemplate such a parent-subsidiary self-insurance arrangement, which the parties refer to as a self-insurance umbrella. Nevertheless, it is apparently a common practice. From what we have been able to gather, this approach allows a subsidiary like Apogee to self-insure on the strength of its parent's financial health. If a subsidiary covered by the parent's financial umbrella is unable to pay a black lung claim, the Department can call on the parent to do so. In this way, parent corporations effectively guarantee their subsidiaries' black lung obligations.

The record before us does not reveal whether the terms of this parent-subsidiary self-insurance arrangement are memorialized in a written contract akin to black lung insurance policies. Although self-insurers are required, as a "condition precedent" to receiving self-insurance authorization, to "execute and file with the [Department] an agreement and undertaking" committing to pay black lung claims "as required by the Act," no such agreement is in the record. *Id.* § 726.110(a), (a)(1). Neither party did much in their briefs to explain with much clarity how these parent-subsidiary arrangements work and get recorded at a nuts-and-bolts level.

What we do know, though, is that Bulletin 16-01 instructs claims processing staff to treat parent-subsidiary self-

insurance arrangements similarly to commercial insurance policies. At a practical level this translates into a bankrupt Patriot Coal subsidiary (like Apogee) being named as a potentially liable operator so long as the claimant (like Harold Grimes) worked for the entity at a time when it was covered by a solvent parent corporation's self-insurance umbrella. In that circumstance, the Department appeared to believe that a parent corporation (akin to a commercial insurer) could be made under the Act to pay all claims that accrued against the subsidiary during the period of self-insurance, regardless of when the claim for benefits was filed. If this is correct, then in this circumstance, too, a bankrupt subsidiary would be "capable of assuming [] liability for the payment" of benefits through a solvent third party. *Id.* § 725.494(e).

Consistent with these instructions from Bulletin 16-01, the district director identified Apogee as a potentially liable operator on Mr. Grimes's claim and notified Arch of its potential for liability as Apogee's "Insurance Carrier."

Mr. Grimes's death came before the district director could issue its preliminary decision and order. This resulted in the substitution of Mrs. Grimes as a party, and the case proceeded. From the beginning, Arch objected to the district director's decision to notify Apogee as a potentially liable operator, seeing the notice as an indirect assertion of liability against it. Believing that no legal authority supported the Department's theory of liability, Arch insisted that the benefits obligation must fall to the Trust Fund.

The district director was not persuaded and in April 2019 issued a preliminary decision and order finding Mrs. Grimes eligible for black lung survivor's benefits and designating Apogee as the responsible operator under 20 C.F.R. § 725.495. Although the district director's decision did not explicitly address Arch's objections to liability, implicit in its designation of Apogee was the conclusion that the core logic underpinning Bulletin 16-01 was correct—that although Apogee had gone bankrupt, Arch remained solvent and could be compelled to pay any black lung claims that accrued against Apogee while it was covered by Arch's self-insurance umbrella.

B

At Arch's request, the district director referred Mrs. Grimes's claim to a Department of Labor ALJ for further adjudication. After extensive proceedings, the ALJ came to agree with the district director's central conclusions—both that Mrs. Grimes was eligible for benefits (as Mr. Grimes's surviving spouse) and that, despite its bankruptcy, Apogee could be designated as the responsible operator because Arch bore legal responsibility for Mrs. Grimes's benefits under the Act and its implementing regulations.

The reasoning the ALJ gave for the latter of these two conclusions is difficult to parse. Where the ALJ began is easy enough to follow—with the recognition that Apogee could be designated as the responsible operator for Mrs. Grimes's benefits only if it satisfied the regulatory criteria enumerated by 20 C.F.R. § 725.494. In conducting that

inquiry, however, the ALJ at times seemed to treat Arch as though it too were designated by the district director as a responsible operator. For example, the ALJ faulted Arch for failing to "prove that it is financially unable to pay benefits" under 20 C.F.R. § 725.495(b), a provision that by its terms applies only to the designated responsible operator. And in closing, the ALJ remarked that "Apogee/Arch meets the regulatory criteria of responsible operator."

Arch seized upon this apparent conflation of Arch and Apogee in a motion for reconsideration. Pointing out that the district director had made it a party to Mrs. Grimes's black lung claim only in its capacity as a potentially liable self-insurer, Arch insisted that the ALJ had erred by treating it as a designated responsible operator under the Act's regulations.

The ALJ disagreed. In a supplemental opinion, the ALJ clarified that he was well aware that the district director "named Apogee, not Arch, as a potentially liable operator" and from there stood by his prior ruling that the district director had authority to do so under 20 C.F.R. § 725.494. Because everyone agreed that Apogee met § 725.494's first four requirements, the ALJ explained that "the only way for [Arch] to escape liability was to establish that Apogee [did] not possess sufficient assets to pay benefits." Arch failed to make that necessary showing, with the ALJ reasoning this way: Although Apogee was "no longer in . . . operation," Arch could be made to pay "under the regulations" because "it provided Apogee's self-insurance while the Miner was employed by Apogee." And there was no dispute that Arch had the financial ability to do so.

C

The Benefits Review Board affirmed. Rather than address the ALJ's reasoning, the Board rejected Arch's challenge to liability in a single paragraph that incorporated by reference its reasoning in three prior cases: *Bailey v. E. Assoc. Coal Co.*, BRB No. 20-0094 (Oct. 25, 2022) (en banc), *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-298 (2022), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301 (2022).

Arch then sought our review.

III

Arch lodges several objections to the administrative proceedings below. We address just one—its contention that the Department's theory of continuing liability for self-insuring parent corporations is without legal foundation.

A

But before we reach the merits, we owe a word on the standard of review. Although black lung appeals come to us from decisions of the Benefits Review Board, we have often observed that our principal focus is on the reasoning of the ALJ. See, *e.g., Collins v. Old Ben Coal Co.*, 861 F.2d 481, 486 (7th Cir. 1988); *Zeigler Coal Co. v. Director, Off. of Workers' Compensation Programs*, 326 F.3d 894, 897 (7th Cir. 2003) (collecting cases). In most cases, this makes good sense. Because the Board's authority is strictly appellate, see 20 C.F.R. § 802.301, it must affirm an ALJ's decision

that is "rational, supported by substantial evidence, and in accordance with applicable law." See *Consol. Coal Co. v. Director, Off. of Workers' Compensation Programs*, 911 F.3d 824, 838 (7th Cir. 2018). Most often our role is to ensure that the Board adheres to that mandate—that it affirms decisions of the ALJ that satisfy that standard and reverses those that do not. See *Crowe ex rel. Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 440–41 (7th Cir. 2011). So our focus necessarily concentrates in the main on the ALJ's reasoning, not the Board's.

This case comes to us with a slight wrinkle, however. Rather than review the ALJ's analysis on its own terms, the Board invoked, without elaboration, three of its own precedents that it believed foreclosed Arch's position. We see no problem in the Board's doing so. Whatever limitations 20 C.F.R. § 802.301 might place on the authority of the Board to affirm an ALJ ruling on alternative grounds—a question we do not consider or decide—we have no doubt that the Board can apply its own decisions to the cases that come before it, even when those decisions went overlooked by the ALJ.

But when we roll up our own sleeves and look to the decisions relied on by the Board, we immediately see that they do not overlap completely with the reasoning given by the ALJ below. We therefore find ourselves confronted with *two* distinct rationales for the agency action under review. In these circumstances, we cannot limit our focus to the ALJ's reasoning alone. We instead must affirm so long as *either* rationale is sound. So we proceed by examining with equal rigor the analysis of both the ALJ and Board.

B

For all this case's regulatory complexity, the question presented distills to a single point of law: did either the ALJ or the Board identify a valid legal basis for holding Arch liable for the black lung liability owed by Apogee to Harold Grimes's surviving spouse?

That basis could be statutory, regulatory, contractual, or even equitable. But a basis there must be. There must be some source of law (or perhaps combination of sources) that the Department can point to that affirmatively requires Arch to satisfy benefits owed to Mrs. Grimes. Without such a legal basis, we see no alternative other than to reach the twofold conclusion that the district director improperly designated Apogee the responsible operator *and* that the Trust Fund must bear the cost of Mrs. Grimes's benefits. The latter conclusion follows because, remember, Apogee, by everyone's account, has no other conceivable source of assets that it could call on to cover its benefits obligation to Mrs. Grimes. To put the point in regulatory terms, if Arch is not legally obligated to pay on Apogee's behalf, Apogee is not "capable of assuming [] liability" for Mrs. Grimes's benefits under 20 C.F.R. § 725.494(e) and could not be designated as the responsible operator under § 725.495(a)(1).

We also cannot overstate the importance of a principle that limits our review. That principle comes from the Supreme Court's 1943 decision in *SEC v. Chenery* and instructs that agency action must be judged on the reasoning given by the agency at the time of its decision. See 318 U.S. 80, 87–

88, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Indeed, both parties were quick at oral argument to agree with this precise observation and, even more specifically, that the *Chenery* doctrine applies with full force in black lung appeals. See *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426 (4th Cir. 2006); *Pate v. Director, Off. of Workers' Compensation Programs*, 834 F.2d 675, 676 (7th Cir. 1987); but see *Arch of Kent., Inc. v. Director, Off. of Workers' Compensation Programs*, 556 F.3d 472, 477 (6th Cir. 2009) (concluding that *Chenery* does not apply to review of black lung benefits determinations).

In no way is our observation academic. The *Chenery* doctrine has the very practical effect of directing our focus singularly on whether the rationales given by the ALJ and the Board for holding Arch liable were legally sound.

Right off the bat, then, we can eliminate some possibilities. As Arch correctly observes, neither the ALJ nor the Board purported to hold Arch liable under common law principles of equity. See, *e.g., Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739, 753 (7th Cir. 1989) (applying veil-piercing principles to determine whether parent could be held liable for labor law violations of subsidiary). Nor did the ALJ or the Board ground Arch's liability in an oral or written contract or in one or more than one provision of the Black Lung Benefits Act itself. Instead, both decisionmakers relied exclusively on the Act's implementing regulations.

But the ALJ and Board invoked the Act's regulations in only the most general and conclusory manner. We have thoroughly reviewed the decision of the ALJ and not one

of the regulations it discussed or cited can be fairly read (in isolation or combination) to support the premise at the core of its liability determination: that self-insuring parent corporations—akin to commercial insurers—are legally obligated to pay all black lung benefits that accrue against their subsidiaries during the period of self-insurance, regardless of when the claim is filed.

The Board's reliance on its own precedent fell short for much the same reason. Of the three cases it identified and relied upon—*Bailey*, *Graham*, and *Howard*—only *Howard* squarely confronted the legal question before the ALJ here. The *Howard* case also involved Arch and Apogee. There, as here, the Department of Labor sought to use Arch's self-insurance umbrella as a means of shifting liability away from the Trust Fund. And there, too, Arch was adamant that the regulations did not support this result. It emphasized that the Department had achieved a similar result in the commercial insurance context only through the promulgation of 20 C.F.R. § 726.203(a), and stressed that "no similar provision" exists for self-insurance.

The Board in *Howard* was unpersuaded by Arch's insistence that its liability had to find some basis in positive law. To be sure, the Board did seem to agree with Arch that neither the Act nor its implementing regulations explicitly made a self-insuring parent liable for claims that accrued against a former subsidiary like Apogee. But from there the Board saw that legal gap as supporting the Department of Labor, not the other way around. Arch, it reasoned, had failed to point to any "regulatory authority

to support [its] argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment." Regulatory silence, in other words, supported liability, not assignment of the claim to the Trust Fund.

The Director attempts to defend the essence of *Howard*'s reasoning on appeal. Conceding that there is no "explicit regulation" supporting the Department's proposed rule, the Director contends that such a regulation is unnecessary because the liability of parent corporations like Arch is inherent in the very fiber of self-insurance. We find this assertion unpersuasive, for the position anchors itself more in policy reasoning than an identifiable source of law. Liability may not be imposed on a corporation simply because it strikes an agency or a court as sensible as a matter of policy. The rule of law requires that the rights, duties, and obligations of persons and corporations alike spring, if at all, from some concrete basis in positive law or principle of equity. Unless and until the Department identifies such a basis for the theory of liability it embraced in this case, we are unwilling to read into regulatory silence an intention to depart from the time-honored principle "that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998) (internal quotation marks omitted); see also *Olympia Equipment Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 798 (7th Cir. 1986).

The Director presses several other contentions to save the ALJ's and Board's decisions. Foremost, the Director

criticizes as "irrational" a rule that would treat the primary liability of operators like Apogee—which endures as long as they remain "capable of assuming [ ] liability for the payment of continuing benefits" under 20 C.F.R. § 725.494(e)—differently from that of a self-insuring parent corporation. He claims, moreover, to find support for the Department's position in a D.C. Circuit decision interpreting indemnity bonds posted as security for self-insurance. See *United States v. Ins. Co. of N. Am.*, 83 F.3d 1507 (D.C. Cir. 1996). Finally, he warns of the potentially serious policy consequences that might ensue if Arch's position prevails. Whatever their merit, not one of these arguments was mentioned (directly or even obliquely) by the ALJ or the Board below. *Chenery* precludes us from considering them for the first time on appeal.

We have read the ALJ's and Board's decisions many times over, and in the end remain unable to identify a statutory or regulatory provision—identified by the ALJ or Board—that supports holding Arch liable for the benefits obligation owed by Apogee to Harold Grimes's surviving spouse. *Chenery* requires that we approach our review this exact way, and in the final analysis we see no way around concluding that the decisions of the ALJ and Board lack legal support. We therefore have no choice but to vacate the decision of the Benefits Review Board.

In reaching this conclusion, we find ourselves at odds with the Sixth Circuit's recent decision in *Apogee Coal Company, LLC v. Director, Off. of Workers' Compensation Programs*, No. 23-3332, 112 F.4th 343(6th Cir. Aug. 5, 2024), which affirmed the Board's bottom-

line conclusion in *Howard* that Arch could be held liable as a self-insuring parent for black lung benefits owed by Apogee, its former subsidiary. It did so based on two regulations: 20 C.F.R. §§ 726.110(a)(1) and 726.4(b). The first mandates that all self-insurers "execute and file . . . an agreement and undertaking" in which they agree to pay black lung benefits "when due, as required by the Act." *Id.* § 726.110(a)(1). The second emphasizes "that the Secretary [of Labor] has wide latitude for determining which operator shall be liable for the payment of Part C benefits" and states that any "business entity which has had or will have a substantial and reasonably direct interest in the operation of a coal mine may be determined liable for the payment of pneumoconiosis benefits" under the Act.

After careful consideration, we see nothing in the Sixth Circuit's analysis that warrants a different outcome in this case. Although §§ 726.110(a)(1) and 726.4(b) found passing mention in the decisions of the ALJ and the Board below, neither decisionmaker intimated, let alone held, that Arch's liability as a third-party self-insurer sprung from those regulations. *Chenery* thus precludes us from affirming the Board on the Sixth Circuit's theory.

Even if we could overlook *Chenery*, it is hard to see how either provision could support a finding of liability on the facts before us. Section 726.110(a)(1) mandates only that self-insurers agree to pay black lung benefits "*as required by the Act.*" (emphasis added). By its very terms, § 726.110(a)(1) is not an independent source of liability—a self-insurer's promise to pay benefits kicks

in only if a provision elsewhere in the Act makes it liable on a claim. As for § 726.4(b), that regulation appears to do no more than give the Secretary of Labor flexibility in determining which entities can be designated as the responsible operator. But remember that the district director designated Apogee—not Arch—as the responsible operator for Mrs. Grimes's benefits. That the district director *might* have been able to designate Arch as the responsible operator in this case (a question we take no position on) is beside the point, because that is not the decision that was actually made by the agency.

Because this opinion could be seen as creating a conflict with the Sixth Circuit, the panel circulated it before release to all judges in active service under Circuit Rule 40(e). No judge voted to hear the appeal en banc.

All that remains is to determine the scope of remand. Whatever authority we might possess to remand for a fresh attempt by the agency to justify its liability determination, we decline to do so in the circumstances of this case. The Director has not requested a remand, and the Act's implementing regulations disfavor turning the liability question into a game of administrative ping pong. It is precisely to prevent such delay in the adjudication of benefits that the Department decided to require the Trust Fund to pay benefits in cases where the district director designated the wrong responsible operator. 65 Fed. Reg. 79990 (Dec. 20, 2000) (noting that "[t]his limitation . . . prevents a claimant from having to relitigate his entitlement to benefits"). So although we return the case to the Department, we do so for the

limited and exclusive purpose of allowing the Department to take those measures necessary to assign Mrs. Grimes's benefits to the Black Lung Disability Trust Fund.

IV

We close by emphasizing the limited scope of today's holding. That the Department of Labor has yet to articulate a basis for liability in cases like this one does not mean that no such basis exists. For today, all we decide is that the ALJ and the Board have failed to justify their conclusions that Arch can be compelled to satisfy the black lung liability of Apogee. The *Chenery* doctrine, to say nothing of the party presentation principle, affirmatively prohibits us from scouring the Act and regulations for bases for liability that have to date gone unidentified by the Department. In future black lung cases, the Director can press additional arguments for the rule it advocates. And with the benefit of those proceedings, courts will come closer to a final answer about what the regulations do and do not authorize. In the specific case of Mrs. Grimes, however, the Trust Fund, not Arch, must pay.

The petition for review is GRANTED and the case REMANDED to the Board with instructions that Mrs. Grimes's benefits be assigned to the Black Lung Disability Trust Fund.

APPENDIX D — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR DATED FEBRUARY 25, 2020

U.S. Department of Labor

Issue Date: 25 February 2020

Case No.: 2017-BLA-05163

In the Matter of:
DAVID M. HOWARD

Claimant

v.

APOGEE COAL COMPANY
Employer

and

ARCH COAL, INC.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

Appendix D

Before: LAUREN C. BOUCHER
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits filed with the U.S. Department of Labor ("Department") by David M. Howard ("Claimant") against Apogee Coal Company ("Apogee"), as insured by Arch Coal, Inc. ("Arch"),[1] under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2018) ("Act"). The Act and its implementing regulations, 20 C.F.R Parts 718 and 725 (2018), award benefits to coal miners who are totally disabled as a result of pneumoconiosis or to the surviving dependents of coal miners who died as a result of pneumoconiosis. 30 U.S.C. § 901; 20 C.F.R. §§ 718.3, 718.204(a), 718.205(a). Pneumoconiosis, commonly known as "black lung," is a chronic dust disease of the lungs that arises out of coal mine employment. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201.

At Employer's request, this matter was referred to the Office of Administrative Law Judges ("OALJ") for a hearing. Accordingly, an administrative law judge ("ALJ") was assigned to hold a hearing and issue a decision. 20 C.F.R. §§ 725.421, 725.450-452.

1. Apogee and Arch will be referred to collectively as "Employer."

Appendix D

I. Procedural History

On November 19, 2014, Claimant filed a claim for benefits under the Act. (DX 2.)[2] On September 26, 2016, the district director of the Office of Workers' Compensation Programs ("district director") issued a Proposed Decision and Order awarding benefits to Claimant. (DX 44.) On October 5, 2016, Claimant appealed. (DX 45.) On November 18, 2016, the district director referred this claim to OALJ. (DX 49.)

On July 17, 2019, I held a telephonic hearing in this matter. Claimant testified at the hearing. Claimant's lay representative and Employer's counsel participated in the hearing. Counsel for the Director of the Office of Workers' Compensation Programs ("Director") also participated in the hearing. Following a series of motions, I set December 20, 2019, as the deadline for post-hearing briefs. Employer and the Director each timely submitted closing briefs. Claimant did not submit a closing brief.

On January 15, 2020, Employer filed a Motion to Strike. Employer argues that the Director improperly attached to its closing brief two exhibits relating to liability. Employer seeks to strike those exhibits and any argument based thereon. On January 28, 2020, the Director submitted an amended post-hearing brief that does not contain the two exhibits or any reference thereto.

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2. This Decision uses the following abbreviations: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; and "Tr." refers to the transcript of the hearing, held on July 17, 2019.

Thus, it appears the Director has complied with the relief sought by Employer, and the motion is now moot. I will consider the Director's amended brief, not the Director's initial brief.

II. Evidence

At the hearing, I admitted DX 1-51, CX 1, 4-7, and EX 1-9, 26 without objection. (Tr. 7, 9, 15.) I also conditionally admitted CX 2 and EX 24-25, contingent upon submission of those exhibits within the deadlines set forth below. (Tr. 15, 50.) Claimant testified at the hearing regarding his employment history and his health history. I have reviewed and considered the entire record in this matter.

With the agreement of the parties, I held the record open for forty-five days to permit Employer to submit Dr. Rosenberg's supplemental medical report (EX 25) and to permit Claimant to submit Dr. DePonte's rebuttal interpretation of Claimant's November 30, 2016, chest x-ray (CX 2). (Tr. 50.) I also held the record open until November 5, 2019, for Employer's submission of Dr. Rosenberg's deposition transcript (EX 24). (Tr. 50.) On October 29, 2019, Employer submitted the deposition transcript of Dr. Rosenberg (EX 24) and simultaneously withdrew Dr. Rosenberg's supplemental medical report (EX 25). Claimant did not submit Dr. DePonte's rebuttal interpretation of Claimant's November 30, 2016, chest x-ray (CX 2).

On March 4, 2015, Dr. Esther Ajjarapu conducted the complete pulmonary evaluation of Claimant required

under 20 C.F.R. § 725.406. (DX 14.) Dr. Ajjarapu's evaluation included a chest x-ray (interpreted by Dr. DePonte), a pulmonary function test, an arterial blood gas study, an EKG, and a completed Form CM-988 ("Medical History and Examination for Coal Mine Workers' Pneumoconiosis"). At the request of the Department's claims examiner, Dr. Ajjarapu also wrote a supplemental report dated September 15, 2016. (DX 43.)

Pursuant to his evidence summary form, Claimant relies on the following evidence in support of his affirmative case: Dr. Michael Alexander's interpretation of Claimant's May 9, 2013, chest x-ray (DX 15); Dr. Kathleen DePonte's interpretation of Claimant's April 26, 2016, chest x-ray (CX 1); Pulmonary function tests administered by Dr. Esther Ajjarapu on April 26, 2016, and December 12, 2017 (DX 17; CX 4); Dr. David Rosenberg's medical report dated May 10, 2015 (DX 18); Claimant's hospitalization and treatment records with Dr. Cynthia Dean dated June 2016 to December 2018 (CX 5); Claimant's hospitalization and treatment records with Dr. Nagabhushanam Bollavaram dated October to December 2016 (CX 6); and Claimant's hospitalization and treatment records from Harlan ARH dated August 9, 2016 (CX 7). To rebut the Department-sponsored chest x-ray, Claimant relies on Dr. Michael Alexander's interpretation of Claimant's March 4, 2015, chest x-ray (DX 17.)

Pursuant to its evidence summary form, Employer relies on the following evidence in support of its affirmative case: Dr. Cristopher Meyer's interpretation of Claimant's March 4, 2015, chest x-ray (DX 19); Dr. Cristopher Meyer's

interpretation of Claimant' November 30, 2016, chest x-ray (EX 1); a pulmonary function test administered by Dr. Roger McSharry on November 29, 2016 (EX 2); a pulmonary function test administered by Dr. Esther Ajjarapu on April 13, 2017 (EX 26); an arterial blood gas study administered by Dr. Roger McSharry on November 29, 2016 (EX 2); Dr. David Rosenberg's medical reports dated May 10, 2016, April 13, 2017, November 2, 2017, and June 17, 2019 (DX 18; EX 6; EX 9); Dr. David Rosenberg's deposition testimony dated October 22, 2019 (EX 24); Dr. Roger McSharry's medical reports dated January 19, 2017, March 16, 2017, and May 30, 2019 (EX 3); Dr. Cristopher Meyer's interpretation of Claimant's November 29, 2016, CT scan (EX 1); Claimant's hospitalization and treatment records from Clover Fork Clinic dated November 2013 to November 2016 (EX 4); and Claimant's hospitalization and treatment records from ARH Daniel Boone dated July 1999 to February 2017 (EX 5).

To rebut Claimant's affirmative case, Employer relies on Dr. Cristopher Meyer's interpretation of Claimant's May 9, 2013, chest x-ray (DX 19) and Dr. Danielle Seaman's interpretation of Claimant's April 26, 2016, chest x-ray (EX 8). To rebut the Department-sponsored chest x-ray, Employer relies on Dr. Danielle Seaman's interpretation of Claimant's March 4, 2015, chest x-ray (DX 19).

III. Issues & Applicable Standard

To demonstrate entitlement to benefits under the Act, Claimant must establish that: (1) he suffers from pneumoconiosis; (2) his pneumoconiosis arose out of coal

mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. §§ 718.202, 718.203, 718.204. Claimant bears the burden to establish each element of entitlement by a preponderance of the evidence. §725.103; *see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). Failure to establish any one elements precludes entitlement to benefits.

At the hearing, Employer withdrew the following issues: timeliness, status as a miner, and post-1969 employment. (Tr. 47.) In its post-hearing brief, Employer conceded that Claimant is totally disabled, explaining that Claimant "has established . . . that he is totally disabled based on the medical opinions and qualifying pulmonary function tests."[3] (Empl. Brief at 6.)

Additionally, Employer indicated that Claimant "has established at least fifteen years of coal mining."[4] (Empl. Brief at 6.) Though Employer did not characterize Claimant's coal mine employment as qualifying, Employer acknowledged that "the only issue to be decided is whether the evidence rebuts the presumption that [Claimant]'s totally disabling respiratory impairment is due to

3. Upon review of the evidence, the record supports a finding of total disability based on the five qualifying pulmonary function tests and the physician opinions of Dr. Ajjarapu, Dr. Rosenberg, and Dr. McSharry, each of whom opined that Claimant is totally disabled.

4. The record likewise supports a finding of at least fifteen years of coal mine employment.

pneumoconiosis under 20 C.F.R. § 718.305." (Empl. Brief at 6.) Moreover, I find that Claimant engaged in at least fifteen years of qualifying coal mine employment based on his testimony that all of his coal mine employment was underground. (Tr. 24.)

Accordingly, the following issues remain for adjudication:[5]

1. Does Claimant suffer from pneumoconiosis?

2. Is Claimant's total disability due to pneumoconiosis?

3. Did his pneumoconiosis, if any, arise from coal mine employment?

4. Is Employer the responsible operator?

5. Has the named employer secured the payment of benefits?

IV. Findings of Fact

Claimant was born in (DX 2.) He has one dependent, his wife, to whom he has been married since September 2001. (DX 2; DX 9; Tr. 28, 47.) Claimant worked in coal mines from approximately 1977 to 1997. (DX 3; DX 7; DX 8; Tr. 25.) Claimant last worked for Employer

5. Employer also preserved various issues for purposes of appeal. (Tr. 5-6, 47-49.)

as a shearer operator.[6] (DX 3; DX 4; Tr. 21-24.) For the reasons set forth below, I find that Claimant smoked for thirty-five pack years.

Smoking History

There are several sources of information concerning the length and severity of Claimant's smoking history. At his deposition in June 2017, Claimant testified that he started smoking prior to 1990, but he did not provide an exact year. (EX 7 at 45-46.) Claimant testified that he was still smoking one-half pack per day as of 2015 and was smoking "less than half a pack" per day as of the date of his deposition in 2017. (EX 7 at 46.)

At the hearing in July 2019, Claimant testified that he quit smoking three or four years prior. (Tr. 44.) Claimant stated that he had "no idea" when he started smoking but admitted to smoking one pack per day. (Tr. 44.)

The physicians' opinions also provide details about the length and severity of Claimant's smoking history. In her March 2015 medical report, Dr. Ajjarapu noted that Claimant has been smoking one pack per day since 1990. (DX 14.) Following his examination of Claimant in December 2016, Dr. McSharry wrote that Claimant had been smoking one-half to one pack of cigarettes per day for twenty to thirty years. (EX 3 at 4.) Based on his

6. Claimant last worked as a miner in Kentucky. (Tr. 42; DX 3.) Therefore, the law of the U.S. Court of Appeals for the Sixth Circuit applies. *Shupe v. Dir., Office of Workers' Comp. Programs*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

review of the record, Dr. Rosenberg estimated a thirty to fifty pack-year smoking history. (EX 24 at 27-28.) Based on Claimant's carboxyhemoglobin level measurements in the record from 2015 and 2016, Dr. Rosenberg estimated that Claimant was smoking over two packs per day at that time. (EX 24 at 27.)

Claimant's hospitalization and treatment records also contain references to the length and severity of Claimant's smoking habit. These records generally reflect that Claimant was smoking for approximately thirty years at a rate ranging from one-half to two packs per day. (CX 5; CX 6; CX 7; EX 4; EX 5.)

Based on the foregoing evidence, I find that Claimant has a thirty-five pack-year smoking history. At the latest, Claimant started smoking in 1990. At his deposition in June 2017, Claimant testified that he was still smoking. Because the record shows that Claimant smoked as much as two packs per day and as little as one-half pack per day, I find that Claimant smoked an average of one and one-quarter packs per day over the course of his smoking history. Therefore, because Claimant smoked an average of one and one-quarter packs per day from 1990 through 2017, I find that Claimant has a thirty-five pack year smoking history.

V. Rebuttal of the Presumption of Total Disability Due To Pneumoconiosis

A miner who can establish at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment is entitled to invoke the § 718.305 presumption of total disability due to pneumoconiosis. As set forth above, the record in this matter reflects that Claimant engaged in at least fifteen years of qualifying coal mine employment and that Claimant has established the element of total disability. Thus, Claimant is entitled to invoke the rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b). Accordingly, the presence of pneumoconiosis and total disability due to pneumoconiosis are presumed. 20 C.F.R. § 718.305(c).

Once invoked, the burden shifts to Employer to rebut the presumption. § 718.305(d); *see also Mitchell v. Dir., Office of Workers' Comp. Program*, 25 F.3d 500, 505-06 (7th Cir. 1994); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480 (10th Cir. 1989); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *Cent. Ohio Coal Co. v. Dir., Office of Workers' Comp. Programs*, 762 F.3d 483, 486-87 (6th Cir. 2014) (citing *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011)). Employer may rebut the presumption by either: (1) establishing that the miner does not have legal pneumoconiosis and does not have clinical pneumoconiosis; or (2) "[e]stablishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." § 718.305(d)(1)(i), (ii); *see also Minich v. Keystone Coal Mining Corp.*, 25

B.L.R. 1-149, 1-155-56 (2015) (explaining that the "very high burden" of proving that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis" is warranted because "Congress determined that miners with fifteen or more years of qualifying coal mine employment should bear a lesser burden to obtain benefits"). In other words, the regulation "allows employer to establish rebuttal of the presumption by either disproving the elements of disease and disease causation at Section 718.305(d)(1)(i), or disproving disability causation at Section 718.305(d)(1)(ii)." *Minich*, 25 B.L.R. at 1-155.

Employer must establish one of these two elements by a preponderance of the evidence to successfully rebut the presumption. *E.g.*, *Ashley v. Westmoreland Coal Co.*, BRB Nos. 15-0262 BLA and 15-0263 BLA (Mar. 30, 2016) (unpub.); *Vandyke v. Vandyke Brothers Coal Co., Inc.*, BRB No. 13-0339 BLA (Apr. 21, 2014) (unpub.). "The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary condition of unknown origin."§ 718.305(d)(3).

A. Disproving the Existence of Pneumoconiosis

The Act defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b); 20 C.F.R. § 718.201(a). Pneumoconiosis is further divided into clinical and legal pneumoconiosis. Employer must disprove the existence of

both clinical and legal pneumoconiosis by a preponderance of the evidence. § 718.305(d)(1)(i). The Board has observed that, to rebut the presumption pursuant to § 718.305(d)(1)(i), the "employer must affirmatively disprove the existence of pneumoconiosis." *Minich*, 25 B.L.R. at 1-155, n.8.

i. Clinical Pneumoconiosis

Clinical pneumoconiosis consists of those diseases recognized by the medical community as having been caused by the presence of dust deposits in the lungs. § 718.201(a)(1). The record contains x-ray evidence, CT scan evidence, physician opinion evidence, and hospitalization and treatment records relevant to disproving the existence of clinical pneumoconiosis. *Cf.* § 718.202(a) (setting forth the means of establishing the existence of pneumoconiosis); § 725.414(a)(4).

a. X-ray Evidence

Section 718.202(a)(1) states that a chest x-ray conducted and classified in accordance with § 718.102, using the classification system of the International Labor Organization (ILO), may form the basis for a finding of the existence of pneumoconiosis.[7] ILO Classifications

7. "There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis." *Lisa Lee Mines v. Dir., Office of Workers' Comp. Programs*, 86 F.3d 1358, 1359 n.1 (4th Cir. 1996) (en banc) (quoting N. LeRoy Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 729-31 (1981)). The Board has held that reliance on "narrative x-ray interpretations that mentioned opacities

1, 2, 3, A, 8, or C shall establish the existence of pneumoconiosis; Category 0, including subcategories 0/0 and 0/1, does not establish pneumoconiosis. Category 1/0 is ILO Classification 1 and therefore can support a finding of pneumoconiosis. An x-ray interpretation that is not classified in accordance with the ILO/UICC system does not constitute evidence of pneumoconiosis under § 718.202(a)(1)." *M.F.A. v. Peerless Eagle*, BRB Nos. 07-0585 BLA (Apr. 30, 2008) (unpub.) (citing § 718.102(b) (2014); *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006) (en banc)).

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consistent with pneumoconiosis as evidence of pneumoconiosis pursuant to § 718.202(a)(1) is not in accordance with applicable law. Under §718.102(b), an x-ray interpretation that is not classified in accordance with the ILO/UICC system does not constitute evidence of pneumoconiosis under§ 718.202(a)(1)." *M.F.A. v. Peerless Eagle*, BRB Nos. 07-0585 BLA (Apr. 30, 2008) (unpub.) (citing § 718.102(b) (2014); *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006) (en banc)).

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The record contains the following ILO x-ray evidence:

Date of x-ray/ Exh. No.	**Date Read**	**Physician/ Credentials**[8]	**Film Qual.**	**ILO Classification**
05/09/2013 DX 15 at 2	06/12/2013	Dr. Alexander B; BCR	1	ILO: p/p small opacities across all lung zones with 1/2 profusion.

8. A "B reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the National Institute for Occupational Safety and Health (NIOSH). *See generally* 42 C.F.R. § 37.51; Centers for Disease Control and Prevention, *The NIOSH B Reader Program*, https://www.cdc.gov/niosh/topics/chestradiography/breader.html (last visited Aug. 15, 2018). A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Board of Radiology. *See generally* American College of Radiology, *What is a Radiologist?*, https://www.acr.org/Quality-Safety/Radiology-Safety/Patient-Resources/About-Radiology (last visited Aug. 15, 2018); *The American Board of Radiology*, https://www.theabr.org/ (last visited Aug. 15, 2018).

				Additional abnormalities noted on ILO form: bulla(e), emphysema, and plate atelectasis. Other comments: Healed fracture of posterior left 9th rib.
05/09/2013 DX 19 at 24	04/23/2016	Dr. Meyer B; BCR	2 (poor contrast)	ILO: No parenchymal abnormalities consistent with pneumoconiosis. Additional abnormalities noted on ILO form: None. Other comments: The lungs are clear. There are no fine nodular opacities or large opacities. The mediastinum, cardiac silhouette, bones and soft tissue are normal.

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03/04/2015 DX 14 at 5	03/07/2015	Dr. DePonte B; BCR	1	ILO: s/t small opacities across all lung zones with 1/1 profusion. Additional abnormalities noted on ILO form: Emphysema. Other comments: None.
03/04/2015 DX 17 at 2	12/23/2015	Dr. Alexander B; BCR	1	ILO: p/p small opacities across all lung zones with 1/1 profusion. Additional abnormalities noted on ILO form: None. Other comments: 9 x 5 mm nodule in medial right lower zone – recommend further evaluation.

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03/04/2015 DX 19 at 25	04/13/2016	Dr. Seaman B; BCR	1	ILO: No parenchymal abnormalities consistent with pneumoconiosis. Additional abnormalities noted on ILO form: None. Other comments: There are no small rounded or irregular opacities to suggest coal workers' pneumoconiosis. The heart, mediastinum, lungs, pleural spaces, bones and soft tissues are within normal limits.

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03/04/2015 DX 19 at 3	04/23/2016	Dr. Meyer B; BCR	1	ILO: No parenchymal abnormalities consistent with pneumoconiosis. Additional abnormalities noted on ILO form: None. Other comments: The lungs are well-expanded without small round, small irregular or large opacities. The mediastinum and cardiac silhouette are unremarkable. The bones and soft tissues are within normal limits.

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04/26/2016 CX 1	05/31/2016	Dr. DePonte B; BCR	2 (under exposed)	ILO: s/t small opacities across all lung zones with 1/1 profusion. Additional abnormalities noted on ILO form: Emphysema. Other comments: None.
04/26/2016 EX 8	10/25/2017	Dr. Seaman B; BCR	1	ILO: No parenchymal abnormalities consistent with pneumoconiosis. Additional abnormalities noted on ILO form: atherosclerotic aorta.

				Other comments: There are no small rounded or irregular opacities to suggest coal worker's pneumoconiosis. The heart size is normal. There are atherosclerotic aortic calcifications. There are multiple surgical clips in the left upper quadrant.
11/30/2016 EX 1	01/14/2017	Dr. Meyer B; BCR	2 (mottle)	ILO: No parenchymal abnormalities consistent with pneumoconiosis. Additional abnormalities noted on ILO form: atherosclerotic aorta,

				Other comments: The lungs are hyperinflated. There are no small rounded, small irregular or large opacities. There is atherosclerotic calcification in the thoracic aorta. The cardiac silhouette is not enlarged. There are surgical clips in the left upper quadrant of the abdomen.

Where two or more x-ray reports conflict, consideration shall be given to the radiological credentials of the physicians interpreting the x-rays. § 718.202(a)(1). It is well established that an adjudicator may give additional weight to the interpretation of a dually certified radiologist.[9] *E.g.*, *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32, 1-34

9. A dually certified radiologist is a Board-certified radiologist who also is a NIOSH-certified B reader.

(1985); *Scheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 1-131 (1984). A finder of fact is not required to accord greater weight to the most recent x-ray evidence of record; rather, the length of time between the x-ray studies and the qualifications of the interpreting physicians are factors to consider. *McMath v. Dir., Office of Workers' Comp. Programs*, 12 B.L.R. 1-6, 1-8 (1988); *Pruitt v. Dir., Office of Workers' Comp. Programs*, 7 B.L.R. 1-544, 1-546 (1984). An ALJ may consider numerical superiority in resolving conflicts in x-ray evidence. *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65, 1-68 (1990).

As listed above, the record contains nine interpretations of four chest x-rays. Each physician who offered an interpretation is dually certified. Therefore, each x-ray interpretation is entitled to equal weight based on equivalent radiological credentials of the physicians.

The record contains two interpretations of Claimant's May 9, 2013, chest x-ray. Dr. Alexander interpreted this x-ray as positive for clinical pneumoconiosis, whereas Dr. Meyer interpreted this x-ray as negative for clinical pneumoconiosis. Therefore, the overall weight of this chest x-ray stands in equipoise.

The record contains four interpretations of Claimant's March 4, 2015, chest x-ray. Dr. DePonte and Dr. Meyer interpreted this chest x-ray as positive for clinical pneumoconiosis, whereas Dr. Seaman and Dr. Meyer interpreted this chest x-ray as negative for clinical pneumoconiosis. Therefore, the overall weight of this chest x-ray stands in equipoise.

The record contains two interpretations of Claimant's April 26, 2016, chest x-ray. Dr. DePonte interpreted this chest x-ray as positive for clinical pneumoconiosis, whereas Dr. Seaman interpreted this chest x-ray as negative for clinical pneumoconiosis. Therefore, the overall weight of this chest x-ray stands in equipoise.

The record contains one interpretation of Claimant's November 30, 2016, chest x-ray. Dr. Meyer interpreted this chest x-ray as negative for clinical pneumoconiosis. Therefore, the overall weight of this chest x-ray is negative for clinical pneumoconiosis.

Based on the foregoing summary, the May 9, 2013, March 4, 2015, and April 26, 2016, chest x-rays each stand in equipoise for clinical pneumoconiosis, and the November 30, 2016, chest x-ray is negative for clinical pneumoconiosis. Therefore, I conclude the overall weight of the x-ray evidence is preponderantly negative, and, considered alone, supports a finding that Claimant does not suffer from clinical pneumoconiosis.

b. Other Medical Evidence: CT Scans

The regulations also permit parties to submit "other medical evidence," which § 718.107 defines as: "any medically acceptable test or procedure reported by a physician . . . which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment." § 718.107(a). An ALJ must give "appropriate consideration" to evidence submitted as "other medical evidence." *Id.* The

party proffering evidence under § 718.107 must also present evidence "that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." § 718.107(b).

CT scans are admissible as "other medical evidence" under § 718.107. *E.g.*, *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (en banc). The Board has recognized the general relevance of CT scan evidence in benefits cases under the Act, and CT scans may be used to diagnose pneumoconiosis and other pulmonary diseases. *See Melnick v. Consol. Coal Co.*, 16 B.L.R. 1-31 (1991). CT scan evidence should be weighed separately from chest x-rays. *Id.*

In support of its burden to prove that Claimant does not suffer from clinical pneumoconiosis, Employer submitted Dr. Meyer's interpretation of Claimant's November 29, 2016, CT scan. Dr. Meyer is a Board certified radiologist and B-reader. Dr. Meyer explained: "Chest CT scan is more sensitive than chest x-ray for detection and characterization of pulmonary parenchymal abnormalities. CT may be useful in confirming or refuting the presence of simple coal worker's pneumoconiosis . . . " (EX 1 at 4.) Dr. Meyer also indicated that Claimant's CT scan "is of good quality, the interpretation of which is sufficient for evaluating the presence or absence of coal worker's pneumoconiosis." (EX 1 at 4.) Employer has thus established that "the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." § 718.107(b); *Lykins v. Consolidation Coal Co.,* BRB No. 07-0127 BLA, slip op. at 6 (Oct. 31, 2007) (unpub.).

Upon review of Claimant's CT scan, Dr. Meyer wrote:

> There is mild apical predominant centrilobular emphysema. Ill-defined ground-glass opacity with an upper zone predominance is also present. There are no centrilobular or perilymphatic nodules. There are no large opacities.
>
> There is no mediastinal or hilar lymphadenopathy. Mild atherosclerotic calcification is seen in the thoracic aorta. Coronary artery calcification is present. Surgical clips are seen in the left upper quadrant of the abdomen.

(EX 1 at 3.) Dr. Meyer concluded that there are no findings of clinical pneumoconiosis and the "centrilobular ground-glass opacity in association with emphysema is most consistent with respiratory bronchiolitis secondary to smoking." (EX 1 at 3.) Because Dr. Meyer determined that Claimant's November 29, 2016, CT scan is negative for clinical pneumoconiosis, the weight of the CT scan evidence is preponderantly negative for clinical pneumoconiosis and, considered alone, supports a finding that Claimant does not suffer from clinical pneumoconiosis.

c. Physician Opinion Evidence

Employer may also rebut the presumption of pneumoconiosis through a physician's reasoned medical judgment. A medical opinion should be both well documented and well reasoned. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Any report lacking these

qualities may be assigned less probative weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989); *see also Duke v. Dir., Office of Workers' Comp. Programs*, 6 B.L.R. 1-673 (1983). Each physician who provided a report in this case is sufficiently well qualified to opine on the presence or absence of clinical pneumoconiosis.

The Sixth Circuit holds that the ALJ is tasked with making credibility determinations concerning physician opinions, including whether those opinions are sufficiently documented and reasoned. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072 (6th Cir. 2013). An ALJ is not bound to accept the opinion or theory of any medical expert; rather, credibility decisions are expressly reserved for the factfinder. *Id.*

The physician opinions of record are summarized more fully below in Part V.A.ii.a. In sum, Dr. Ajjarapu diagnosed Claimant with clinical pneumoconiosis, whereas Dr. Rosenberg and Dr. McSharry did not diagnose clinical pneumoconiosis. The basis for Dr. Ajjarapu's diagnosis was a single positive chest x-ray interpretation. Because Dr. Ajjarapu did not have the opportunity to review additional radiographic evidence, and because her opinion contradicts the preponderance of the chest x-ray and CT scan evidence of record, I conclude Dr. Ajjarapu's opinion merits reduced probative weight on the issue of clinical pneumoconiosis.

Alternatively, Dr. Rosenberg and Dr. McSharry based their opinions on substantial radiographic evidence. Because their conclusions are well documented and are

supported by the chest x-ray and CT scan evidence of record discussed above, I conclude their opinions merit normal probative weight. Because the opinions of Dr. Rosenberg and Dr. McSharry outweigh that of Dr. Ajjarapu on the issue of clinical pneumoconiosis, I conclude the preponderance of the physician opinion evidence, considered alone, supports a finding that Claimant does not suffer from clinical pneumoconiosis.

d. Hospitalization and Treatment Records

The regulations allow parties to submit "any record of a miner's hospitalization for a respiratory or pulmonary or related disease." § 725.414(a)(4). Medical treatment records may be relevant to the issue of whether a miner has pneumoconiosis or a disabling pulmonary impairment. *Hill v. Lone Mountain Processing*, BRB N. 13-0327 BLA, slip op. at 6 n. 7 (unpub.) (Apr. 17, 2014). I have briefly summarized these records below.

St. Charles Breathing Center (CX 5)

The record contains Claimant's treatment records from St. Charles Breathing Center from June 2016 through December 2018. These records generally reflect that Claimant has a past medical history of and/or has been diagnosed with the following conditions: dyspnea, wheezing, coughing, mucus production, respiratory infection, coal workers' pneumoconiosis, COPD, and chronic bronchitis. Pulmonary function test results in December 2018 reflect severe restriction. (CX 5 at 23.)

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Harlan ARH (CX 6; CX 7; EX 5)

Claimant's progress notes from Harlan ARH span from July 1999 to February 2017. These records generally reflect that Claimant has a past medical history of and/or has been diagnosed with diabetes, back and neck pain, arthritis, shortness of breath, hypoxemia, wheezing, sputum production, chest tightness, COPD (for which he used an inhaler), GI disorder, and black lung/CWP. Chest x-ray interpretations in these records were negative for clinical pneumoconiosis. Claimant underwent a polysomnography test, which revealed that Claimant does not have sleep apnea. Pulmonary function test results from November 2016 reflect a moderate obstructive and restrictive lung defect. (EX 5 at 27.)

Clover Fork Clinical (EX 4)

Claimant's treatment records from the Clover Fork Clinic span from November 2013 to November 2016. These records generally reflect that Claimant has a past medical history of and/or has been diagnosed with ailments including diabetes, GERD/BARRETS, hypertension, hyperlipidemia, hypothyroidism, COPD, chronic bronchitis, back and neck pain, and benign prostatic hyperplasia. Chest x-ray interpretations in these records were almost entirely negative for clinical pneumoconiosis, except for an October 1997 chest x-ray, which revealed q/q small opacities with 1/1 profusion. (EX 4 at 494.)

Appendix D

Discussion of Hospitalization and Treatment Records

These records generally reflect that Claimant suffers from respiratory/pulmonary impairments including pneumoconiosis and COPD, as well as other health problems, including back and neck pain. Though some of these records indicate Claimant suffers from pneumoconiosis, the basis for such a diagnosis is unclear, so these records are not sufficiently well documented or well reasoned to independently establish the presence of clinical pneumoconiosis.

On the other hand, most of the radiographic evidence contained in these records does not report pneumoconiosis. Thus, these records generally support an inference of the absence of clinical pneumoconiosis. Because it is uncertain whether each interpreting physician specifically considered the presence of pneumoconiosis, though, and because much of the radiographic evidence is non-ILO-compliant, I conclude that these records are insufficient to independently establish the absence of clinical pneumoconiosis.

Overall, I conclude these records are insufficient to affirmatively establish either the presence or the absence of clinical pneumoconiosis. Without additional explanation from treating and/or interpreting physicians—in this situation where it appears some records may weigh in favor of a finding of pneumoconiosis, and others weigh against such a funding—I find these records, considered alone, merit little probative weight on the issue of clinical pneumoconiosis.

e. Conclusion: Clinical Pneumoconiosis

The burden is on Employer to affirmatively demonstrate that Claimant does not suffer from clinical pneumoconiosis. § 718.305(d)(1)(i)(B). As set forth above, the x-ray evidence, CT scan evidence, and physician opinion evidence are each preponderantly negative for clinical pneumoconiosis. Though the treatment records overall are insufficient to establish the presence or absence of clinical pneumoconiosis, the radiographic reports contained therein generally support a finding that Claimant does not suffer from clinical pneumoconiosis. Therefore, I conclude the weight of the medical evidence supports a finding that Employer has met its burden under section 718.305(d)(1)(i)(B) to establish, by a preponderance of the evidence, that Claimant does not have clinical pneumoconiosis.

ii. Legal Pneumoconiosis

Legal pneumoconiosis is any chronic lung disease or impairment that arises from coal mine employment. § 718.201(a)(2). "[A] disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." § 718.201(b). The physician opinion evidence is the evidence in the record most relevant to disproving the existence of legal pneumoconiosis. *Cf.* § 718.202(a) (setting forth the means of establishing the existence of pneumoconiosis). The record also contains relevant hospitalization and treatment records, which are summarized above.

Appendix D

a. Physician Opinion Evidence

As set forth above, a medical opinion should be both well documented and well reasoned. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Any report lacking these qualities may be assigned less probative weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989); *see also Duke v. Dir., Office of Workers' Comp. Programs*, 6 B.L.R. 1-673 (1983). The record contains the following physician opinion evidence.[10]

Dr. Esther Ajjarapu (DX 14 at 23; DX 43)

Dr. Ajjarapu performed Claimant's Department-sponsored pulmonary examination in accordance with § 725.406 on March 4, 2015. (DX 14.) Dr. Ajjarapu is Board certified in family medicine. Regarding Claimant's coal mine employment history, Dr. Ajjarapu referred to Claimant's Form CM-911a, which documents a coal mine employment history beginning in May 1977 and ending in February 1997. Dr. Ajjarapu noted that Claimant started smoking in 1990 and continued to smoke one pack per day at the time of her exam.

Claimant's past medical history includes attacks of wheezing since 2005, arthritis since 1995, diabetes since 2010, and high blood pressure since 2011. Claimant presented with complaints of daily sputum production,

10. For ease of discussion, the summaries of the physician opinion evidence include the physicians' opinions on all relevant elements of entitlement and have not been limited to their opinions concerning pneumoconiosis.

daily wheezing, dyspnea upon exertion, coughing, chest pain upon exertion, three-pillow orthopnea, and paroxysmal nocturnal dyspnea. Dr. Ajjarapu also detailed Claimant's medications.

On auscultation of Claimant's lungs, Dr. Dr. Ajjarapu observed clear breath sounds. Dr. Ajjarapu administered a chest x-ray (which Dr. DePonte interpreted as positive for clinical pneumoconiosis), a pulmonary function test (which showed "severe pulmonary impairment"), an arterial blood gas study (which showed "mild hypoxemia"), and an EKG (which showed "normal sinus rhythm, no acute changes").

Dr. Ajjarapu diagnosed Claimant with clinical pneumoconiosis and chronic bronchitis. The diagnosis of clinical pneumoconiosis was based on Dr. DePonte's x-ray interpretation. The diagnosis of chronic bronchitis was based on "the presence of symptoms of daily cough with sputum production."

Dr. Ajjarapu attributed Claimant's clinical pneumoconiosis to his coal mine work because "inhaled coal dust eventually causes macules and nodules to form in the lung tissue and these can be seen as opacities." Dr. Ajjarapu attributed Claimant's chronic bronchitis to both his coal mine dust exposure and his smoking history. She explained: "Both tobacco smoke and coal dust cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms."

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Dr. Ajjarapu concluded that Claimant is totally disabled. She based this on Claimant's spirometry (which "shows severe pulmonary impairment"), his arterial blood gas study (which shows "mild pre and post arterial hypoxemia"), and Claimant's positive chest x-ray. Dr. Ajjarapu determined the cause of Claimant's total disability is "multifactorial and it is due to both causes of extensive smoking and inhalation of coal dust."

Dr. Ajjarapu wrote a supplemental medical report dated September 15, 2016. (DX 43.) Dr. Ajjarapu specified that Claimant suffers from legal pneumoconiosis in the form of chronic bronchitis. She reiterated that her diagnosis is based on Claimant's respiratory symptoms, including complaints of sputum production, dyspnea on ambulation, and shortness of breath. She again attributed Claimant's chronic bronchitis to both his smoking and coal mine dust exposures. She explained that coal dust inhalation directly irritates the airways, which causes cough and sputum production. She also explained that these effects can still occur, even after a miner's exposure to coal mine dust has ceased, because dust particles are "embedded in the parenchyma of airway tissues."

Dr. Ajjarapu also reiterated that Claimant suffers from clinical pneumoconiosis. Dr. Ajjarapu acknowledged the existence of negative x-ray interpretations but explained that "a negative chest x-ray does not necessarily mean that the miner is not suffering from" pneumoconiosis, and "the x-ray was read as positive" on the day of her exam, so she believes that Claimant suffers from clinical pneumoconiosis.

Dr. Ajjarpu agrees with Dr. Rosenberg (whose opinion is summarized below) that Claimant is totally disabled would be unable to perform his previous coal mine employment. Regarding the cause of Claimant's total disability, Dr. Ajjarapu wrote: "This miner is totally and completely disabled due in part to his work in the coal mines from pulmonary perspective."

Dr. David Rosenberg (DX 18; EX 6; EX 9; EX 24)

Dr. Rosenberg has authored four reports, and he has been deposed since the filing of this claim. Dr. Rosenberg is Board certified in internal medicine, pulmonary disease, and occupational medicine. He has reviewed substantial medical evidence, including radiographic evidence, pulmonary function test results, arterial blood gas studies, hospitalization and treatment records, and medical reports.

Dr. Rosenberg's first report is dated May 10, 2016. (DX 18 at 1.)[11] Based on his review of the evidence, Dr. Rosenberg observed that Claimant worked in the coal mines from 1978 to 1996 and last worked as a shearer operator. Dr. Rosenberg noted a smoking history of one pack per day from 1990 to the time of his exam.

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11. DX 18 contains two reports from Dr. Rosenberg dated May 10, 2016. (DX 18 at 1; DX 18 at 6.) Although the conclusions reached in both reports are identical, I have summarized the report at page 1 because it appears to be based on a review of more evidence than the report at page 6.

Dr. Rosenberg concluded that Claimant does not have clinical pneumoconiosis. He based this on various factors including Claimant's lungs being clear on auscultation and the preservation of his gas exchange in association with exercise, which "indicates the alveolar capillary bed within his lungs is intact." Dr. Rosenberg explained: "If one had parenchymal changes that were causing restriction, one would expect a falling pO_2 in association with exercise."

Dr. Rosenberg determined that Claimant is totally disabled from a pulmonary perspective. He observed that Claimant has "severe airflow obstruction with a degree of bronchodilator response," and "his spirometric measurements are qualifying." Therefore, Dr. Rosenberg concluded that Claimant "would be considered disabled from performing his previous coal mine job or similarly arduous types of labor."

Dr. Rosenberg described Claimant's pattern of impairment as "a pattern seen in association with legal CWP." He explained that Claimant "does have a reduction of his FEV_1, but it is associated with only a mild reduction of his FEV_1/FVC ratio . . . in association with bronchodilators." Dr. Rosenberg concluded that, despite Claimant's significant smoking history, "the pattern of impairment supports a component of legal CWP contributing to his disabling impairment."

The second medical report authored by Dr. Rosenberg is dated April 13, 2017. (EX 6.) Upon review of additional medical evidence, Dr. Rosenberg noted that Claimant has a coal mine employment history totaling "a little under

20 years," overall there is no evidence of micronodularity, and Claimant's qualifying pulmonary function test results reflect "restriction with an obstructive component."

Dr. Rosenberg reiterated his opinions that Claimant is totally disabled but does not have clinical pneumoconiosis. Because Claimant's FEV_1 is reduced, "but only with a milder reduction of the FEV_1/FVC ratio," Dr. Rosenberg again concluded that "one cannot rule out a component of legal CWP." However, referencing Claimant's nineteen years of coal mine employment and a smoking history as high as fifty pack-years, Dr. Rosenberg explained that "when considering dose response relationships in the development of disease, smoking has played a much more significant role as a cause for his respiratory impairment compared to coal dust exposure."

Dr. Rosenberg's third medical report is dated November 2, 2017. (EX 9.) Upon review of additional medical evidence, Dr. Rosenberg again concluded that the radiographic evidence fails to establish that Claimant suffers from clinical pneumoconiosis. Additionally, Dr. Rosenberg continued to believe that the physiologic pattern of Claimant's disabling impairment is "consistent with a component of legal CWP," though he concluded that "smoking clearly has played a much more significant role as a cause for his respiratory impairment compared to coal mine dust exposure."

Dr. Rosenberg's most recent report is dated June 17, 2019. (EX 6.) Though Dr. Rosenberg summarized several pieces of medical evidence at the outset of this report, it

appears Dr. Rosenberg had already reviewed most of the evidence he summarized. For instance, Dr. Rosenberg had already reviewed Dr. McSharry's January 19, 2017, report (and associated test results) in writing his report of April 13, 2017. (EX 6.) Likewise, Dr. Rosenberg had already reviewed Claimant's April 13, 2017, pulmonary function test results in writing his report of November 2, 2017. (EX 9.)

In any case, in writing this report, Dr. Rosenberg determined that Claimant has twenty-one and one-half years of coal mine employment, and Claimant smoked for approximately twenty to thirty years at a rate of one-half to one-pack per day. (EX 6.) Dr. Rosenberg concluded that Claimant does not have clinical pneumoconiosis because he "does not have micronodularity related to past coal mine dust exposure." Rather, Dr. Rosenberg concluded that Claimant has "centrilobular ground-glass opacities in association with the emphysema consistent with respiratory bronchiolitis interstitial lung disease (RBILD)." Dr. Rosenberg indicated that this disease was caused by smoking and "is responsible for any restriction observed," and (along with emphysema) is also responsible for Claimant's reduced diffusing capacity. Dr. Rosenberg also noted that Claimant "has smoking-related chronic obstructive lung disease (COPD)."

Dr. Rosenberg again concluded that Claimant suffers from a totally disabling pulmonary impairment. Dr. Rosenberg indicated this conclusion was based on Claimant's severe airflow obstruction, his "marked reduction" of FEV_1, and his "severely reduced FEV_1 in

relationship to the FVC." Dr. Rosenberg also noted that Claimant is "disabled as a whole person" based on his other health conditions.

For several reasons, Dr. Rosenberg determined that Claimant's COPD/emphysema is not etiologically related to his past coal mine dust exposure. First, citing to various medical studies, Dr. Rosenberg explained that, when providing a differential diagnosis, it is possible to distinguish between the effects of cigarette smoking and coal dust exposures by examining the magnitude in the reduction of the FEV_1 in comparison to the reduction in the FVC. Specifically, Dr. Rosenberg explained that smoking reduces the FEV_1 farther than the FVC, whereas coal dust reduces the FEV_1 and FVC in equal measure. In Claimant's case, his FEV_1 in relationship to his FVC is reduced to around 60%. Based on a predictive equation for how dust exposure reduces the FEV_1 in relationship to the FVC, Dr. Rosenberg opined that Claimant's FEV_1 in relationship to his FVC has "fallen to a much greater extent" (approximately ten percent greater) than would be expected given his twenty-one and one-half years of coal mine employment.

Similarly, Dr. Rosenberg cited to medical studies to demonstrate that the effects of cigarette smoking are far greater than the effects of coal dust in terms of a loss of FEV_1. Dr. Rosenberg concluded that, when considering the dose-response relationships of coal dust exposure and smoking, as well the magnitude in the decrement of FEV_1 compared to other values, Claimant "does not have obstruction related to coal dust exposure." Instead,

Dr. Rosenberg determined Claimant's reduction of FEV_1 is related to his smoking history. Dr. Rosenberg specified that the magnitude of Claimant's loss of FEV_1 "is not consistent with a coal mine dust etiology," and his marked reduction of FEV_1 in relationship to his FVC is "inconsistent with the presence of legal CWP."

Next, Dr. Rosenberg reasoned that Claimant's emphysema was caused by his coal dust exposure. He explained that both coal mine dust and cigarette smoke can cause emphysema through similar mechanisms. However, he indicated it is possible to distinguish between the effects of smoking and coal mine dust. According to Dr. Rosenberg, "emphysema related to cigarette smoking is more diffuse than emphysema due to coal dust and results in lower diffusing capacity measurements, marked air trapping, and bullae formation because the particles in cigarette smoke are smaller and more numerous than coal particles and distribute deeper throughout the lungs." Dr. Rosenberg cited to medical literature to support the positions that smaller particles cause more diffuse emphysema and that coal dust exposure does not cause diffuse emphysema. Dr. Rosenberg emphasized that, whereas some animal studies demonstrate a connection between tobacco smoke and genetic controls related to emphysema, there are no animal studies demonstrating the development of diffuse emphysema related to coal dust. Based on all this information, Dr. Rosenberg concluded Claimant's emphysema is not a form of legal pneumoconiosis. Rather, Claimant's reduced diffusing capacity "indicates widespread emphysematous lung destruction related to smoking," and his "findings are not representative of coal mine induced emphysema."

Dr. Rosenberg also concluded "[t]here is no scientific basis for attributing any bronchitis in [Claimant's] case to his remote coal dust exposure." Citing to medical literature, Dr. Rosenberg asserted that "[c]hronic bronchitis dissipates within months after exposure ceases" because the associated symptoms (couth and sputum production) are caused by direct irritation of the airway cells from dust inhalation." Dr. Rosenberg noted that smoking is one of the primary causes of bronchitis, and he attributed Claimant's bronchitis to his smoking history. In part because Claimant continued to smoke after the leaving the mines in 1997, Dr. Rosenberg concluded his bronchitis "is caused by his continuing cigarette smoking habit and not his past coal mine dust exposure."

Dr. Rosenberg also referenced Claimant's response to bronchodilators as evidence that he does not suffer from legal pneumoconiosis. Specifically, Dr. Rosenberg observed that Claimant's spirometric results displayed "significant improvement in relationship to the administration of bronchodilators." According to Dr. Rosenberg: "This type of response in response to bronchodilators is not consistent with the pattern of legal CWP. The chronic scarring associated with CWP would be expected to allow luminal dilation and thus improved airflow." Dr. Rosenberg posited that the fact that Claimant's results did not return completely to normal after bronchodilators was due to airway remodeling.

Dr. Rosenberg next determined Claimant's airway disease is not a latent and progressive form of pneumoconiosis. Dr. Rosenberg explained that latent

and progressive pneumoconiosis is rare. He wrote, based on scientific literature, that "developing latent and progressive simple clinical CWP after a given miner has left the coal mine industry with a negative X-ray is an uncommon phenomenon." He cited to a study that found miners display a decline in lung function in the first few years after beginning work in the mines. Therefore, "workers would not be expected in a latent and progressive fashion to experience falls in their FEV_1 values in relationship to legal CWP years after having left their coal mine employment." Because Claimant continued to smoke heavily for two decades after leaving the mines, Dr. Rosenberg concluded that it "is this excessive smoking consumption which has caused his RBILD as well as his emphysema."

Dr. Rosenberg's ultimate conclusion was that Claimant does not suffer from either clinical or legal pneumoconiosis. Although he agreed that Claimant is totally disabled by a respiratory impairment, Dr. Rosenberg opined that Claimant's disability is not related to coal mine dust exposure. Dr. Rosenberg's opinions remain the same "even assuming he has a degree of CWP."

Dr. Rosenberg testified at a deposition on October 22, 2019. (EX 24.) Dr. Rosenberg testified to the importance of relying on relevant research to reach evidence-based medical conclusions. (Tr. 14-15.) He explained that physicians generally employ the methodology of differential diagnosis to determine the cause of particular medical findings by considering the possible causes and then "hon[ing] in on what's more probable than not based

on the testing that's been performed" and based on medical literature. (Tr. 15-16.) He also explained that, while risk is an important consideration in performing differential diagnosis, "it's not the only consideration. You have to use the risk model and other information that's been provided to decide what's more probable than not." (Tr. 17-18.) Dr. Rosenberg emphasized that risk alone does not establish causation. For instance, the fact of exposure to coal mine dust or to cigarette smoke does not necessarily mean that one's lung disease was caused by either of those factors. (Tr. 18-19.) Dr. Rosenberg agreed that the likelihood of a miner developing coal mine dust-related lung disease would depend on the miner's level of exposure (*i.e.*, there is a dose-response relationship), and the same is true with respect to smoking-induced lung disease. (Tr. 19.)

Based on his review of the entire record, Dr. Rosenberg estimated a smoking history of thirty to fifty pack-years. (EX 24 at 27-28.) Dr. Rosenberg indicated that, based on his pulmonary function test results, Claimant has a totally disabling obstructive respiratory impairment. (EX 24 at 28-29.) Dr. Rosenberg again explained that Claimant "has on obstructive pattern where the FEV_1 is reduced to a greater extent than the FVC," as well as "a degree of restriction." (EX 24 at 30.) Dr. Rosenberg emphasized the magnitude of Claimant's loss of FEV_1 as compared to FVC: "Initially it looked like it was only mildly reduced. But based on the totality of the information, it becomes more severely reduced, the ratio has been down as low as 54 percent." (EX 24 at 30.) Dr. Rosenberg also observed that "there's been worsening of his obstruction over time." (EX 24 at 31.)

Dr. Rosenberg opined that the decline seen on Claimant's pulmonary function test is due to smoking. (EX 24 at 31.) Dr. Rosenberg emphasized that Claimant's treatment records from around the time he left mines do not show any respiratory complaints or diagnosis/treatment for any respiratory condition. (EX 24 at 32.) He stated that this is "very supportive information" that Claimant's impairment is not related to coal mine dust because symptoms "would have been manifest in close proximity to when he worked in the mines." (EX 24 at 32.) He added: "You're not going to get, as I mentioned, those kinds of manifestations and clinical correlates years and decades after one leaves the mine." (EX 24 at 32.) Dr. Rosenberg's conclusion is that Claimant's disabling obstruction and emphysema were caused by his smoking habit. (EX 24 at 35.)

Asked to explain why he initially found that Claimant's pattern of impairment seen on pulmonary function testing was consistent with legal pneumoconiosis, Dr. Rosenberg stated:

> At that point in time, I had the spirometric values and I was looking at the reduction of the ratio. It was only mildly reduced. Then over time I've had more information to look at. And as I mentioned prior in this deposition, there are times when his FEV_1/FVC ratio has been very significantly reduced. He also at time times has demonstrated a bronchodilator response. You wouldn't expect a bronchodilator response in relationship to a coal dust related impairment.

(EX 24 at 36.) Dr. Rosenberg explained that a broncho-responsive impairment is not consistent with legal pneumoconiosis because chronic scarring of the airways caused by legal pneumoconiosis "is not going to allow that airway to dilate in response to bronchodilators." (EX 24 at 36.) Dr. Rosenberg also explained that the worsening of Claimant's lung function over time is inconsistent with legal pneumoconiosis. (EX 24 at 37.)

Instead, based in part on Claimant's CT scan which showed ground glass opacities, Dr. Rosenberg diagnosed Claimant with respiratory smoking-related bronchiolitis, which can lead to both restriction and obstruction. (EX 24 at 37.) He explained: "Respiratory bronchiolitis is inflammation around the airways, and in the interstitium of the lung that is generally related to cigarette smoking. The cigarette smoke causes this fluffy type of appearance on the CAT scan and that refers to ground glass changes." (EX 24 at 38-39.) Along with Claimant's emphysema, "these kinds of findings are classic for a smoking related form of airway disease and inflammation in the lungs." (EX 24 at 39.) Dr. Rosenberg again described how the small particles in cigarette smoke are more likely than coal dust to cause a diffuse pattern of emphysema. (EX 24 at 41-42.)

In sum, the factors on which Dr. Rosenberg relied to rule out coal dust as a cause of Claimant's impairment include the dose response relationships of smoking and coal mine dust, the prevalence of smoking-induced disease versus coal mine dust-induced disease, the reduction in Claimant's FEV_1 compared to his FVC, the

bronchodilator response seen during pulmonary function testing, Claimant's CT scan (which revealed ground glass opacities), Claimant's reduced diffusion capacity, and the latency and progressivity of Claimant's symptoms. (EX 24 at 43-44.) Dr. Rosenberg explained that his opinion (that the *magnitude* of reduction in the FEV1/FVC ratio can be used to distinguish between the effects of coal dust and smoking) is not contrary to the science underlying the regulations. (EX 24 at 45-46.)

Dr. Rosenberg disagreed with Dr. Ajjarapu's attribution of Claimant's chronic bronchitis to both his smoking and coal mine dust exposures. (EX 24 at 46-48.) He explained that "there's not scientific literature that chronic bronchitis will develop in coal miners years after they left their employment." (EX 24 at 46-47.) Dr. Rosenberg attributed Claimant's chronic bronchitis to his smoking, and he explained "that's what's irritating his airways causing his continued cough and sputum production." (EX 24 at 48.) Dr. Rosenberg specified that he considered Claimant's underground coal mine employment in reaching his diagnosis, and he considered the possibility that coal mine dust exposure could have aggravated a smoking-induced lung condition. (EX 24 at 49-50.)

Dr. Rosenberg concluded that Claimant does not suffer from clinical pneumoconiosis. (EX 24 at 51.) He cited the "overwhelming majority" of negative B readings, the negative CT scan evidence, and the preservation of Claimant's gas exchange with exercise. (EX 24 at 51-53.) Dr. Rosenberg also agreed that Claimant's totally disabling obstructive impairment was caused by his long

smoking habit, and coal mine dust exposure could be ruled out as a causative factor to a reasonable degree of medical certainty. (EX 24 at 54-55.)

Dr. Roger McSharry (EX 3)

Dr. McSharry examined Claimant on December 1, 2016, and reviewed substantial medical evidence, including radiographic evidence, pulmonary function tests, arterial blood gas studies, hospitalization and treatment records, and medical reports. He has written three reports since the filing of this claim. (EX 3.) Dr. McSharry is Board certified in internal medicine and pulmonary disease.

In the report of his physical examination, Dr. McSharry noted that Claimant worked in coal mines for 21 years, last worked as a shearer operator, and smoked for twenty to thirty years at a rate of one-half to one pack per day. Dr. McSharry noted Claimant's history of dyspnea on exertion, daily productive cough, daily wheezing, chest pain, orthopnea, hypertension, diabetes, and orthopedic issues. Dr. McSharry also detailed Claimant's medications. On auscultation of Claimant's lungs, Dr. McSharry observed slight wheezing and good air movement.

Dr. McSharry's first narrative report is dated is January 19, 2017. (EX 3 at 1.) As part of his examination, Dr. McSharry administered a pulmonary function test, which "indicated severe airflow limitation as well as moderate restrictive abnormalities and reduced diffusion capacity," though Dr. McSharry noted that

the test "did not meet reproducibility standards and may underestimate [Claimant's] best lung function." Dr. McSharry also administered an arterial blood gas study, which showed "mild hypoxemia for age, and a significantly elevated carboxyhemoglobin level indicating current smoking." Additionally, Claimant underwent a chest x-ray and CT scan, which were interpreted by Dr. Meyer and Dr. McSharry as negative for pneumoconiosis.

Dr. McSharry concluded that Claimant does not suffer from clinical pneumoconiosis. The basis for this opinion was the negative x-ray and CT scan. Dr. McSharry reasoned: "The fact that no lesions were seen on this CT study strongly rebuts any contention that radiographic pneumoconiosis is present."

Dr. McSharry also concluded that Claimant does not suffer from legal pneumoconiosis. Though he acknowledged that Claimant does have chronic lung disease, Dr. McSharry emphasized Claimant's long smoking history and concluded that Claimant's "essentially irreversible" obstructive lung disease, with some restrictive changes and diffusion abnormalities, "is almost certainly the result of long-term tobacco use and for this reason does not indicate the presence of legal pneumoconiosis."

Dr. McSharry recognized that pneumoconiosis can cause a combination of restrictive and obstructive lung disease. However, he explained that such a condition "is almost universally associated with severe radiographic changes of pneumoconiosis," which are not present in Claimant's case. Dr. McSharry also explained that such

a pattern of restrictive and obstructive lung disease with diffusion abnormalities can be caused by cigarette smoking alone.

Dr. McSharry concluded that "it is extremely unlikely to me that that this severe degree of pulmonary function abnormalities would be seen as a result of coal workers' pneumoconiosis without any radiographic evidence of that disease, whereas cigarette-related lung disease of this degree is frequently associated with no radiographic changes." Dr. McSharry added: "The possibility that a very small portion of the abnormality seen on pulmonary function testing in this patient is due to coal dust exposure cannot be completely excluded," though he noted there is no "compelling support" for that assertion.

Dr. McSharry concluded that Claimant suffers from a totally disabling respiratory impairment and would be unable to perform his previous coal mine employment. He described Claimant's pulmonary function test as "severely abnormal" and indicated that it meets the Department's standard for disability. He attributed Claimant's disability to his long smoking history.

Dr. McSharry wrote a second report dated March 16, 2017. (EX 3 at 39.) Upon review of additional medical records, Dr. McSharry wrote that his opinions from his previous report remain unchanged. That is, Claimant suffers from neither clinical pneumoconiosis nor legal pneumoconiosis, but he is totally disabled by a respiratory impairment caused by his long smoking history.

Appendix D

Dr. McSharry's most recent report is dated May 30, 2019. (EX 3 at 42.) After reviewing additional medical records, Dr. McSharry again concluded that Claimant does not suffer from clinical pneumoconiosis. He recognized that the chest x-ray evidence he reviewed contains both positive and negative interpretations and specifically referenced his own review of Claimant's November 29, 2016, chest x-ray. Dr. McSharry also relied on Dr. Meyer's interpretation of Claimant's November 29, 2016, CT scan, which was negative for clinical pneumoconiosis.

On the issue of legal pneumoconiosis, Dr. McSharry wrote: "I feel it is unlikely, although not impossible, that legal coal workers' pneumoconiosis is present." He again commented that in his experience, when a person has "significant abnormalities in lung function" like Claimant does, "it is almost always associated with clear-cut radiographic evidence of high profusion CWP or PMF." In contrast, the radiographic evidence in Claimant's case are "the typical radiographic findings in long-time smokers with no industrial exposure to pulmonary hazards." Additionally, according to Dr. McSharry, the emphysematous changes seen in Claimant's pulmonary function results are "fairly uncommon in non-smoking coal miners, even when there is clear-cut radiographic evidence of pneumoconiosis." He reasoned: "These two findings suggest that coal workers' pneumoconiosis is simultaneously invisible radiographically and yet causing a PFT appearance uncommon even in non-smoking miners with strong evidence of pneumoconiosis." Dr. McSharry concluded: "The likelihood of both of these unusual circumstances occurring together is much less

than the likelihood this represents simple smoking-related pneumoconiosis." However, he added: "I cannot fully exclude that any contribution from coal dust exposure exists in this claimant."

Dr. McSharry does believe that Claimant is totally disabled. Although he described Claimant's arterial blood gas studies as "minimally abnormal," Dr. McSharry noted that Claimant's "severely abnormal pulmonary function testing" meets the Department's standard for disability. He determined that "the cause for the respiratory impairment and resulting disability is smoking-related lung disease." Because there is "no compelling evidence" that coal dust exposure caused or contributed to Claimant's lung disease, Dr. McSharry concluded it is "extremely unlikely" that coal dust contributed to or aggravated Claimant's respiratory condition.

Discussion of Physician Opinions

In support of its burden to prove that Claimant does not have legal pneumoconiosis, Employer offered the opinions of Drs. Rosenberg and McSharry. Both Dr. Rosenberg and Dr. McSharry are Board certified in internal medicine and pulmonary disease, so they are well qualified to opine on the presence or absence of legal pneumoconiosis. Both Dr. Rosenberg and Dr. McSharry also had a reasonably accurate understanding of Miner's coal mine employment and smoking histories. Both Dr. Rosenberg and Dr. McSharry determined Claimant does not suffer from legal pneumoconiosis.

Appendix D

In his first three reports dated May 10, 2016 (DX 18), April 13, 2017 (EX 6), and November 2, 2017 (EX 9), Dr. Rosenberg opined that (though smoking was likely the more significant cause of Claimant's lung disease) Claimant's pattern of impairment also was consistent with legal pneumoconiosis because his FEV_1/FVC ratio was only mildly reduced. However, in his final report dated June 17, 2019 (EX 6), Dr. Rosenberg determined that the pattern of Claimant's obstructive lung disease is not consistent with a coal mine dust etiology.

At his deposition (EX 24), Dr. Rosenberg attributed this change in his opinion to the fact that "over time I've had more information to look at," specifically additional spirometric results. (EX 24 at 36.) However, between the time when Dr. Rosenberg wrote his third report in November 2017 (EX 9)—and opined that Claimant's impairment was consistent with legal pneumoconiosis—and the time when he wrote his final report in June 2019 (EX 6)—and opined that Claimant's impairment was inconsistent with pneumoconiosis—it does not appear that Dr. Rosenberg reviewed any additional spirometric results.

In his final report (EX 6), Dr. Rosenberg references Dr. McSharry's November 2016 pulmonary function test, Dr. Ajjarapu' s April 2017 pulmonary function test, and 2016 pulmonary function test results contained in Claimant's treatment records from St. Charles Breathing Center. It is clear from Dr. Rosenberg's other reports that he had already previously reviewed each of these results. Specifically, he reviewed Dr. McSharry's November 2016

results in writing his April 2017 report (EX 6), and he reviewed Dr. Ajjarapu's April 2017 results and the St. Charles Breathing Center treatment records in writing his November 2017 report (EX 9).

Therefore, Dr. Rosenberg's explanation that he changed his opinion based on his review of additional spirometric results does not hold up to scrutiny. Rather, I conclude Dr. Rosenberg's opinion is internally inconsistent because he reaches different conclusions based on the same test results. On this basis, I conclude Dr. Rosenberg's opinion is not well reasoned, and I do not credit it.[12] *See, e.g.*, *Griffith v. Dir. Office of Workers' Comp. Programs*, 49 F.3d 184, 186 (6th Cir. 1995) (proper for the ALJ to assign less weight to an equivocal medical opinion); *Lively v. A & M Coal Co., Inc.*, BRB No. 18-0009 BLA (Nov. 15, 2018) (unpub.) (same); *Long v. Eastern Associated Coal Co.*, BRB No. 15-00018 BLA (Oct. 27, 2015) (unpub.) (permissible for the ALJ to afford less weight to a medical report on the basis of inconsistencies (citing *Hopton v. U.S. Steel Corp.*, 7 B.L.R. 1-12 (1984))).

Dr. McSharry also concluded that Claimant does not suffer from legal pneumoconiosis. He diagnosed Claimant

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12. By the time of his deposition, it appears Dr. Rosenberg had reviewed an additional pulmonary function test of record, namely Dr. Ajjarapu's December 2017 test (CX 4). (EX 24 at 23.) It is conceivable that this additional test result may have warranted a change in Dr. Rosenberg's opinion. Nonetheless, because Dr. Rosenberg's prior opinions in this case are internally inconsistent and not credible, as described above, I also decline to credit Dr. Rosenberg's deposition opinion.

with lung disease in the form of a mixed restrictive and obstructive pattern with diffusion abnormalities. He determined Claimant's impairment is "almost certainly" caused by his long smoking history. Dr. McSharry opined: "I feel it is unlikely, although not impossible, that legal coal workers' pneumoconiosis is present."

Dr. McSharry reasoned that, in his experience, when a person has "significant abnormalities in lung function" like Claimant does, "it is almost always associated with clear-cut radiographic evidence of high profusion CWP or PMF." In contrast, the radiographic evidence in Claimant's case represents "the typical radiographic findings in long-time smokers with no industrial exposure to pulmonary hazards." Additionally, according to Dr. McSharry, the emphysematous changes seen in Claimant's pulmonary function results are "fairly uncommon in non-smoking coal miners, even when there is clear-cut radiographic evidence of pneumoconiosis." Dr. McSharry also wrote: "The possibility that a very small portion of the abnormality seen on pulmonary function testing in this patient is due to coal dust exposure cannot be completely excluded," though he noted there is no "compelling support" for that assertion.

Dr. McSharry based his opinion on the medical records he reviewed, as well as his own examination of Claimant. Upon consideration of the relevant risk factors (namely, smoking and coal mine dust exposure), Dr. McSharry determined that the characteristics of Claimant's pulmonary condition are consistent with smoking-induced lung disease. Accordingly, Dr. McSharry's opinion

is sufficiently well reasoned and well documented to establish that Claimant suffers from a smoking-induced pulmonary impairment. However, I find Dr. McSharry's opinion is insufficient to affirmatively establish that Claimant's impairment is not also "significantly related to, or substantially aggravated by, dust exposure." § 718.201(b).

First, one of Dr. McSharry's primary reasons for attributing Claimant's lung disease to smoking and not to coal mine dust is that the radiographic evidence is typical of a smoking-induced impairment, but not of a coal mine dust-induced impairment characterized by significant abnormalities in lung function. However, the regulations do not require that a finding of legal pneumoconiosis be accompanied by radiographic evidence of clinical pneumoconiosis. *See* § 718.201(a)(2); *Obush v. Helen Mining Co.*, BRB No. 08-0671 BLA (June 24, 2009). A diagnosis of legal pneumoconiosis simply is not dependent on radiographic evidence of pneumoconiosis. *See Cumberland River Coal Co. v. Dir., Office of Workers' Comp. Programs*, 690 F.3d 477, 487 (6th Cir. 2012) (finding the ALJ properly concluded that the regulations provide legal pneumoconiosis may exist even in the absence of clinical pneumoconiosis, *i.e.* negative x-rays and CT scans). Rather, legal pneumoconiosis is specifically defined separate and apart from clinical pneumoconiosis, which is usually diagnosed by radiographic evidence. *See* § 718.201.

Likewise, a finding of legal pneumoconiosis is not precluded by a finding that Claimant's pulmonary function test abnormalities are consistent with smoking-

induced lung disease. The presence of one causal factor (smoking) is not evidence of the absence of another causal factor (coal mine dust exposure). Even if Dr. McSharry is correct that Claimant's smoking habit is the primary cause of his pulmonary condition, his reasoning does not disprove that coal mine dust also substantially contributed to or aggravated Claimant's lung disease, especially considering "the prevailing view of the medical community that the risks of smoking and coal mine dust exposure are additive." *Pennington v. Bates Contracting and Constr., Inc.*, BRB No. 13-0287 BLA, slip op. at 6 (Feb. 25, 2014) (unpub.); *see also* 65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000) ("Smokers who mine have additive risk for developing significant obstruction").[13]

Finally, considering Dr. McSharry's express recognition that the presence of legal pneumoconiosis is "unlikely, although not impossible," I find Dr. McSharry did not sufficiently explain why Claimant could not be suffering from *both* tobacco-related and coal mine dust-related lung disease, or why Claimant's coal dust exposure did not substantially exacerbate any tobacco related lung disease. Therefore, I conclude his opinion does not establish, by a preponderance, that Claimant's impairment is not "significantly related to, or substantially aggravated by, dust exposure."[14] *See* § 718.201(b). For these reasons,

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13. The Board has held that the Preamble "comprises an authoritative statement of medical principles accepted by the Department of Labor." *Tackett v. H.J. Mining Co., Inc.*, BRB No. 13-0502 BLA, at 9 (Jul. 10, 2014) (unpub.).

14. Dr. McSharry also concluded Claimant does not suffer from legal pneumoconiosis because he found "no compelling

Dr. McSharry's opinion has not persuaded me that Claimant does not suffer from legal pneumoconiosis.

Based on the foregoing analysis, I conclude Dr. Rosenberg's and Dr. McSharry's opinions on the issue of legal pneumoconiosis are insufficient (alone or together) to satisfy Employer's burden to disprove the existence of legal pneumoconiosis, as required by § 718.305(d)(1)(i)(A). Therefore, the physician opinion evidence does not preponderantly establish that Claimant is not suffering from legal pneumoconiosis.[15]

b. Hospitalization and Treatment Records

The hospitalization and treatment records do not aid Employer in rebutting the presumption of legal pneumoconiosis. These records show that Claimant has been diagnosed and treated for pulmonary and respiratory impairments, including COPD. However, because these records are devoid of any discussion as to the cause of

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evidence to suggest coal dust exposure is causing or contributing to this claimant's lung disease." (EX 3 at 45.) From this language, it appears that Dr. McSharry would find legal pneumoconiosis only if the evidence of a coal dust-induced lung disease were "compelling." The burden of proof in a black lung proceeding is "preponderance of the evidence," so a claimant is never required to establish the existence of pneumoconiosis by "compelling evidence." *See* § 725.202(d); *see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

15. Dr. Ajjarapu diagnosed Claimant with legal pneumoconiosis. Therefore, her opinion cannot assist Employer in rebutting the presumption of legal pneumoconiosis.

these impairments, they are not determinative on the issue of legal pneumoconiosis. Therefore, I conclude that the hospitalization and treatment records, taken alone, neither establish nor refute the presence of legal pneumoconiosis and merit little weight on the issue.

c. Conclusion: Legal Pneumoconiosis

The physician opinion evidence does not establish, preponderantly, that Claimant does not have legal pneumoconiosis. The hospitalization and treatment records are insufficient to establish the presence or absence of legal pneumoconiosis. Accordingly, weighed together, I find that the evidence as a whole does not establish that Claimant is not suffering from legal pneumoconiosis. Therefore, Employer has failed carry its burden to rebut the presumption of legal pneumoconiosis as required by § 718.305(d)(1)(i)(A).

Because Employer failed to establish that Claimant does not suffer from both clinical and legal pneumoconiosis, Employer has failed to rebut the presumption of pneumoconiosis in accordance with§ 718.305(d)(1)(i).

B. Disproving Disability Causation

The final method available to Employer to rebut the § 718.305 presumption is to establish that pneumoconiosis caused "no part" of Claimant's respiratory total disability. § 718.305(d)(1)(ii). In other words, Employer must "'rule out' any connection between pneumoconiosis and the miner's total disability." *Dalman v. Consol. Coal Co.*,

BRB No. 15-0022 BLA (Oct. 30, 2015) (unpub.); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144 (4th Cir. 2015) (explaining that the presumption is rebutted only by showing that the miner's disability is "attributable exclusively to a cause or causes other than pneumoconiosis"); *Minich v. Keystone Coal Mining Corp.*, 25 B.L.R. 1-149, 1-159 (2015); *Hall v. Paramount Coal Co. of Va.*, BRB No. 16-0610 BLA (Jul. 31, 2017) (unpub.). The Board has also distinguished between proving that *pneumoconiosis* caused no part of Claimant's total disability and proving that *coal dust exposure* caused no part of Claimant's total disability; the Board clarified that it is the former that is required to rebut the presumption. *Minich*, 25 B.L.R. at, 1-158.

Employer has failed to carry its burden to rebut the presumption of legal pneumoconiosis as required by § 718.305(d)(1)(i)(A). Dr. Rosenberg and Dr. McSharry opined that Claimant did not have legal pneumoconiosis. As discussed above, I found that their opinions failed to rebut the presumption of legal pneumoconiosis. "Long-standing precedent establishes that a medical opinion premised on an erroneous finding that a claimant does not suffer from pneumoconiosis is 'not worthy of much, if any weight,' particularly with respect to whether a claimant's disability was caused by that disease." *Hobert Mining v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (quoting *Grigg v. Dir., Office of Workers' Comp. Programs*, 28 F.3d 416, 419 (4th Cir. 1994)), cited in *Carter v. Island Creek Coal Co.*, BRB Nos. 16-0423 BLA and 16-0423 BLA-A (May 22, 2017) (unpub.).

Here, neither Dr. Rosenberg nor Dr. McSharry credibly disproved the existence of legal pneumoconiosis. Their opinions on disability causation are inseparably linked to their dubious conclusions on the issue of legal pneumoconiosis and are thus inadequate to establish that no part of Claimant's disability was caused by pneumoconiosis. *See*, *e.g.*, *Terry v. Newton Energy, Inc.*, BRB No. 17-0087 BLA (Nov. 28, 2017) (unpub.); *Sturgill v. Double M Coal Co.*, BRB No. 15-0294 BLA (Nov. 28, 2016) (unpub.); *Gamble v. Charalais Corp.*, BRB Nos. 15-0357 BLA and 15-0380 BLA (Apr. 28, 2016) (unpub.).

Because Employer has also failed to establish that Claimant does not have pneumoconiosis, Employer has failed to rebut the § 718.305 presumption that Claimant is totally disabled due to pneumoconiosis. Accordingly, Claimant has established, through the operation of the presumption at § 718.305, that he is totally disabled due to pneumoconiosis.

VI. Pneumoconiosis Causation

If an administrative law judge finds the existence of legal pneumoconiosis, it is not necessary to separately determine the etiology of the disease under § 718.203, because the findings at § 718.202(a)(4), regarding causation, necessarily subsume that inquiry. *See Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-256, 1-259 n.18 (2006). Here, Claimant has established legal pneumoconiosis via operation of the § 718.305 presumption (and Employer's failure to rebut the presumption). Thus, Claimant has established pneumoconiosis arising out of coal mine employment.

Based on the foregoing analysis, Claimant has established all elements of entitlement: (1) he suffers from pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis.

VII. Responsible Operator/Insurance

Employer contends that Arch, the named self-insurance carrier, is not liable for this claim. The crux of Employer's argument is that, at the time this claim was filed, Patriot Coal Corporation ("Patriot") provided self-insurance for Apogee (Claimant's last coal mine employer), so Patriot is the self-insurer liable for this claim. Because Patriot is now insolvent, Employer asserts that liability must fall to the Black Lung Disability Trust Fund ("Trust Fund").

According to Employer, Arch sold Apogee and its federal black lung liabilities in 2005 and, in subsequent years, adjusted its Department-approved self-insurance applications to exclude Apogee. Patriot ultimately acquired Apogee's assets and liabilities in 2008, and Patriot included Apogee's liabilities in its Department-approved self-insurance agreement in 2011.[16] In 2015, Patriot was dissolved. In 2015, the Department issued Bulletin 16-01, which, according to Employer, effectively imposed liability on Arch for certain claims, including this one. Employer's legal challenge to the Bulletin was dismissed by a federal

16. In making these assertions, Employer relies on exhibits not admitted to the record.

district court for lack of jurisdiction, and the dismissal was affirmed by the D.C. Circuit.

Employer argues that there is no evidence in the record (such as a self-insurance agreement) to establish that Arch was Apogee's self-insurer or that Arch is liable for this claim. Employer contends that the Department has not explained its decision to name Arch as the self-insurer for this claim instead of Patriot. Employer emphasizes that the Department approved Patriot as the self-insurer of Apogee's liabilities.

Employer asserts the Department has refused to engage in discovery on the issue of whether the Department released Arch from liability (which, according to Employer, suggests that discovery would disprove the Department's assertion that there is no evidence that it released Arch from liability). Employer emphasizes that the Department also has prevented it from introducing relevant liability evidence and thus concludes the Department has deprived Arch of the right to participate meaningfully in a fair hearing.

Employer asserts Arch is not a responsible operator and cannot be treated as one because: (1) Arch does not meet the regulatory definition of operator; (2) Bulletin 16-01 directs that Apogee should be named the responsible operator and Arch should be named the responsible self-insurer; (3) § 725.407(d) prohibits the Department from now naming or treating Arch as a responsible operator; and (4) the Department improperly pierced the corporate veil when it treated Arch as the responsible

operator under § 725.493(b)(2). Employer argues that the Department has provided no evidence or legal justification for treating Arch, the parent company—and not Apogee, the subsidiary—as the responsible operator and thus illegally attempts to impose perpetual liability on parent companies.

Employer challenges the Department's interpretation of the self-insurance regulations to impose liability on a self-insurer based on a miner's last day of work rather than on the entity who was responsible for the liability at the time the claim was filed. Employer contends this is an improper rule change that eliminates the clear regulatory distinction between commercial insurers and self-insurers. Employer thus argues the Department cannot treat self-insurance as commercial insurance.

Employer asserts that Arch's self-insurance and its liability for this claim ended in 2005. Employer emphasizes that, consistent with the Part 126 regulations, the Department approved Arch's self-insurance agreements, which did not include Apogee's liabilities after 2005.[17] Employer argues that Patriot's self-insurance agreement was in effect at the time this claim was filed, so it is Patriot that is the liable self-insurer. Because Patriot is insolvent, Employer concludes the Trust Fund is liable for this claim.

Employer argues that the Department's actions and its interpretation of the applicable regulations constitutes

17. Again, in making this argument, Employer relies on exhibits not admitted to the record.

improper rulemaking through litigation in violation of Arch's due process rights and the Administrative Procedure Act. Employer likewise challenges, as a violation of due process and the APA: the application of Bulletin 16-01, the Department's interpretation of the regulatory evidentiary limitations, and the denial of discovery and exclusion of Employer's liability evidence in this matter.

The Director asserts that a straightforward application of the Act and its implementing regulations leaves no doubt that Apogee, as self-insured by Arch, is liable in this claim. The Director explains that, at the time Claimant was employed by Apogee, Apogee was an Arch subsidiary, and Arch was Apogee's self-insurer; thus, Apogee, as self-insured by Arch, is liable. The Director emphasizes that Claimant never worked for Patriot or a Patriot-owned subsidiary.

The Director contends that Apogee meets all the requirements of a potentially liable operator under § 725.494, so Apogee is the responsible operator under § 725.495 because Apogee most recently employed Claimant as a miner. The Director argues Apogee is capable of paying benefits because, at the time Claimant was employed by Apogee, it was self-insured by Arch, and Arch still qualifies as a self-insurer. The Director emphasizes that it is Employer's burden to prove that it does not possess sufficient assets to pay benefits under § 725.495(c), and Employer has presented no such evidence.

The Director asserts that neither Arch nor Apogee was ever released from liability for claims by miners who

last worked for Apogee when it was owned by Arch. The Director contends that any contractual arrangement that purported to release Arch from liability for such claims could not and did not relieve Arch of its liability under the Act. The Director argues that, though Patriot was retroactively authorized to self-insure its black lung liabilities, Arch was not released from liability for claims of miners who worked for its subsidiaries if Patriot's self-insurance failed. Rather, according to the Director, Arch remains liable for claims of miners who worked for its subsidiaries and never worked for Patriot subsidiaries.

A. Potentially Liable Operator

Liability for payment of benefits under the Act to eligible miners and their survivors rests with the "responsible operator." § 725.490(b). To be designated the responsible operator, a coal mine operator must first be identified as a "potentially liable operator." § 725.494.

The five regulatory requirements necessary to be considered a potentially liable operator are as follows:

> (1) the miner's disability arose at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator;[18]
>
> (2) the potentially liable operator operated a coal mine after June 30, 1973;

18. There is a rebuttable presumption that a miner's disability arose in whole or in part out of his work with the potentially liable operator. § 725.494(a).

> (3) the potentially liable operator employed the miner for a cumulative period of not less than one year;
>
> (4) the miner's employment with the potentially liable operator included at least one working day after December 31, 1969; and
>
> (5) the potential liable operator is financially capable of paying benefits.

§ 725.494(a)-(e). A potentially liable operator is deemed financially capable if: the operator had insurance for the time period covering the miner's employment, the operator qualifies as a self-insurer, or the operator possesses sufficient assets to secure the payment of benefits. § 725.494(e)(1)-(3).

At the outset of a claim, the district director identifies all potentially liable operators and notifies each such operator of the existence of the claim. § 725.407(b). After developing evidence and receiving responses from the parties, the district director issues a Schedule for the Submission of Additional Evidence ("SSAE") in which she names a potentially liable operator as the "designated responsible operator." § 725.410(a)(3). The designated responsible operator is the "potentially liable operator" who last employed the miner. § 725.495(a)(1).

In adjudicating the identity of the responsible operator, the district director bears the burden to establish that the responsible operator is a potentially liable operator in accordance with §725.494, except that "[i]t shall be presumed, in the absence of evidence to the

contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with §725.494(e)." § 725.495(b). To escape liability, the designated responsible operator bears the burden to show that either (1) it does not possess sufficient assets to secure payment of benefits, or (2) it is not the potentially liable operator that most recently employed the miner. § 725.495(c).

In this case, the district director notified Apogee, as self-insured by Arch, that it was a potentially liable operator on December 8, 2015. (DX 22.) The district director issued the SSAE and designated Apogee, as self-insured by Arch, as the potentially liable operator responsible for payment of benefits on March 17, 2016. (DX 27.)

The evidence in the record reflects that Apogee, as owned and self-insured by Arch, meets the five regulatory requirements of a potentially liable operator. First, Employer has not rebutted the presumption that Claimant's disability, at least in part, arose out of his work for Apogee. *See* § 725.494(a). Next, the record reflects that Claimant worked as a miner for the same company, which ultimately became Apogee, from 1984 to 1997. (Tr. 21, 25, 33; DX 3; DX 7; DX 8.) The evidence thus shows that Apogee operated a coal mine after June 30, 1973; Claimant worked for Apogee for at least one cumulative year; and Claimant worked for Apogee for at least one day after December 31, 1973. *See* § 725.494(b)-(d).

Finally, absent evidence to the contrary, Apogee is presumed to be financially capable of paying benefits in accordance with §725.494(e). § 725.495(b). Financial capability may be based on an operator's authorized self-insurance. § 725.494(e)(2). Employer has presented no evidence that Apogee is incapable of paying benefits, particularly through its self-insurance with Arch.[19] It does not appear from the record that Employer disputes that Apogee's liabilities were self-insured by Arch during Claimant's employment with Apogee. Instead, Employer complains that the Department has not affirmatively established a self-insurance relationship between Arch and Apogee after 2005 (when Arch purportedly sold Apogee's assets and liabilities).

Employer's argument misconstrues the burdens of the parties involved in this case. As plainly set forth in the regulations, it is presumed that Apogee is capable of assuming liability for the payment of benefits. § 725.495(b). Because Employer did not submit any evidence that Apogee, as self-insured by Arch, is incapable of assuming liability for the payment of benefits, Employer did not defeat the § 725.495(b) presumption, and the Director is not required to prove the fact of Apogee's self-insurance through Arch; the ability of Apogee (as self-insured by Arch) to assume financial liability is presumed under the regulations.

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19. Any such evidence would now be inadmissible (absent extraordinary circumstances) because it was not submitted to the district director. § 725.456(b)(1); § 725.414(d). In my June 17, 2019, Order Granting Motion to Reconsider and Denying Request for Subpoenas, I determined extraordinary circumstances are not present here.

Instead, to defeat liability, Employer must establish either that Apogee was not the last potentially liable operator to employ Claimant, or that Apogee is not financially capable of paying benefits. § 725.495(c)(1)-(2); *see also Gilbert v. Williamson Coal Co.*, 7 BLR 1-289, 1-294 (1984); *Borders v. A.G.P. Coal Co.*, 9 BLR 1-32, 1-34 (1986). Employer does not dispute that Apogee was Claimant's last coal mine employer, and the record does not reflect that Claimant worked for any coal mine operator subsequent to his employment with Apogee. (DX 8; Tr. 33-34.) Therefore, Employer has not established that it is not liable under § 725.495(c)(2).

The only remaining avenue by which Employer can avoid liability is to prove that Apogee does not possess sufficient assets to pay benefits. Employer has not made such an argument. Though Apogee's assets were apparently sold several times (ultimately to Patriot), there is no evidence that Apogee, as self-insured by Arch, is now unable to assume liability in the event Claimant is found to be eligible for benefits.[20] Employer, thus, has not established that Apogee is not financially capable of paying benefits. The fact that Apogee is no longer in operation does not affect this analysis. An operator may still be liable for payment of benefits as long as the operator meets the conditions set forth in § 725.494. *See* 30 U.S.C. § 932(i); 20

20. Employer's argument that there is no self-insurance agreement between Apogee and Arch in the record does not amount to affirmative evidence that Apogee is unable to pay benefits.

C.F.R. § 725.492(d).[21] Therefore, Employer has not shown that it is not liable under § 725.495(c)(1).

For these reasons, I conclude that Apogee, as self-insured by Arch, was properly identified as a potentially liable operator and was properly designated as the responsible operator in this claim.

B. Arch as Responsible Operator

Employer next argues that the Department erred in treating Arch as the responsible operator. Employer contends: (1) Arch does not meet the regulatory definition of operator; (2) Bulletin 16-01 directs that Apogee should be named the responsible operator and Arch should be named the responsible self-insurer; and (3) § 725.407(d) prohibits the Department from now naming or treating Arch as a responsible operator.

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21. The section governing the liability of successor operators (those who acquire substantially all assets from a prior operator) provides: "This section **shall not be construed to relieve a prior operator of any liability if such prior operator meets the conditions set forth in §725.494.**" § 725.492(d). The regulation goes on to explain the parameters of successor liability "[i]f the prior operator does not meet the conditions set forth in §725.494." *Id.* Thus, it is *only if the prior operator no longer qualifies as a potentially liable operator*, that a successor operator is held liable for the payment of benefits. Hence, the relevant question here is whether Apogee, as self-insured by Arch, qualifies as a potentially liable operator. I determined above that Apogee, as self-insured by Arch, does qualify as a potentially liable operator. Therefore, it is Apogee, as self-insured by Arch, that remains primarily liable for Claimant's claim.

These arguments are unavailing. As set forth above, the district director properly named Apogee, not Arch, as a potentially liable operator and as the responsible operator in this claim. (DX 22; DX 27.) Therefore, whether Arch meets the regulatory definition of operator at § 725.491 is irrelevant. Likewise, the district director's compliance with Bulletin 16-01 is immaterial,[22] and the district director did not name Arch a responsible operator in violation of § 725.407(d).

Employer's primary argument is that the Department abused its discretion and improperly pierced the corporate veil when it treated Arch as the responsible operator under § 725.493(b)(2). The regulation provides:

> In any case in which the operator which directed, controlled or supervised the miner is no longer in business and such operator was a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or was substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity **may** be considered the employer of any employees of such operator.

§ 725.493(b)(2) (emphasis added). Employer contends that the Department has provided no evidence or legal justification for treating Arch, the parent company—and

22. I must evaluate the instant claim and the arguments made by the parties according to the applicable regulations, not according to the Department's internal policy bulletins.

not Apogee, the subsidiary—as the responsible operator. Employer emphasizes that, under general principles of corporate law, parent and subsidiary companies are viewed as distinct, and there must be some evidentiary basis for piercing the corporate veil to impose liability on a parent for a claim directed at a subsidiary. Employer thus asserts that the Department was required (and failed) to make some evidentiary showing to justify imposing liability on Arch.

First, it does not appear that the district director relied on this regulation. The record does not reflect that the district director found an employment relationship between Claimant and Arch (though this regulation apparently would permit such a finding). Again, the record reflects that the district director named *Apogee*, not Arch, as the responsible operator in this claim. Arch bears liability for this claim *as Apogee's self-insurer*, not as the responsible operator.

Second, as explained in detail in my June 17, 2019, Order Granting Motion to Reconsider and Denying Request for Subpoenas, and my July 10, 2019, Order Denying Employer's Motion to Transfer Liability, Arch was properly notified of its liability in this claim as Apogee's self-insurer and yet failed to timely offer or seek through discovery any evidence that it is not liable. As a result, Employer is now prohibited from presenting liability evidence during this proceeding, §§ 725.414(d), 725.456(b)(1), and as set forth above, Apogee's capability of assuming liability for the payment of benefits is now presumed under the regulations. § 725.495(b). Contrary to

Employer's arguments, it did have the opportunity to prove that Arch was not liable for this claim as Apogee's self-insurer; it simply failed to avail itself of that opportunity.

C. Self-Insurance

Employer challenges the Department's interpretation of the self-insurance regulations and its imposition of "liability on a self-insurer based on the miner's last day of work, rather than on the company who was responsible for the liability on the date the claim was filed." (Empl. Brief at 21.) Employer contends this is a new, retroactive, and unsupported interpretation that constitutes a rule change. Employer argues this interpretation eliminates the clear regulatory distinction between commercial insurers and self-insurers.

Employer explains that, whereas commercial insurance serves to cover liability for claims arising during a specific contractual time period, self-insurance does not. Instead, self-insurance simply enables an entity to identify the level of risk and liability it is willing to assume. Employer, citing § 726.203(a), contends that commercial insurance contracts only impose liability on an insurance carrier if the insurance agreement was in effect on the claimant's date of last exposure. Employer indicates there is no similar requirement in the regulations governing self-insurance. Employer asserts the Department cannot treat self-insurance as commercial insurance, and, based on principles of insurance law and contract law, Patriot is the liable self-insurer.

I recognize that Part 726 of the regulations separates self-insurance from commercial insurance. There is some appeal to Employer's argument that the Department cannot treat self-insurance the same as commercial insurance without risking the elimination of the regulatory distinction between the two. I also appreciate Employer's argument that self-insurance is more akin to the absence of insurance than to commercial insurance.

However, I see no basis in the regulations to relieve Arch of liability under the circumstances of this claim. As set forth above, Apogee (as self-insured by Arch) was properly identified as the responsible operator in this claim. As explained in my June 17, 2019, Order Granting Motion to Reconsider and Denying Request for Subpoenas, and my July 10, 2019, Order Denying Motion to Transfer Liability, Employer was properly notified of its liability in this claim but failed to timely seek or offer evidence that it is not liable.

Employer assumes that the self-insurance regulations do not impose liability based on the date of a miner's last employment. However, the self-insurance regulations simply do not govern the imposition of liability. Section 726 of the regulations governs only *how* an operator must secure its existing liability; it does not *create* liability. Whether an operator complies with the insurance requirements of section 726 (or whether the Department properly administers these requirements) does not initiate or terminate liability.[23] Rather, it is the Act itself and the

23. Likewise, any argument that the Department released Arch from liability also fails because, though an operator choosing

substantive requirements of section 725 (particularly subpart G) that impose liability.

I find no regulatory basis to refute the Director's arguments that Arch is liable here because it provided Apogee's self-insurance while Claimant was employed by Apogee, and Apogee, as owned and self-insured by Arch, meets the requirements of a potentially liable operator. Even if Employer's assertions about general principles of corporate and insurance law are correct, black lung liabilities are very specifically regulated, and I am bound to apply those regulations. Overall, I conclude Employer's arguments do not offer a sufficient legal basis to transfer liability for this claim to the Trust Fund.[24]

VIII. Onset Date

The only remaining question is the date on which benefit payments should begin. Benefits are payable from the date the medical evidence first establishes that the miner became totally disabled due to pneumoconiosis; or, if such a date cannot be determined from the record, benefits are payable from the month and year in which the miner filed the present claim. § 725.503; *Carney v. Dir., Office of Workers' Comp. Programs*, II B.L.R. 1-32

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to self-insure is required to receive authorization from the Department, it is not the Department's actions that create liability.

24. I decline to address Employer's due process arguments and the arguments related to my interpretation of the evidentiary limitations and exclusion of Employer's liability evidence, which I have already addressed in detail in my prior orders. Employer has preserved its arguments for appeal.

(1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990).

Here, the evidence of record does not disclose when Claimant first became totally disabled due to pneumoconiosis. Thus, benefits are awarded as of the date the current claim was filed and are payable dating back to November 2014.

IX. Representative Fees

Non-attorney representative fees may be awarded in cases in which a claimant is awarded benefits. Sixty days is hereby allowed for Claimant's representative to submit a fee application. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. The Act prohibits charging a fee in the absence of an approved application. Claimant is responsible for the payment of any fees awarded to the non-attorney representative. *See* §§ 725.365, 725.366; *Harrison v. Liberty Mut. Ins. Co.*, 3 B.L.R. 1-596, 1-597 (1981) ("[T]here is no authority in either the Act or the implementing regulations for [a lay representative's fee] to be assessed against an employer, the Black Lung Disability Trust Fund or as a lien against claimant's benefits.").

X. Order

Based upon applicable law and a review of all the evidence, Claimant has established his entitlement to benefits under the Act. Therefore, Claimant's claim for benefits under the Act is **AWARDED.**

SO ORDERED.

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey

APPENDIX E — BENEFITS REVIEW BOARD'S DECISION AND ORDER AFFIRMING AWARD DATED OCTOBER 18, 2022

U.S. Department of Labor Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0229 BLA

DAVID M. HOWARD,

Claimant-Respondent,

v.

APOGEE COAL COMPANY,

and

ARCH COAL, INCORPORATED,

Employer/Carrier Petitioners,

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

Party-in-Interest.

DATE ISSUED: 10/18/2022

Appendix E

DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2017-BLA-05163) rendered on a claim filed on November 19, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal, Inc. (Arch) is the responsible carrier because it self-insured Apogee on the last day of Claimant's coal mine employment with Apogee. She determined Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she concluded Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Further, she found

1. Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally

Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to ALJs violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also argues the ALJ erred in finding Arch is the liable insurance carrier. On the merits, it contends she erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Finally, it argues she erred in determining it did not rebut the presumption.[3] Claimant has not filed a response brief.

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disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

2. Article II, Section 2, Clause 2, sets forth the appointing powers:

> [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.

3. We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

Appendix E

The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenge. Further, the Director urges the Board to affirm the ALJ's determination that Apogee is the responsible operator and Arch is liable for the payment of benefits. Finally, the Director contends Employer's argument on the merits with respect to the issue of total disability is not persuasive. Employer has filed a reply brief reiterating its arguments.

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.[4] 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).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 16-19. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC,* 585 U.S. __, 138 S.

4. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 21, 42.

Ct. 2044 (2018).[5] Employer's Brief at 16-19. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. _ _ , 140 S. Ct. 2183 (2020), and the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated,* 594 U.S. __, 141 S. Ct. 1970 (2021). Employer's Brief at 16-19.

Employer's arguments are not persuasive, as the only circuit court to squarely address this precise issue with regard to Department of Labor (DOL) ALJs has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer,* 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in rejecting a similar argument raised regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise Fund*[6] the Supreme Court "took care to

5. *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC,* 585 U.S. __, 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r,* 501 U.S. 868 (1991)).

6. In *Free Enterprise Fund,* the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's

omit ALJs from the scope of its holding." *Calcutt v. FDIC,* 37 F.4th 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund,* 561 U.S. at 507 n.10). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Id.* (citing *Collins v. Yellen,* 141 S. Ct. 1761, 1789 (2021)). Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Id.* at 315-16. Employer in this case has not alleged it suffered any harm due to the ALJ's removal protections.

Nor do *Seila Law* or *Arthrex* support Employer's argument. In *Seila Law,* the Supreme Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch because the CFPB was an "independent agency led by a single Director and vested with significant executive

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vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. 477, 496 (2010). The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia,* 138 S. Ct. at 2050 n.1.

power."[7] 140 S. Ct. at 2201. It did not address ALJs. Finally, in *Arthrex,* the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1970. The Court explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office.*" *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison,* 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575 (1988) (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show 5 U.S.C. §7521

7. In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. __, 140 S. Ct. 2183, 2191, 2200 (2020).

cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC,* 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus Employer has not established the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer,* 8 F.4th at 1137-38.

Responsible Insurance Carrier

Claimant last worked in coal mine employment for Apogee from 1993 to 1997.[8] Director's Exhibit 6. Apogee was self-insured through Arch when Claimant last worked for Apogee. Employer's Brief at 34; Director's Response at 2. In 2005, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 2-3; Director's Response at 2; Director's Exhibit 49 at 31, 34. In 2015, Patriot went bankrupt. Director's Exhibit 32.

Employer does not directly challenge Apogee's designation as the responsible operator. Rather, it argues DOL violated its due process rights by failing to designate Arch as a responsible carrier in the district director's Proposed Decision and Order (PDO) and then seeking to impose liability on Arch at a later time. Employer's Brief at 19-21. In addition, Employer contends DOL did not serve the PDO on Arch. *Id.*

8. Claimant's Social Security Administration earnings record shows income from Apogee c/o Arch from 1993 to 1997. Director's Exhibit 7. Employer concedes Arch self-insured Apogee until December 31, 2005. Employer's Brief at 34.

Next, Employer argues the ALJ erred in finding Arch is the responsible carrier liable for this claim. Employer's Brief at 2-3, 22-25, 32-35. It maintains that when Arch sold Apogee in 2005 and then renewed its self-insurance authorization with DOL in 2006, it excluded Apogee as a covered entity. *Id.* at 2-3. Therefore Employer contends Arch no longer provided insurance coverage "for any employee of Apogee no matter when they worked." *Id.* at 2-3. Employer asserts the sale of Apogee to Magnum on December 31, 2005, released Arch from liability for the claims of miners who worked for Apogee, and that DOL endorsed this shift of liability. *Id.*

In addition, Employer argues DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[9] reflects a change in policy wherein DOL began to retroactively impose new liability on self-insured mine operators and bypass traditional rulemaking. Employer's Brief at 32-35. Finally, Employer contends the ALJ abused her discretion in denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id.* at 26-32.

The Director responds, noting the PDO lists Arch as the responsible carrier and the district director served the PDO on Arch. Director's Response at 13-15. The Director argues the ALJ did not err in finding Apogee is the responsible operator and Arch is the self-insurer for

9. The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015 to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

this claim. *Id.* at 15-18. Moreover, he asserts the ALJ did not abuse her discretion in denying Employer's untimely request for discovery relating to its liability. *Id.* at 19-21. Finally, the Director argues the Board should reject Employer's challenges to the BLBA Bulletin No. 16-01. *Id.* at 21-24.

Relevant Procedural History

Although the district director initially issued a Notice of Claim on December 9, 2014, to Apogee, self-insured through Patriot, she subsequently issued a second Notice of Claim on December 8, 2015, to Apogee, self-insured through Arch. Director's Exhibits 21, 22. The Notice gave Employer thirty days to respond and ninety days to submit liability evidence. Director's Exhibit 22. Employer timely responded through its third-party administrator, Underwriters Safety & Claims, and denied liability. Director's Exhibit 24. It asserted, in part, that Apogee had become a subsidiary of Patriot and thus Patriot was the proper self-insurer, but it did not submit any evidence to the district director nor any discovery requests on the Director at that time. *Id.*

On March 17, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch, as the responsible operator and carrier. Director's Exhibit 27. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until May 16, 2016, to do so. *Id.* Moreover, 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 Office of Administrative Law Judges [(OALJ)]." *Id.* at 2-3 (citing 20 C.F.R. §725.456(b)(1)). On April 11, 2016, Arch responded, arguing the district director had improperly named Apogee and Arch as parties to the claim. Director's Exhibit 29. It also designated Claimant as a potential hearing witness pertaining to its liability. *Id.* But again, it submitted no documentary evidence to the district director, nor any discovery requests on the Director.

The district director issued a PDO awarding benefits on September 26, 2016, listing Apogee in the caption as the responsible operator. Director's Exhibit 44 at 2. In the summary of the medical and employment evidence section of the PDO, the district director stated Apogee was "self-insured through Arch" and thus Arch is the insurance carrier. *Id.* at 7. In the liability analysis section of the PDO, the district director stated Apogee meets all the criteria of being a potentially liable operator and was the last potentially liable operator that employed Claimant. *Id.* at 11. In addition, the district director stated:

> A Notice of Claim was received by the potentially liable operator/carrier, [s]elf-insured thru Patriot Coal Company, on December 11, 2014, as evidenced by the signed return receipt from the post office. The potentially liable operator/carrier has failed to timely submit evidence to support its position or to timely request an extension of the period of time for submission of such evidence.

Id. The district director served the PDO by certified mail on Apogee, Arch, Arch's attorney, and Arch's third-party administrator as evidenced by certified mail numbers and return receipts. *Id.* at 5, 14, 19-23.

Employer objected to the award of benefits and requested a formal hearing before an ALJ. Director's Exhibit 45. Thereafter the case was transferred to the OALJ.[10] Director's Exhibit 47.

The record does not reflect, nor does Employer argue, it submitted any liability evidence to the district director or any liability-related discovery requests on the Director prior to the above-stated deadlines. Nor did it request any extensions of time while the claim was before the district director. Further, Employer did not designate any liability witnesses other than Claimant.

On April 29, 2019, Employer requested – for the first time in this claim – that the ALJ issue subpoenas compelling DOL Office of Workers' Compensation Programs employees Michael Chance and Kim Kasmeier to give deposition testimony related to Arch's liability and provide related documentary evidence. The Director objected.

The ALJ quashed the subpoenas. She first concluded the requested documents were inadmissible because the regulations mandate she exclude liability evidence not first

10. This case was initially assigned to ALJ Scott R. Morris, but subsequently reassigned to ALJ Boucher.

submitted to the district director, unless extraordinary circumstances are established. *See* 20 C.F.R. §§725.414(d), 725.456(b)(1); May 28, 2019 Order Denying Request for Subpoenas (May 28, 2019 Order); June 17, 2019 Order Granting Motion to Reconsider and Denying Request for Subpoenas (June 17, 2019 Order). The ALJ also ruled Employer is precluded from deposing the two DOL employees because the regulations require it to designate liability witnesses while the claim is before the district director, which Employer failed to do with respect to Mr. Chance and Ms. Kasmeier. 20 C.F.R. §725.414(c); May 29, 2019 Order; June 17, 2019 Order. Further, the ALJ found Employer did not establish extraordinary circumstances for failing to submit liability evidence or to designate Mr. Chance and Ms. Kasmeier as liability witnesses before the district director. 20 C.F.R. §§725.414(c), 725.456(b)(1); May 29, 2019 Order; June 17, 2019 Order.

On June 19, 2019, Employer moved to transfer liability to the Black Lung Disability Trust Fund. It argued the district director did not give Arch proper notice of the claim because she designated Patriot as the responsible carrier in the PDO. Thus it argued Arch should not be held liable as a responsible carrier. The ALJ denied the motion, finding no merit in Employer's arguments. July 10, 2019 Order Denying Employer's Motion to Transfer Liability (July 10, 2019 Order) at 3.

Finally, at the hearing for this claim, Employer submitted documentary evidence related to liability, marked Employer's Exhibits 12 through 17 and 21, and deposition testimony obtained in other cases from former

Division of Coal Mine Workers' Compensation employees David Benedict and Steven Breeskin, marked Employer's Exhibits 19 and 20. The ALJ excluded the documentary evidence because she found it was not submitted to the district director and Employer did not establish extraordinary circumstances for failing to do so. 20 C.F.R. §725.456(b)(1); Hearing Transcript at 13-16. In addition, the ALJ excluded the depositions of Mr. Benedict and Mr. Breeskin because Employer neither identified them as liability witnesses before the district director nor established extraordinary circumstances for failing to do so. 20 C.F.R. §725.414(c); Hearing Transcript at 13-16.

In her Decision and Order, the ALJ concluded Apogee, self-insured through Arch, is the responsible operator and carrier. Decision and Order at 27-23.

Due Process Violation

We first address Employer's due process arguments. Due process requires only that a party be given notice and the opportunity to respond. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009); *Island Creek Coal Co. v. Holdman,* 202 F.3d 873, 883-84 (6th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799,807 (4th Cir. 1998). Employer argues the district director failed to properly serve Arch with the PDO and thereby violated its due process rights. Employer's Brief at 19-21. It contends there "is no evidence of how or even whether [Arch]

was served with the PDO."[11] *Id.* The record belies this contention.

The ALJ accurately found the PDO's "service sheet and certified mail receipts reflect [it] was served on [both] Apogee and Arch via certified mail."[12] July 10, 2019 Order at 2 (citing Director's Exhibit 44 at 5, 14, 19, 23). Moreover, as Arch timely responded to the PDO and controverted its liability, it actively participated in the claim when it was before the district director. Director's Exhibits 24, 29, 45. Thus we reject Employer's argument that the district director failed to properly serve the PDO on Arch. *Hatfield,* 556 F.3d at 478; *Holdman,* 202 F.3d at 883-84; *Dominion Coal Corp. v. Honaker,* 33 F.3d 401, 404 (4th Cir. 1994) ("When the record establishes actual notice, the purpose of the statutory certified mail requirement has been met."); 20 C.F.R. §§725.360(a)(4), 725.407(b), 725.418(d).

Employer also maintains the district director named Patriot, not Arch, as the responsible carrier in the PDO.

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11. Employer does not dispute the district director served the December 8, 2015 Notice of Claim and the SSAE on Arch, Arch's counsel, and Arch's third-party administrator. *See* Employer's Brief at 22; Director's Exhibits 22, 27.

12. The district director stated she served Apogee, Arch, Arch's counsel, and Underwriters Safety & Claims by certified mail, and the Proposed Decision and Order (PDO) includes certified mail numbers and receipts for all four recipients. Director's Exhibit 44 at 5, 14, 19-23. The return receipt for Arch indicates the PDO was delivered to it on October 3, 2016. Director's Exhibit 44 at 19.

Employer's Brief at 19-21. It contends because "Arch was not named as the responsible [carrier] in the PDO," it "cannot be held liable" after this claim was transferred to the OALJ. *Id.* This argument has no merit.

The ALJ acknowledged the PDO references Patriot insofar as the district director stated Employer never responded to the December 9, 2014 Notice of Claim sent to Apogee, self-insured through Patriot. July 10, 2019 Order at 2-3. She correctly found, however, that the "heading of the summary of evidence [section] associated with the PDO lists Apogee as the [responsible] operator and Arch as the insurance carrier." *Id.* at 2 (citing Director's Exhibit 44 at 7). Further, she found "the 'Certificate of First Payment of Benefits' to be filed by the responsible operator or carrier lists Apogee as the operator and Arch as the insurance carrier." *Id.* (quoting Director's Exhibit 44 at 15). She recognized that on "October 5, 2016, Arch (through counsel) responded to the PDO, requested a hearing, and noted that 'DOL incorrectly named it as a party.'" *Id.* (quoting Director's Exhibit 45). The ALJ rationally found "a fair reading of the PDO and associated documents leads to the conclusion that Arch was named as the self-insurer, and the lone reference to Patriot in the analysis section was a typographical error." *See United States v. Hython,* 443 F.3d 480, 488 (6th Cir. 2006) ("failure to amend the affidavit was nothing more than 'a scrivener's error'" and thus of no legal consequence); *Jericol Mining, Inc. v. Napier,* 301 F.3d 703, 712-14 (6th Cir. 2002). Thus we reject Employer's due process argument as it relates to the PDO.

Appendix E

Exclusion of Evidence

Employer next contends the ALJ erred in quashing its subpoenas for testimony and documents from Mr. Chance and Ms. Kasmeier and in otherwise excluding evidence relevant to Bulletin No. 16-01. Employer's Brief at 25-32. It asserts the evidence it was seeking to obtain and have admitted into the record does not relate to its liability as an insurance carrier, but instead relates to whether the Director improperly changed DOL's policy through the issuance of Bulletin No. 16-01 and issued a rule in violation of the APA. *Id.* The Director responds the ALJ did not abuse her discretion in determining this constitutes liability evidence and finding Employer did not establish extraordinary circumstances for its failure to designate witnesses and submit documentary evidence while the case was before the district director. Director's Response at 19-21. We agree with the Director's argument.

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an "abuse of . . . discretion." *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The ALJ acknowledged Employer's argument that its discovery request did not pertain to the issue of liability, but rather whether DOL violated the notice and comment provisions of the APA when it issued Bulletin No. 16-01. June 17, 2019 Order at 2. Regardless of how Employer

characterized its argument, however, the ALJ correctly found its defense only relevant to whether the designated responsible carrier is liable for the payment of benefits. June 17, 2019 Order at 2-6. In *Arch Coal, Inc. v. Acosta,* 888 F.3d 493 (D.C. Cir. 2018), the United States Court of Appeals for the District of Columbia Circuit rejected Arch's argument that its challenge to Bulletin 16-01 is "wholly collateral" to the Act's statutory review scheme. *Acosta,* 888 F.3d at 502. Because Bulletin No. 16-01 is not a substantive rule that had to comply with the notice and comment provisions of the APA, the court concluded Arch's challenge to it is one that Congress intended to be reviewed within the Act's "detailed and comprehensive process for adjudicating black lung benefits claims." *Id.* at 499-505.

Thus Employer had to submit its evidence in compliance with the applicable regulations. Because the district director must identify the responsible operator or carrier before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, liability evidence pertaining to the responsible carrier must be timely submitted to the district director; moreover, a party must identify any potential liability witnesses before the district director.[13] 20 C.F.R. §§725.414(c),

13. The ALJ correctly rejected Employer's argument that "the regulations governing the admissibility of liability evidence address the liability of an operator, not a carrier." June 17, 2019 Order at 4. A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations therefore specifically include the

725.456(b)(1). The ALJ found "the record does not reflect Employer identified either Mr. Chance or Ms. Kasmeier as a potential witness on the issue of liability at any time while this claim was pending before the district director." June 17, 2019 Order at 4; *see also* Hearing Transcript at 13-16. She also found no indication that while the case was before the district director Employer submitted any evidence "on the issue of liability or propounded any discovery requests on the [DOL] for documents relevant to the issue of liability." *Id.* Employer does not dispute it did not submit any liability evidence or designate any liability witnesses, other than Claimant, while this claim was before the district director.[14] Thus we see no abuse of discretion in the ALJ's finding that Employer was required to establish extraordinary circumstances to admit this evidence. *Blake,* 24 BLR at 1-113.

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insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne,* 895 F.2d at 952.

14. Employer argues the United States Court of Appeals for the District of Columbia Circuit "guaranteed" Arch the "right to develop evidence" challenging Bulletin No. 16-01 in *Arch Coal, Inc. v. Acosta,* 888 F.3d 493 (D.C. Cir. 2018). Employer's Reply Brief at 11-12 (unpaginated). Contrary to Employer's argument, the court explained "Arch is entitled to reasonable discovery before the Department to the full extent allowed by the [Act] and its *implementing regulations*." *Acosta,* 888 F.3d at 502 (emphasis added). Employer's failure to follow the applicable regulations by submitting liability evidence or designating liability witnesses before the district director undermines its argument that its due process rights have been violated. *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009).

The ALJ addressed Employer's assertion that extraordinary circumstances exist because "the Director has not complied with Employer's discovery requests in other cases." June 17, 2019 Order at 5; *see* Employer's Brief at 32 n.9. She rationally rejected this argument because "[t]he Director's actions in separate claims . . . have no bearing on how the regulations apply to the evidence in this claim." June 17, 2019 Order at 6; *see Blake,* 24 BLR at 1-113. As Employer raises no other specific argument, we affirm the ALJ's exclusion of Employer's liability evidence.[15] *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); June 17, 2019 Order at 4-6. Because Employer had the opportunity to submit discovery requests regarding documentary liability evidence, submit any such documentary evidence it received or possessed, and identify liability witnesses before the district director, and it failed to do so, we reject its due process arguments.[16]

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15. Although the ALJ's June 17, 2019 Order pertained to the subpoenas and documents Employer sought with respect to Mr. Chance and Ms. Kasmeier, the ALJ applied the same rationale for excluding the liability evidence and deposition testimony of Mr. Benedict and Mr. Breeskin that Employer moved to have admitted at the hearing for this claim. Hearing Transcript at 13-16. Thus we affirm the ALJ's exclusion of Employer's Exhibits 12-17, 19-21.

16. Employer states that subjecting the development of its liability evidence to the regulatory time constraints would render "the district director an inferior officer in violation of *Lucia*." Employer's Brief at 32 n.9. It also argues the regulations "divest the ALJ of her powers, duties, and responsibilities including accepting and overseeing disputes concerning evidence." *Id.* (internal quotations omitted). As Employer has offered no explanation or argument to support these assertions, we decline

Hatfield, 556 F.3d at 478; *Holdman,* 202 F.3d at 883-84; Employer's Brief at 25-32.

Arch's Liability

Employer argues the ALJ erred in finding Arch is the responsible carrier. Employer's Brief at 22-35. The ALJ found Apogee qualifies as a potentially liable operator because it is undisputed: (1) Claimant's disability arose at least in part out of his employment with it; (2) Apogee operated a mine after June 30, 1973; (3) Apogee 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) Apogee was self-insured through Arch on Claimant's last day of coal mine employment with Apogee and therefore is capable of assuming liability. 20 C.F.R. §725.494(a)-(e); Decision and Order at 30. Because Apogee was the last potentially liable operator to employ Claimant, the ALJ designated Apogee as the responsible operator and Arch as the responsible carrier. 20 C.F.R. §725.495(a)(1); Decision and Order at 30. She also found Employer did not present any evidence that Arch is unable to assume liability if Claimant is found eligible for benefits. 20 C.F.R. §§725.494(e), 725.495(c); Decision and Order at 30. Therefore, she found Employer met the requirements for liability under the Act. Decision and Order at 30.

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to address them as inadequately briefed. *See Jones Bros. v. Secy of Labor,* 898 F.3d 669, 677 (6th Cir. 2018); *Cox v. Benefits Review Bd.,* 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Employer argues the Director did not meet his burden to establish Arch's self-insurance authorization covers this claim. Employer's Brief at 22-25. As the ALJ correctly held, Employer "misconstrues the burdens of the parties involved in this case."[17] Decision and Order at 30. The Director bears the burden of establishing the named responsible operator meets the criteria for being a potentially liable operator as set forth in 20 C.F.R. §725.494(a)-(e). *See* 20 C.F.R. §725.495(b). However, "in the absence of evidence to the contrary," the regulation presumes the designated responsible operator is capable of assuming liability for the payment of benefits.[18] *Id.* The named responsible operator may

17. Employer cites 20 C.F.R. §725.495(d) to support its contention that the Director bears the burden of establishing that Arch's self-insurance authorization covers this claim. Employer's Brief at 22. Its reliance on this regulation is misplaced. If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id.* In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id.* No operator employed Claimant after Apogee. Thus 20 C.F.R. §725.495(d) is inapplicable.

18. An operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was authorized to self-insure

be relieved of liability only if it shows either it is financially incapable of assuming liability or another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c).

Employer does not dispute Arch provided self-insurance coverage to Apogee on Claimant's last date of employment with it.[19] 20 C.F.R. §§725.494(e), 726.203(a). Rather, it argues the ALJ erred in finding that self-insurance coverage applies to this claim. Employer's Brief at 32-35; Employer's Reply Brief at 5-8 (unpaginated). It asserts self-insurance liability is triggered by the date

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during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to 20 C.F.R. §726.104(b) is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). Insurance coverage for black lung benefits exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured. 20 C.F.R. §726.203(a).

19. Employer argues that in "other cases" the district director has improperly designated Arch as the responsible operator to hold it liable for claims. Employer's Brief at 23-24. It further contends the district director improperly "pierce[d] Arch's corporate veil [to] hold it responsible for" Apogee's employee, Claimant. Employer's Brief at 25 (citing 20 C.F.R. §725.493(b)(2)). But as the ALJ correctly held, the district director did not name Arch as the responsible operator in this case. Decision and Order at 31-32. Nor did she rely on 20 C.F.R. §725.493(b)(2) to determine Arch is liable. *Id.* Rather, she determined Arch "bears liability for this claim as Apogee's self-insurer, not as the responsible operator." *Id.*

a claim is filed, whereas commercial insurance liability is triggered by the date of a miner's last coal mine employment. *Id.* To support this argument, Employer notes the regulations "set forth two distinct regulatory systems," with self-insurance regulations found at 20 C.F.R. §§726.101-726.115 and commercial insurance regulations found at 20 C.F.R. §§726.201-726.213. Employer's Brief at 32-35. Citing 20 C.F.R. §726.203(a), Employer asserts liability for commercial insurance is triggered if a policy is in place "on the date of the miner's last day of employment in the mines." Employer's Brief at 32-35. Insofar as no similar provision is found within the regulations applicable to self-insurance, Employer contends applying 20 C.F.R. §726.203(a) to self-insurers "eliminates the distinction between commercial and self-insurance set forth in the regulations as well as the case law." *Id.*

But as the ALJ correctly found, there is no regulatory authority to support Employer's argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment. Decision and Order at 33. She correctly found the regulations at 20 C.F.R. §§726.101-726.115 govern "only how an operator must secure its existing liability" and do not "create liability." *Id.* Arch does not dispute that it qualified as a self-insurer and its self-insurance coverage included Apogee when Apogee last employed Claimant.

Employer next argues that, in other cases, DOL historically has placed liability on self-insured parent companies based on the date of filing of the claim.

Employer's Brief at 26-27. We agree with the Director's position that Employer has failed to show the Director changed its policy in naming Arch as the responsible carrier. Director's Response at 22. Employer cites three cases in which a district director named either Patriot or Magnum as the responsible carrier. Employer's Brief at 26-27 (citing *Massey v. Apogee Coal*, 2019-BLA-05144; *Creech v. Apogee Coal*, xxx-xx-6408 LM C; *Allen v. Hobet Mining*, 2019-BLA-06231). But in each of those cases, either Patriot or Magnum owned the subsidiary, was insured or self-insured, and was financially capable of paying benefits. Director's Response at 22. In this case, however, Patriot is no longer capable of paying benefits, reflecting a change in circumstances rather than a change in DOL's policy.

Employer further argues the Director released Arch from liability because DOL approved Arch's agreement not to insure Apogee's liabilities after December 31, 2005. Employer's Brief at 1-2, 34-35 (citing Employer's Exhibits 13-17); Employer's Reply Brief at 8-9 (unpaginated). But the ALJ permissibly excluded as untimely the only evidence Employer cites to support this argument. June 17, 2019 Order; Hearing Transcript at 13-16. Thus we reject this argument.[20]

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20. For the same reasons, we reject Employer's argument that Patriot Coal should have been held liable for this claim. Employer's Brief at 22-23 (arguing the Director has not "explain[ed] why [he] did not pursue Patriot" as the responsible carrier). DOL's authorization for Patriot to self-insure for claims retroactive to July 1, 1973, does not release Arch from liability. 30 U.S.C. §932(a), (b); 20 C.F.R. §726.110(a)(1). Moreover, as the

Appendix E

BLBA Bulletin No. 16-01

Employer argues DOL's issuance of BLBA Bulletin No. 16-01 constitutes a new "rule" retroactively imposing new liability on self-insured mine operators in violation of the APA. Employer's Brief at 34-35.

As the ALJ correctly found after considering the evidence properly admitted into the record, Arch's liability is established under the Act and regulations, not by BLBA Bulletin No. 16-01 or any internal DOL policy; therefore Bulletin No. 16-01 "is immaterial." Decision and Order at 31-32 n.22; *see* 20 C.F.R. §§725.494-495. She found Employer meets all the requirements of a potentially liable operator: Claimant's total disability is presumed to have arisen at least in part out of his coal mine work for Apogee; Apogee was an operator after June 30, 1973; Claimant worked for Apogee for a cumulative period of not less than one year; Claimant's employment with Apogee included at least one working day after December 31, 1969; and Apogee is able to pay benefits through Arch. 20 C.F.R. §725.494; Decision and Order at 30. Further, she found Apogee is the last potentially liable operator to employ Claimant. 20 C.F.R. §725.495; Decision and Order at 30. As Employer has not challenged any of these findings, we affirm them. *Skrack,* 6 BLR at 1-711.

Moreover, the D.C. Circuit rejected Employer's argument that Bulletin No. 16-01 constitutes a substantive

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Director correctly notes, Claimant retired eleven years before Patriot purchased Apogee and thus never worked for Patriot. Director's Response at 16-17.

rule affecting Arch's rights and interests or governing its liabilities in any given case. *Acosta,* 888 F.3d at 500-01. We therefore reject Employer's challenges to its liability based on Bulletin No. 16-01.

In light of the foregoing, we affirm the ALJ's finding that Apogee, as insured by Arch, is liable for the payment of benefits. 20 C.F.R. §§725.494, 725.495; Decision and Order at 30.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.,* 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.,* 9 BLR 1-195, 1-198 (1986), *aff'd on recon.,* 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions, and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 4 n.3, 5.

Appendix E

Employer acknowledges it "conceded" before the ALJ that Claimant is totally disabled based on the pulmonary function studies and medical opinions. Employer's Brief at 4; *see* Employer's Post-Hearing Brief at 6. Nonetheless, it now argues the ALJ failed to consider that Claimant is totally disabled from working as a coal miner due to neck, back, and knee injuries and thus is not entitled to benefits. Employer's Brief at 35-37.

Employer advocates applying *Peabody Coal Co. v. Vigna,* 22 F.3d 1388 (7th Cir. 1994), but that decision interpreted a prior version of 20 C.F.R. §718.204 (1999), and the Board has declined to apply *Vigna* to cases, like this one, arising in jurisdictions outside of the Seventh Circuit. *See Bateman v. E. Assoc. Coal Corp.*, 22 BLR 1-255, 1-267 (2003). Moreover, DOL explicitly rejected the premise that a non-pulmonary disability precludes entitlement when it promulgated the 2001 revised regulations. 20 C.F.R. §718.204(a) ("any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]"). For these reasons, we reject Employer's argument.

As Employer raises no further argument regarding total disability, we affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 5.

Appendix E

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[21] or that "no part of [his] 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 ALJ found Employer failed to establish rebuttal by either method.[22]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does 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*

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21. "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

22. The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 10.

Minich v. Keystone Coal Mining Corp., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young,* 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves,* 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the medical opinions of Drs. McSharry and Rosenberg to disprove legal pneumoconiosis. Director's Exhibit 18; Employer's Exhibits 3, 6, 9, 24.

Dr. McSharry diagnosed Claimant with an obstructive lung impairment and a restrictive lung impairment. Employer's Exhibit 3. He attributed the impairments to cigarette smoking and opined they are unrelated to coal mine dust exposure. *Id.* Dr. Rosenberg diagnosed Claimant with tobacco-induced chronic obstructive pulmonary disease (COPD) and emphysema. Director's Exhibit 18; Employer's Exhibits 6, 9, 24. He initially opined these conditions are significantly related to Claimant's coal mine dust exposure, Director's Exhibit 18; Employer's Exhibits 6, 9, but ultimately changed his opinion and concluded they are unrelated to coal mine dust exposure and thus Claimant does not have legal pneumoconiosis. Employer's Exhibit 24.

The ALJ found Dr. McSharry's opinion inadequately reasoned and inconsistent with the regulations. Decision

and Order at 24-25. She found Dr. Rosenberg's opinion internally inconsistent and inadequately reasoned. *Id.* at 23-24.

We first reject Employer's argument that the ALJ erred in discrediting Dr. McSharry's opinion. Employer's Brief at 39-40. Dr. McSharry opined that when coal mine dust exposure causes a mixed obstructive and restrictive lung impairment, it is "almost universally associated with severe radiographic changes of pneumoconiosis," which were not present in this case. Employer's Exhibit 3 at 2. Contrary to Employer's contention, the ALJ permissibly found this reasoning unpersuasive because the regulations provide a claim shall not be denied solely on the basis of a negative chest x-ray and further recognize legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See A & E Coal Co. v. Adams,* 694 F.3d 798, 802-03 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks,* 690 F.3d 477, 487-88 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 24-25.

Dr. McSharry also acknowledged it is "possible" coal mine dust exposure contributed to or aggravated Claimant's lung impairments, but he determined there is "no compelling evidence" that it did so in this case and thus it is "unlikely" Claimant has legal pneumoconiosis. Employer's Exhibit 3 at 3. The ALJ noted the preamble[23]

23. Contrary to Employer's contention, an ALJ may evaluate expert opinions in conjunction with the preamble to the 2001

to the 2001 revised regulations cites medical studies, which DOL found credible, concluding that the risks of smoking and coal mine dust exposure may be additive. 65 Fed. Reg. at 79,941 (risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 25. Further, she recognized legal pneumoconiosis is presumed because Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 25. The ALJ acted within her discretion in finding Dr. McSharry's opinion unpersuasive because he did not sufficiently explain why Claimant was not suffering "from both tobacco-related and coal mine dust related lung disease, or why Claimant's coal dust exposure did not substantially exacerbate any tobacco related lung disease." *Id.*; *see Young,* 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett,* 478 F.3d 350, 356 (6th Cir. 2007); 20 C.F.R. §718.201(a)(2), (b).

Employer next argues the ALJ erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 40-41. We are not persuaded by this argument.

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revised regulations, as it sets forth studies the DOL found credible and the DOL's resolution of scientific questions relevant to the regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams,* 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Brief at 37-38. Although Employer contends it submitted medical evidence contrary to the medical science set forth in the preamble, it does not specifically identify what evidence it submitted. Employer's Brief at 40. Thus we reject this argument. *Samons v. Nat'l Mines Corp.,* 25 F.4th 455, 466-67 (6th Cir. 2022); *Cox,* 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

In his first three medical reports dated May 10, 2016, April 13, 2017, and November 2, 2017, Dr. Rosenberg stated he could not exclude legal pneumoconiosis because the pattern of obstruction present on Claimant's pulmonary function testing reveals a severely reduced FEVl value but a mildly reduced FEVl/FVC ratio, indicating coal mine dust exposure contributed to Claimant's smoking-related COPD. Director's Exhibit 18; Employer's Exhibits 6 at 1-4; 9. However, in his final report dated June 17, 2019, Dr. Rosenberg opined the pattern of Claimant's obstructive impairment is inconsistent with legal pneumoconiosis. Employer's Exhibit 6 at 5-16.

Although, in his deposition, Dr. Rosenberg explained his change of opinion by testifying "over time [he] had more information to look at," Employer's Exhibit 24 at 36, the ALJ found "it does not appear that Dr. Rosenberg reviewed any additional [pulmonary function study] results" between his November 2, 2017 report and his final June 17, 2019 report.[24] Decision and Order at 23. The ALJ

24. The ALJ specifically noted that, in his final June 17, 2019 report, "Dr. Rosenberg references Dr. McSharry's November 2016 pulmonary function [study], Dr. Ajjarapu's April 2017 pulmonary function [study], and 2016 pulmonary function [studies] contained in Claimant's treatment records from St. Charles Breathing Center." Decision and Order at 23. She further pointed out, however, that Dr. Rosenberg had referenced all these studies in his prior reports where he had diagnosed legal pneumoconiosis. *Id.* At his deposition, Dr. Rosenberg identified the presence of ground glass opacifications on computed tomography (CT) scan as a basis for changing his opinion. Employer's Exhibit 24 at 37. However, as part of his April 13, 2017 report he reviewed and discussed a CT scan interpretation which noted the presence of

permissibly found Dr. Rosenberg's opinion "is internally inconsistent because he reaches different conclusions based on the same test results."[25] Decision and Order at

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ground glass opacifications – although Dr. Rosenberg referred to this as a November 29, 2016 CT scan, this appears to be a scrivener's error as there is no CT scan of record with that date. Employer's Exhibit 6 at 2. At that time, despite having knowledge of the ground glass opacifications, Dr. Rosenberg still maintained his opinion that "one cannot rule out a component of legal [coal workers' pneumoconiosis]." *Id.* at 4. Similarly, Dr. Rosenberg reviewed pulmonary function studies showing a response to bronchodilators when preparing his reports prior to his June 2019 report. *See* Director's Exhibit 18. Although he also referenced two additional pulmonary function studies in his deposition, a December 12, 2017 study and a December 13, 2018 study that were in Claimant's treatment records, they were not mentioned as materials he reviewed in the June 2019 report where he changed his position. Employer's Exhibit 24. The ALJ thus permissibly determined Dr. Rosenberg changed his position as of his June 2019 report based on the same pulmonary function test results he considered in formulating his earlier opinions. *See Jericol Mining, Inc. v. Napier,* 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp,* 866 F.2d 179, 185 (6th Cir. 1989).

25. We reject Employer's argument that the ALJ mischaracterized Dr. Rosenberg's opinion. Employer's Brief at 40-41. She acknowledged that, at the time of Dr. Rosenberg's deposition, he "had reviewed an additional pulmonary function [study] of record, namely Dr. Ajjarapu's December 2017 study." Decision and Order at 23 n.12 (citing Employer's Exhibit 24 at 23; Claimant's Exhibit 1). The ALJ found, however, that this did not explain why Dr. Rosenberg changed his opinion between his third and fourth medical reports, and thus his opinion was internally inconsistent. *Napier,* 301 F.3d at 712-14; Decision and Order at 23 n.12.

23; *see Napier*, 301 F.3d at 713-14; *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).

Because the ALJ permissibly discredited the opinions of Drs. McSharry and Rosenberg, the only opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove legal pneumoconiosis. Decision and Order at 26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201."[26] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27. She permissibly discredited the opinions of Drs. McSharry and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to her finding Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063,

26. We reject Employer's argument that the "no part" regulatory standard the ALJ applied to determine whether it rebutted the presumed fact of total disability causation is invalid. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014).

1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage,* 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 26. We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

/s/ Judith S. Boggs
JUDITH S. BOGGS, Chief
Administrative Appeals Judge

/s/ Daniel T.Gresh
DANIEL T. GRESH
Administrative Appeals Judge

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge

APPENDIX F — NOTICE OF CLAIM TO PATRIOT COAL, DATED DECEMBER 9, 2014

U.S. DEPARTMENT OF LABOR

Office of Workers' Compensation
Division of Coal Mine Workers' Compensation Central Mail Room
PO Box 8307
London, KY 40742-8307

Phone: 1-800-366-4599 or
606-218-9300, extension 701233
FAX: (606) 432-3574

NOTICE OF CLAIM

Date Issued: December 9, 2014

Miner's Name: David M Howard	
Claimant's Name/Address David M Howard [redacted] Baxter, KY 40806	Claim Number XXX-XX-6902 LM C CASE ID: B9JWB-2014324
Potentially Liable Operator/ Address Apogee Coal Company Llc % Patriot Coal Corp. 12312 Olive Blvd. Ste 400 St. Louis, MO 63141	Insurance Carrier/Address Self-insured thru Patriot Coal Company C/O Underwriters TPA P. O. Box 23640 Louisville, KY 40223 Policy Number: N/A – Self-insured

Appendix F

The claimant named above has filed a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 et seq. We are currently developing the claim to determine the claimant's eligibility. Enclosed is a copy of the claimant's application and any evidence OWCP has obtained to date relating to the miner's employment.

This Notice of Claim is issued pursuant to 20 C.F.R. 725.407. We have identified you as a 'potentially liable operator' in this claim. A "potentially liable operator" is an employer of the miner (or a successor of an employer pursuant to 20 C.F.R. 725.492) who may be held liable for the payment of benefits should the claimant be found entitled to them. Designation as a potentially liable operator does not constitute a determination that you are in fact liable. Where OWCP's records indicate you obtained a policy of insurance, and the claim falls within such policy, we are sending a copy of this notice to your insurer. You and your insurer shall be considered parties to the claim unless an adjudication officer dismisses you and you are not thereafter notified again of your potential liability.

Within 30 days of receipt of this Notice of Claim, you (or your insurer) must file a response pursuant to 20 C.F.R. 725.408 indicating your intent to accept or contest your identification as a potentially liable operator. This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 30 days. We have enclosed a form entitled 'Operator Response to Notice of Claim'

for your use. Please send your response and any other correspondence to the Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, at the address shown above.

If you accept liability for the payment of benefits should the claimant obtain an award (*i.e.* you accept that you are the 'responsible operator'), please mark the box in Section A (entitled 'Acceptance of Liability') on the Operator Response to Notice of Claim. **Accepting liability means only that you are the operator liable for the payment of any benefits due; it does not constitute a stipulation or admission that the claimant is entitled to benefits.**

If you wish to contest your status as a potentially liable operator, you must state the precise nature of your disagreement by accepting or denying each of the five assertions listed in Section B (entitled 'Contest of Potential Liability – Operator Assertions) on the Operator Response to Notice of Claim. The assertions are limited to information about your employment of the miner and your status as an operator. If you deny any of the five operator assertions, you have 90 days from your receipt of this notice to submit documentary evidence in support of your response. This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 90 days. **Absent extraordinary circumstances, no documentary evidence relevant to the assertions set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim) may be admitted in any further proceedings unless it is submitted within 90**

days of your receipt of this notice or an extended period authorized by the District Director.

If you do not respond within 30 days of your receipt of this Notice of Claim, you will not be allowed to contest your liability for payment of benefits on any of the grounds set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim).

Please note that your response need not include evidence about any other potentially liable operator and its employment of the miner. At the conclusion of the initial evidence-gathering period, the District Director will issue a Schedule for the Submission of Additional Evidence pursuant to 20 C.F.R. 725.410. In that schedule, the District Director will select and designate one "responsible operator" from the potentially liable operators notified. All parties will then be given an opportunity to present evidence regarding the liability of the designated responsible operator or any other operator.

NOTE: THE 'OPERATOR RESPONSE TO NOTICE OF CLAIM' MUST INCLUDE THE ORIGINAL SIGNATURE OF AN AUTHORIZED OFFICIAL FOR THE POTENTIALLY LIABLE RESPONSIBLE OPERATOR OR ITS INSURANCE CARRIER. WE CANNOT ACCEPT A COPY OF THE RESPONSE SENT BY FAX IN LIEU OF THE ORIGINAL DOCUMENT.

We are available to assist you with this process. I may be contacted at the address and telephone number shown above.

Sincerely,

/s/ Delia Dean for
Dennis Glaze
Claims Examiner

Enclosures: Copy of claim and evidence relating to miner's employment history Operator Response to Notice of Claim form (Form No. CM-2970a)

APPENDIX G — PATRIOT'S RESPONSE TO NOTICE OF CLAIM, DATED DECEMBER 16, 2014

OPERATOR RESPONSE TO NOTICE OF CLAIM

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

Miner's Name:	Claimant's Name:	Claim Number:	OMB NO.:
David M Howard	**David M Howard**	**PI XXX-XX-6902 LM C CASE ID: B9JWB-2014324**	1240-0033 Expires: 03/31/2017

Responsible Operator's Name:	Insurer's Name	Policy No.
Apogee Coal Company Llc	**Self-insured thru Patriot Coal Company**	**N/A - Self-Insured**

This information is authorized by the Black Lung Benefits Act (30 U.S.C. 901 et.seq.) (20 CFR 725.408). Please check appropriate boxes and provide requested information. While you are not required to respond, if you fail to do so within 30 days of your receipt of the Notice of Claim you shall not be allowed to contest your liability for the payment of benefits on any of the five specific grounds set forth below in Section B. (20 CFR 725.408). You must send a copy of this response to the claimant by regular mail.

Appendix G

A. Acceptance of Liability

The named potentially liable operator is the responsible operator within the meaning of the Black Lung Benefits Act

B. The Controversion of Liability

Indicate whether the named potentially liable operator accepts or denies the assertions that follows. Acceptance of these assertions is not necessarily an acceptance of liability. You may still contest your liability on any other available grounds.

Accepts	Denies	
☐	☐	This operator was an operator for any period after 06/30/73.
☐	☐	This operator employed the miner as a miner for a cumulative period of not less than one year.
☐	☐	The miner was exposed to coal mine dust while working for this operator.
☐	☐	The miner's employment with this operator included at least one working day after December 31, 1969.
☐	☐	This operator or its insurer is financially capable of assuming liability for the payment of benefits.

Time period for submission of evidence. Within 90 days of the date on which you received the Notice of Claim, you may submit documentary evidence in support of your positions asserted in Section B. For any of the assertions you denied, you must submit all relevant documentary evidence within this 90 day period. The time period may be extended for good cause shown if an extension request is filed with the district director prior to expiration of the 90 days period. You must include a statement of reasons why you need additional time with your extension request.

Privacy Act Statement

The following information is provided in accordance with the Privacy Act of 1974. (1) Submission of this information is required under the Black Lung Benefits Act. (2) The information will be used to determine eligibility for and the amount of benefits payable under the Act. (3) The information may be used by other agencies or persons in handling matters relating directly or indirectly, to the subject matter of the claim, so long as such agencies or persons have received the consent of the individual claimant or beneficiary, or have complied with the provisions of 20 CFR 410 or 20 CFR 725. (4) Furnishing all requested information will facilitate the claims adjudication process; and the effects of not providing all or any part of the requested information may delay the process, or result in an unfavorable decision or a reduced level of benefits. (Disclosure of your social security number is voluntary; the failure to disclose such number will not result in the denial of any right, benefit or privilege to which an individual may be entitled.)

Appendix G

Public Burden Statement

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time for reviewing instructions, searching existing data resources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Division of Coal Mine Workers' Compensation, Room N-3464, 200 Constitution Avenue, N. W., Washington, D.C. 20210. **Note: Persons are not required to respond to this information unless it displays a currently valid OMB control number. (DO NOT SEND THE COMPLETED FORM TO THIS OFFICE.)**

Notice

If you have a substantially limiting physical or mental impairment, Federal disability nondiscrimination law gives you the right to receive help from OWCP in the form of communication assistance, accommodation and modification to aid you in the claims process. For example, we will provide you with copies of documents in alternate formats, communication services such as sign language interpretation or other kinds of adjustments or changes to account for the limitations of your disability. Please contact our office or the claims examiner to ask about this assistance.

C. Additional Information

Please answer the questions below. If the space provided for any response is inadequate, please continue your response on a blank sheet of paper and attach it to the form. If you are unable to respond to these questions within the 30-day period for accepting or denying the assertions set forth in Section B above (*i.e.* within 30 days of receipt of the Notice of Claim), you should return this form in compliance with the 30-day time limitation and provide the information requested in this section within 90 days of your receipt of the Notice of Claim.

1. The miner was employed by the named potentially liable operator (list all periods of employment):

From: _____ To: _____
_____ _____
_____ _____

Miner's Job Classification(s)/ Type(s) of Work Performed	Time Performed (Beginning and Ending Dates)	Name and Location of Mine or Facility (County and State)
_____	_____	_____
_____	_____	_____
_____	_____	_____

2. Our records indicate that the potentially liable operator is insured as indicated in the header of page 1. If this information is incorrect, please complete information below.

Insurance Carrier(s)	Policy Number	Dates of Coverage
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. Is the named potentially liable operator affiliated in any way with any of the other firms identified in the Notice of Claim as potentially liable operators? ☐ Yes ☐ No
If yes, please explain the nature of the relationship.

_____
_____

4. Has the named potentially responsible operator transferred or sold its mine, mines, or coal mining business, or substantially all of the assets thereof, to another person or business organization? ☐ Yes ☐ No
If yes, please explain the details of the transaction(s), including the name(s) of the person(s) or organization(s) acquiring the property.

_____
_____

Appendix G

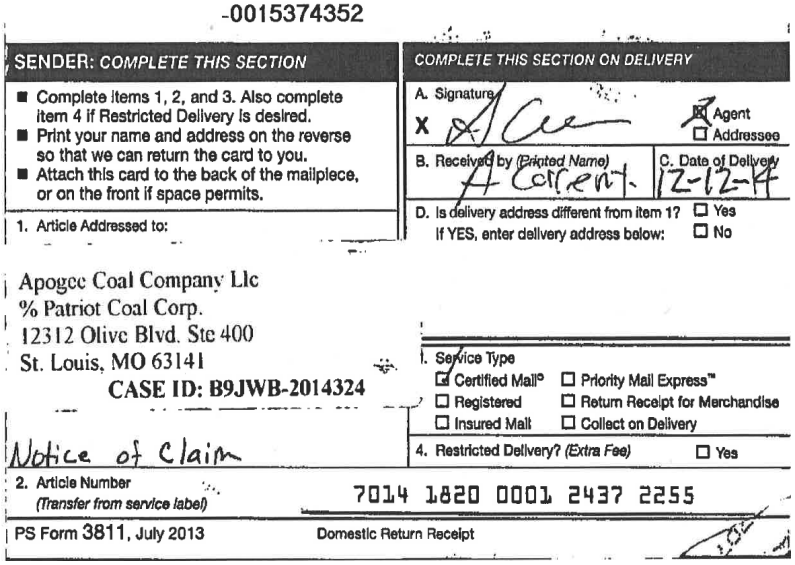
5. Please set forth any additional facts regarding potential liability you would like to have considered.

_____

_____

<table>
<tr><td rowspan="3">Name and Address of Firm Completing Form</td><td colspan="2">Name of Person Completing Form</td></tr>
<tr><td colspan="2">Title</td></tr>
<tr><td>Signature</td><td>Date</td></tr>
</table>

Appendix G



-0015374352

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Apogee Coal Company Llc
% Patriot Coal Corp.
12312 Olive Blvd. Ste 400
St. Louis, MO 63141
CASE ID: B9JWB-2014324

Notice of Claim

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☒ Agent ☐ Addressee

B. Received by (Printed Name) A Correnti C. Date of Delivery 12-12-14

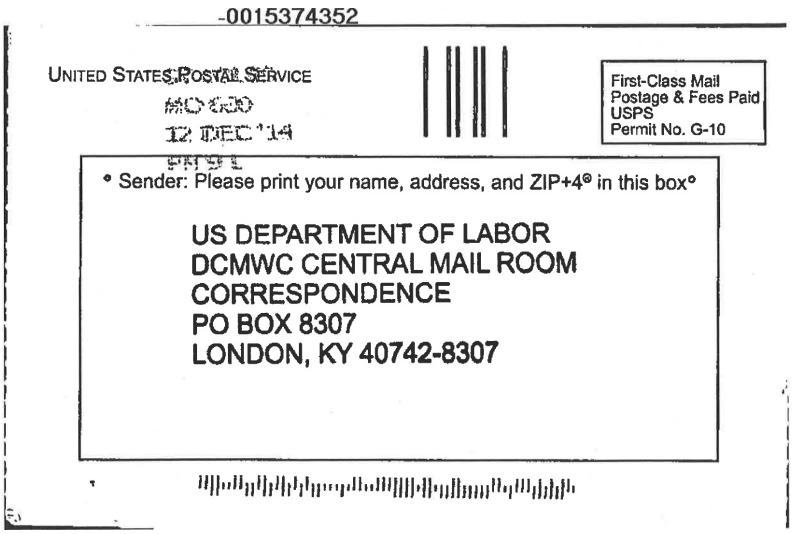
D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7014 1820 0001 2437 2255

PS Form 3811, July 2013 Domestic Return Receipt



-0015374352

UNITED STATES POSTAL SERVICE
MCHD
12 DEC '14

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

US DEPARTMENT OF LABOR
DCMWC CENTRAL MAIL ROOM
CORRESPONDENCE
PO BOX 8307
LONDON, KY 40742-8307

Appendix G

-0003004351

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Patriot Coal Company
C/O Underwriters Tpa
P. O. Box 23640
Louisville, KY 40223

CASE ID: B9JWB-2014324

Notice of Claim

COMPLETE THIS SECTION ON DELIVERY

A. Signature ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

LOUISVILLE ST. ANCHORAGE FINANCE
DEC 11 2014
USPS 40223

3. Service Type
☑ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7014 1820 0001 2437 2262

PS Form 3811, July 2013 Domestic Return Receipt

-0003004351

UNITED STATES POSTAL SERVICE
KY 400
11 DEC '14
PM 4 L

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

US DEPARTMENT OF LABOR
DCMWC CENTRAL MAIL ROOM
CORRESPONDENCE
PO BOX 8307
LONDON, KY 40742-8307

Appendix G

010202484364 B9JWB-2014324

UNDERWRITERS
SAFETY & CLAIMS

December 16, 2014

Dennis Glaze, Claims Examiner
U.S. DOL / OWCP / DCMWC
Central Mail Room
P.O. Box 8307
London, KY 40742-8307

RE: David M. Howard
Apogee Coal / Patriot Coal Corp
DOL Claim #XXX-XX-6902 LM C
Case ID# B9JWB-2014324

Dear Mr. Glaze:

The above named company has received your notification indicating they are being considered as the responsible operator in this claim. Underwriters Safety & Claims is the third-party administrator for Federal Black Lung claims for Patriot Coal Corporation. Apogee Coal / Patriot Coal agrees that it should be a party in interest to all future proceedings in this matter. We would note, however, that the employment data may not be accurate or complete and thus reserve the right to contest liability if and when additional evidence becomes available.

Further, we hereby reserve the right to obtain legal counsel for the purpose of litigation of all other issues

relating to the claimant's entitlement to benefits or the operator's liability for payment until such time as these issues have been resolved by the production of additional evidence and stipulation by the operator.

A more detailed description of the issues reserved, along with a memorandum explaining our controversion and our intentions with respect to our right to obtain legal counsel and further litigation of this claim is attached. As stated previously, when evidence is developed which to our satisfaction resolves any issue, the matter will no longer be contested by the operator and you will be so advised.

Please send us copies of all future correspondence in this claim.

Sincerely,

/s/ Sandy
Sandy L. Downey
Claims Adjuster

Appendix G

0002484364 B9JWB-2014324

Operator Controversion
FORM CM-970
Attached Page 1 of 2

Controversion Liability

1. Responsible Operator Issue- (hereafter referred to as "Operator" - Operator asserts that the claimant has failed to show any specific or measurable years of actual coal mine employment

2. Statutes and regulations creating such liability are legally invalid and unconstitutional. Operator reserves its right to obtain legal counsel and assert such defenses in this claim and all other administrative judicial proceedings in connection with said statutes and regulations.

3. The putative responsible operator asserts that the claim was not timely filed.

Controversion of Eligibility of Claimant

1. It has not been established that the claimant is totally disabled due to pneumoconiosis and, therefore, the operator denies liability.

2. Claimant's medical condition was not caused by any coal mine employment with this responsible operator.

3. Operator desires to obtain and produce medical evidence.

4. Operator denies liability and disputes claimant's eligibility because of the failure to consider or develop any information as to the existence of other comparable and gainful work.

5. Claimant has not established the presence of pneumoconiosis; because claimant has not established he/she is totally disabled as a result of pneumoconiosis; and furthermore, because claimant's impairment, if any, did not arise out of, or in connection with, employment in a coal mine.

6. Claimant is not eligible for benefits because the medical evidence upon which his claim is based does not satisfy the mandatory requirements of the applicable regulations.

Controversion of Benefit Amount

1. Operator denies liability for any benefit amounts assessed by reason of legal expenses and fees incurred by claimant.

2. Operator denies liability for any benefit amounts assessed by reason of medical expenses and fees incurred by claimant.

3. Operator denies liability for any benefit amounts assessed by reason of claimant's alleged marital status or the existence of any dependents.

Appendix G

Controversion – Preservation of Constitutional Issues

1. The evidentiary limitations as currently being applied and any limitations on evidence are unconstitutional.

2. The Patient Protection and Affordable Care Act, Pub. L. NO. 111-148, ——1556 (2010)(PPACA) as it relates to claims filed under the Federal ——Black Lung Act is unconstitutional, both as written and as applied in this ——case.

Appendix G

MEMORANDUM

RE: Operator Controversion and Further Litigation of Claim

We are in the process of obtaining additional information and medical evidence relative to this claim. We have requested that the claimant answer interrogatories regarding his previous employment and medical history. We have also requested that he provide us with an authorization which will permit us to review his past employment and medical records. Upon receipt of the claimant's answer to the interrogatories and authorization, we shall request that all previous employers, as well as doctors and hospitals who have cared for the claimant, supply us copies of all relevant records. We shall also attempt to identify and locate any relevant medical evidence which may have been generated pursuant to a state claim for pneumoconiosis benefits.

The physicians who perform examinations have advised that absent a complete medical history, it is impossible for them to effectively evaluate any claimant. Thus, in order for us to have a meaningful examination of the claimant, we must first gather all relevant medical records. We shall endeavor to complete this process as quickly as possible. However, our ability to do so depends upon the cooperation which we receive from the claimant, his/her employers, and all doctors and hospitals which have treated him/her.

If it appears that an examination by a physician of our choice will be necessary, we shall proceed to schedule

such an examination as soon as possible. As soon as we have been able to obtain a date for an examination, we will contact you.

Appendix G

OPERATOR RESPONSE TO NOTICE OF CLAIM

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

Miner's Name:	Claimant's Name:	Claim Number:	OMB NO.: 1240-0033 Expires: 03/31/2017
David M Howard	**David M Howard**	**PI XXX-XX-6902 LM C CASE ID: B9JWB-2014324**	

Responsible Operator's Name:	Insurer's Name	Policy No.
Apogee Coal Company Llc	**Self-insured thru Patriot Coal Company**	**N/A - Self-Insured**

This information is authorized by the Black Lung Benefits Act (30 U.S.C. 901 et.seq.) (20 CFR 725.408). Please check appropriate boxes and provide requested information. While you are not required to respond, if you fail to do so within 30 days of your receipt of the Notice of Claim you shall not be allowed to contest your liability for the payment of benefits on any of the five specific grounds set forth below in Section B. (20 CFR 725.408). You must send a copy of this response to the claimant by regular mail.

Appendix G

A. Acceptance of Liability

The named potentially liable operator is the responsible operator within the meaning of the Black Lung Benefits Act

B. The Controversion of Liability

Indicate whether the named potentially liable operator accepts or denies the assertions that follows. Acceptance of these assertions is not necessarily an acceptance of liability. You may still contest your liability on any other available grounds.

Accepts	Denies	
☐	☒	This operator was an operator for any period after 06/30/73.
☐	☒	This operator employed the miner as a miner for a cumulative period of not less than one year.
☐	☒	The miner was exposed to coal mine dust while working for this operator.
☐	☒	The miner's employment with this operator included at least one working day after December 31, 1969.
☐	☒	This operator or its insurer is financially capable of assuming liability for the payment of benefits.

Time period for submission of evidence. Within 90 days of the date on which you received the Notice of Claim, you may submit documentary evidence in support of your positions asserted in Section B. For any of the assertions you denied, you must submit all relevant documentary evidence within this 90 day period. The time period may be extended for good cause shown if an extension request is filed with the district director prior to expiration of the 90 days period. You must include a statement of reasons why you need additional time with your extension request.

Privacy Act Statement

The following information is provided in accordance with the Privacy Act of 1974. (1) Submission of this information is required under the Black Lung Benefits Act. (2) The information will be used to determine eligibility for and the amount of benefits payable under the Act. (3) The information may be used by other agencies or persons in handling matters relating directly or indirectly, to the subject matter of the claim, so long as such agencies or persons have received the consent of the individual claimant or beneficiary, or have complied with the provisions of 20 CFR 410 or 20 CFR 725. (4) Furnishing all requested information will facilitate the claims adjudication process; and the effects of not providing all or any part of the requested information may delay the process, or result in an unfavorable decision or a reduced level of benefits. (Disclosure of your social security number is voluntary; the failure to disclose such number will not result in the denial of any right, benefit or privilege to which an individual may be entitled.)

Appendix G

Public Burden Statement

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time for reviewing instructions, searching existing data resources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Division of Coal Mine Workers' Compensation, Room N-3464, 200 Constitution Avenue, N. W., Washington, D.C. 20210. **Note: Persons are not required to respond to this information unless it displays a currently valid OMB control number. (DO NOT SEND THE COMPLETED FORM TO THIS OFFICE.)**

Notice

If you have a substantially limiting physical or mental impairment, Federal disability nondiscrimination law gives you the right to receive help from OWCP in the form of communication assistance, accommodation and modification to aid you in the claims process. For example, we will provide you with copies of documents in alternate formats, communication services such as sign language interpretation or other kinds of adjustments or changes to account for the limitations of your disability. Please contact our office or the claims examiner to ask about this assistance.

C. Additional Information

Please answer the questions below. If the space provided for any response is inadequate, please continue your response on a blank sheet of paper and attach it to the form. If you are unable to respond to these questions within the 30-day period for accepting or denying the assertions set forth in Section B above (*i.e.* within 30 days of receipt of the Notice of Claim), you should return this form in compliance with the 30-day time limitation and provide the information requested in this section within 90 days of your receipt of the Notice of Claim.

1. The miner was employed by the named potentially liable operator (list all periods of employment):

From: _____ To: _____
_____ _____
_____ _____

Miner's Job Classification(s)/ Type(s) of Work Performed	Time Performed (Beginning and Ending Dates)	Name and Location of Mine or Facility (County and State)
_____	_____	_____
_____	_____	_____
_____	_____	_____

2. Our records indicate that the potentially liable operator is insured as indicated in the header of page 1. If this information is incorrect, please complete information below.

Insurance Carrier(s)	Policy Number	Dates of Coverage
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. Is the named potentially liable operator affiliated in any way with any of the other firms identified in the Notice of Claim as potentially liable operators? ☐ Yes ☐ No If yes, please explain the nature of the relationship.

_____

_____

To Be Provided

4. Has the named potentially responsible operator transferred or sold its mine, mines, or coal mining business, or substantially all of the assets thereof, to another person or business organization? ☐ Yes ☐ No If yes, please explain the details of the transaction(s), including the name(s) of the person(s) or organization(s) acquiring the property.

_____

_____

Appendix G

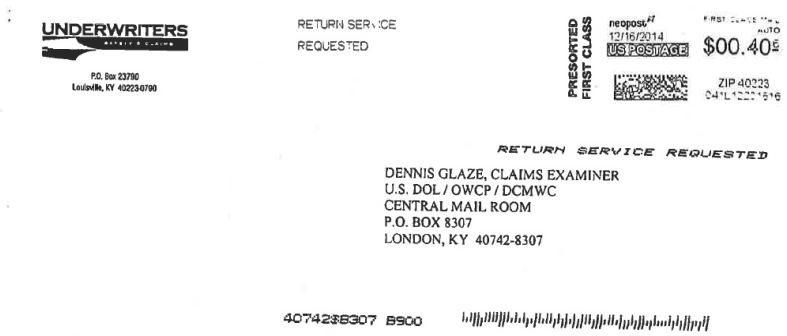
5. Please set forth any additional facts regarding potential liability you would like to have considered.

_____

_____

Name and Address of Firm Completing Form	Name of Person Completing Form
Underwriters Safety & Claims P.O. Box 23790 1700 Eastpoint Parkway Louisville KY 40023-07490	Sandy L.Downey Title Claims Adjuster / FBL Team Leader Signature Sandy L. Downey Date 12-16-14

Appendix G



UNDERWRITERS

P.O. Box 23790
Louisville, KY 40223-0790

RETURN SERVICE
REQUESTED

PRESORTED
FIRST CLASS

neopost
12/16/2014
US POSTAGE
$00.40

ZIP 40223

RETURN SERVICE REQUESTED

DENNIS GLAZE, CLAIMS EXAMINER
U.S. DOL / OWCP / DCMWC
CENTRAL MAIL ROOM
P.O. BOX 8307
LONDON, KY 40742-8307

40742$8307 B900

APPENDIX H — NOTICE OF CLAIM TO ARCH COAL DATED DECEMBER 8, 2015 (DX. 22)

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation
Division of Coal Mine Workers' Compensation
Central Mail Room
PO Box 8307
London, KY 40742-8307
Phone: 1-800-366-4599 or 606-218-9300, extension GD-O
FAX: (606) 432-3574

NOTICE OF CLAIM

Date Issued: December 8, 2015

Miner's Name: David M Howard	
Claimant's Name/Address David M Howard [redacted] Baxter, KY 40806	Claim Number XXX-XX-6902 LM C CASE ID: B9JWB-2014324
Potentially Liable Operator/Address Apogee Coal Company Llc C/O Underwriters Safety & Claims PO Box 23790 Louisville, KY 40223	Insurance Carrier/ Address Self-insured thru Arch Coal Inc. 1 City Place Drive, Ste 300 St Louis, MO 63141 Policy Number: Self-insured

The claimant named above has filed a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 et seq. We are currently developing the claim to determine the claimant's eligibility. Enclosed is a copy of the claimant's

application and any evidence OWCP has obtained to date relating to the miner's employment.

This Notice of Claim is issued pursuant to 20 C.F.R. 725.407. We have identified you as a 'potentially liable operator' in this claim. A "potentially liable operator" is an employer of the miner (or a successor of an employer pursuant to 20 C.F.R. 725.492) who may be held liable for the payment of benefits should the claimant be found entitled to them. Designation as a potentially liable operator does not constitute a determination that you are in fact liable. Where OWCP's records indicate you obtained a policy of insurance, and the claim falls within such policy, we are sending a copy of this notice to your insurer. You and your insurer shall be considered parties to the claim unless an adjudication officer dismisses you and you are not thereafter notified again of your potential liability.

Within 30 days of receipt of this Notice of Claim, you (or your insurer) must file a response pursuant to 20 C.F.R. 725.408 indicating your intent to accept or contest your identification as a potentially liable operator. This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 30 days. We have enclosed a form entitled 'Operator Response to Notice of Claim' for your use. Please send your response and any other correspondence to the Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, at the address shown above.

Appendix H

If you accept liability for the payment of benefits should the claimant obtain an award (*i.e.* you accept that you are the 'responsible operator'), please mark the box in Section A (entitled 'Acceptance of Liability') on the Operator Response to Notice of Claim. **Accepting liability means only that you are the operator liable for the payment of any benefits due; it does not constitute a stipulation or admission that the claimant is entitled to benefits.**

If you wish to contest your status as a potentially liable operator, you must state the precise nature of your disagreement by accepting or denying each of the five assertions listed in Section B (entitled 'Contest of Potential Liability- Operator Assertions) on the Operator Response to Notice of Claim. The assertions are limited to information about your employment of the miner and your status as an operator. If you deny any of the five operator assertions, you have 90 days from your receipt of this notice to submit documentary evidence in support of your response. This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 90 days. **Absent extraordinary circumstances, no documentary evidence relevant to the assertions set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim) may be admitted in any further proceedings unless it is submitted within 90 days of your receipt of this notice or an extended period authorized by the District Director.**

Appendix H

If you do not respond within 30 days of your receipt of this Notice of Claim, you will not be allowed to contest your liability for payment of benefits on any of the grounds set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim).

Please note that your response need not include evidence about any other potentially liable operator and its employment of the miner. At the conclusion of the initial evidence-gathering period, the District Director will issue a Schedule for the Submission of Additional Evidence pursuant to 20 C.F.R. 725.410. In that schedule, the District Director will select and designate one "responsible operator" from the potentially liable operators notified. All parties will then be given an opportunity to present evidence regarding the liability of the designated responsible operator or any other operator.

NOTE: THE 'OPERATOR RESPONSE TO NOTICE OF CLAIM' MUST INCLUDE THE ORIGINAL SIGNATURE OF AN AUTHORIZED OFFICIAL FOR THE POTENTIALLY LIABLE RESPONSIBLE OPERATOR OR ITS INSURANCE CARRIER. WE CANNOT ACCEPT A COPY OF THE RESPONSE SENT BY FAX IN LIEU OF THE ORIGINAL DOCUMENT.

We are available to assist you with this process. I may be contacted at the address and telephone number shown above.

Sincerely,

/s/_____
Dennis Glaze

Enclosures: Copy of claim and evidence relating to miner's employment history Operator Response to Notice of Claim form (Form No. CM-2970a)

[PROOF OF SERVICE OMITTED IN PRINTING]

Appendix H

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

OPERATOR RESPONSE TO NOTICE OF CLAIM

Miner's Name: **David M Howard**	Claimant's Name: **David M Howard**	Claim Number: **PI XXX-XX-6902 LM C CASE ID: B9JWB-2014324**	OMB No.: 1240-0033 Expires: 03/31/2017

Responsible Operator's Name: **Apogee Coal Company Llc**	Insurer's Name: **Self-Insured thru Arch Coal Inc.**	Policy No. **Self-Insured**

This information is authorized by the Black Lung Benefits Act (30 U.S.C. 901 et seq.) (20 CFR 725.408). Please check appropriate boxes and provide requested information. While you are not required to respond, if you fail to do so within 30 days of your receipt of the Notice of Claim you shall not be allowed to contest your liability for the payment of benefits on any of the five specific grounds set forth below in Section B. (20 CFR 725.408). You must send a copy of this response to the claimant by regular mail.

A. Acceptance of Liability

☐ The named potentially liable operator is the responsible operator within the meaning of the Black Lung Benefits Act

Appendix H

B. Controversion of Liability

Indicate whether the named potentially liable operator accepts or denies the assertions that follows. Acceptance of these assertions Is not necessarily an acceptance of liability. You may still contest your liability on any other available grounds.

Accepts	Denies	
☐	☐	This operator was an operator for any period after 06/30/73.
☐	☐	This operator employed the miner as a miner for a cumulative period of not less than one year.
☐	☐	The miner was exposed to coal mine dust while working for this operator.
☐	☐	The miner's employment with this operator included at least one working day after December 31, 1969.
☐	☐	This operator or its insurer is financially capable of assuming liability for the payment of benefits.

Time period for submission of evidence. Within 90 days of the date on which you received the Notice of Claim, you may submit documentary evidence in support of your positions asserted in Section B. For any of the assertions you denied, you must submit all relevant documentary evidence within this 90 day period. The time period may be extended for good cause shown if an extension request

is filed with the district director prior to expiration of the 90 days period. You must include a statement of reasons why you need additional time with your extension request.

Privacy Act Statement

The following information is provided in accordance with the Privacy Act of 1974. (1) Submission of this information is required under the Black Lung Benefits Act. (2) The information will be used to determine eligibility for and the amount of benefits payable under the Act. (3) The information may be used by other agencies or persons In handling matters relating directly or indirectly, to the subject matter of the claim, so long as such agencies or persons have received the consent of the Individual claimant or beneficiary, or have complied with the provisions of 20 CFR 410 or 20 CFR 725. (4) Furnishing all requested information will facilitate the claims adjudication process; and the effects of not providing all or any part of the requested information may delay the process, or result in an unfavorable decision or a reduced level of benefits. (Disclosure of your social security number is voluntary; the failure to disclose such number will not result in the denial of any right, benefit or privilege to which an individual may be entitled.)

Public Burden Statement

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time for reviewing instructions, searching existing data resources, gathering and maintaining the data needed, and completing and reviewing the

collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Division of Coal Mine Workers' Compensation, Room N-3464, 200 Constitution Avenue, N. W., Washington, D.C. 20210. **Note: Persons are not required to respond to this Information unless It displays a currently valid OMB control number. (DO NOT SEND THE COMPLETED FORM TO THIS OFFICE.)**

Notice

If you have a substantially limiting physical or mental impairment, Federal disability nondiscrimination law gives you the right to receive help from OWCP in the form of communication assistance, accommodation and modification to aid you in the claims process. For example, we will provide you with copies of documents in alternate formats, communication services such as sign language interpretation or other kinds of adjustments or changes to account for the limitations of your disability. Please contact our office or the claims examiner to ask about this assistance.

C. Additional Information

Please answer the questions below. If the space provided for any response is inadequate, please continue your response on a blank sheet of paper and attach it to the form. If you are unable to respond to these questions within the 30-day period for accepting or denying the assertions set forth in Section 8 above (*i.e.* within 30 days

of receipt of the Notice of Claim), you should return this form in compliance with the 30-day time limitation and provide the information requested in this section within 90 days of your receipt of the Notice of Claim.

1. The miner was employed by the named potentially liable operator (list all periods of employment):

From: _____ To: _____
_____ _____
_____ _____

Miner's Job Classification(s)/ Type(s) of Work Performed	Time Performed (Beginning and Ending Dates)	Name and Location of Mine or Facility (County and State)
_____	_____	_____
_____	_____	_____
_____	_____	_____

2. Our records indicate that the potentially liable operator is insured as indicated in the header of page 1. If this information is incorrect, please complete information below.

Insurance Carrier(s)	Policy Number	Dates of Coverage
_____	_____	_____
_____	_____	_____
_____	_____	_____

Appendix H

3. Is the named potentially liable operator affiliated in any way with any of the other firms identified in the Notice of Claim as potentially liable operators? ☐ Yes ☐ No If yes, please explain the nature of the relationship.

_____

_____

4. Has the named potentially responsible operator transferred or sold its mine, mines, or coal mining business, or substantially all of the assets thereof, to another person or business organization? ☐ Yes ☐ No If yes, please explain the details of the transaction(s), including the name(s) of the person(s) or organization(s) acquiring the property.

_____

_____

5. Please set forth any additional facts regarding potential liability you would like to have considered.

_____

_____

<table>
<tr><td rowspan="3">Name and Address of Firm Completing Form</td><td colspan="2">Name of Person Completing Form</td></tr>
<tr><td colspan="2">Title</td></tr>
<tr><td>Signature</td><td>Date</td></tr>
</table>

Appendix H

Addendum: Certified Receipt Numbers

Case ID: B9JWB-2014324

David M Howard
Certified Receipt No.: **N/A**

Ron Carson, Program Director
Certified Receipt No.: **N/A**

Apogee Coal Company Llc
Certified Receipt No.: **70142120000447498070**

Self-insured thru Arch Coal Inc.
Certified Receipt No.: **70142120000447498087**

Appendix H

-0019655355

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Arch Coal Inc.
1 City Place Drive, Ste 300
St Louis, MO 63141
CASE ID: B9JWB-2014324-NOC

COMPLETE THIS SECTION ON DELIVERY

A. Signature
x [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery
[signature] DEC 14 2015

D. Is delivery address different from item 1? ☑ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Transfer from service label)* 7014 2120 0004 4749 8087

PS Form 3811, July 2013 Domestic Return Receipt

-0019655355

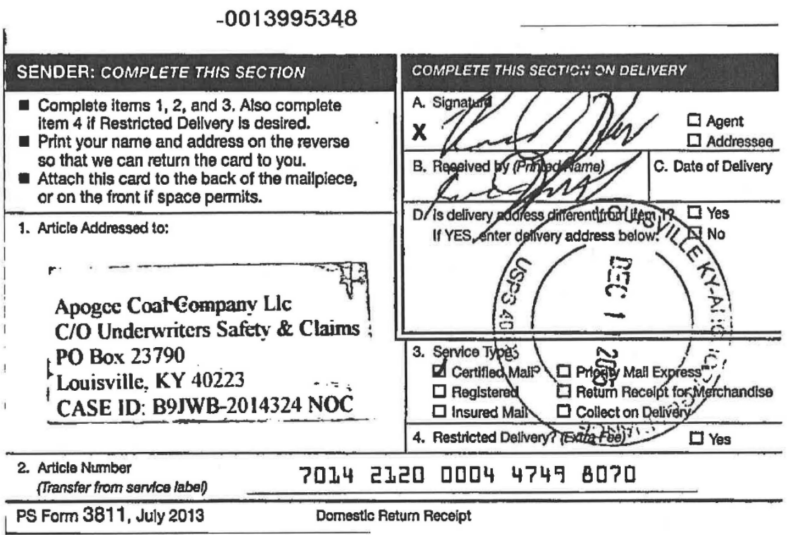
UNITED STATES POSTAL SERVICE
15 DEC '15
PM 5 L

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

US DEPARTMENT OF LABOR
DCMWC CENTRAL MAIL ROOM
CORRESPONDENCE
PO BOX 8307
LONDON, KY 40742-8307

Appendix H



-0013995348

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Apogee Coal Company Llc
C/O Underwriters Safety & Claims
PO Box 23790
Louisville, KY 40223
CASE ID: B9JWB-2014324 NOC

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Addressee

B. Received by (Printed Name)
C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

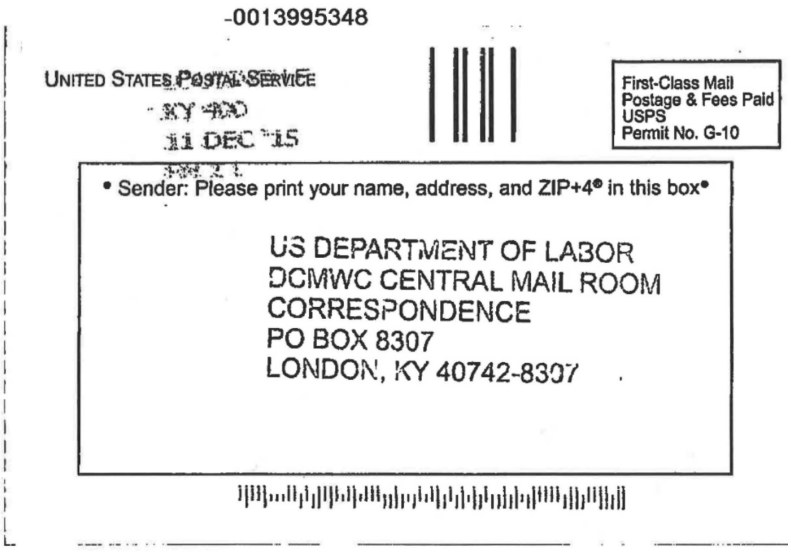
USPS 40 LOUISVILLE KY-A DEC 1 2014

3. Service Type
☑ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7014 2120 0004 4749 8070

PS Form 3811, July 2013 Domestic Return Receipt



-0013995348

UNITED STATES POSTAL SERVICE
KY 400
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USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

US DEPARTMENT OF LABOR
DCMWC CENTRAL MAIL ROOM
CORRESPONDENCE
PO BOX 8307
LONDON, KY 40742-8307

APPENDIX I — PRELIMINARY DECISION AND ORDER DATED FEBRUARY 16, 2016 IN *ADKINS V. APOGEE COAL ET AL.*, NO. B7MHB-2015029 (CHARLESTON DOL)

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation
Division of Coal Mine Workers' Compensation

CLAIM NO.: CH XXX-XX-6043 LM C
CASE ID: B7MHB-2015029
CLAIM DATE: 01/27/2015

IN THE MATTER OF THE CLAIM FOR BENEFITS UNDER THE BLACK LUNG BENEFITS ACT

LGLEASON ADKINS,

Claimant,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Signed February 16, 2016

PROPOSED DECISION AND ORDER
Denial of Benefits

Such development, examination, investigation, and review as is deemed necessary pursuant to the Black Lung Benefits Act having been completed and duly considered, the District Director makes the following:

Appendix I

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That Lgleason Adkins, born _____ hereinafter referred to as the miner, was employed as a coal miner in the Nation's coal mines for 27 years, from 1972 to March 6, 2002;

2. That a written claim for benefits was timely filed on January 27, 2015;

3. That, as a result of the conditions of his coal mine employment, the miner contracted pneumoconiosis, as that term is defined in the Act and the Regulations;

4. That the evidence shows that the disease was caused, at least in part, by coal mine work;

5. That such disease has not caused a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and the Regulations;

Based upon the foregoing Findings of Fact and Conclusions of Law, the District Director makes the following:

PROPOSED DENIAL OF BENEFITS

The claimant is not entitled to benefits because the evidence:

1. Does not show that the miner is totally disabled by the disease.

Within thirty (30) days after the date of issuance of this Proposed Decision and Order, any party may file a written request for revision or request a formal hearing before the Office of Administrative Law Judges. The party must specify the findings and conclusions with which they disagree and shall serve the written request on the District Director and all other parties.

Signed in the office of the District Director on February 16, 2016

/s/_____
Brian Sneed
Claims Examiner

[PROOF OF SERVICE OMITTED IN PRINTING]

Appendix I

**SUMMARY OF MEDICAL
AND EMPLOYMENT EVIDENCE
PROPOSED DECISION AND ORDER**

Date Issued: February 16, 2016
Miner's Name: Lgleason Adkins
CASE ID: **B7MHB-2015029**
DOL Claim No.: XXX-XX-6043 LM C
Claimant's Name: Lgleason Adkins
Coal Mine Company: N/A- Black Lung Disability Trust Fund
Insurance Carrier: N/A

The claimant named above has filed an application under the Black Lung Benefits Act, 30 USC 901 et seq. We have received the medical and employment evidence summarized below. Based on a review of this evidence, we have concluded that the Black Lung Disability Trust Fund is liable for the payment of any benefits in this claim. We have also concluded that the claimant is not entitled to benefits. A summary of the medical and employment evidence and an analysis of the evidence is set forth below. Copies of all the evidence received following the issuance of the Schedule for the Submission of Additional Evidence are attached to this document.

ENTITLEMENT ANALYSIS:

Based on the preliminary analysis of the medical evidence received to date, we have determined the following:

RELATIONSHIP /DEPENDENCY:

The claimant claims one dependent(s) within the meaning of the Act. The file includes a marriage certificate

indicating that the miner married Martha on June 30, 1978. Therefore, the requirements of 20 CFR 725.204(a)(1) and 725.205(a) and 725.205 (e) which relate to relationship and dependency are met.

PRESENCE OF PNEUMOCONIOSIS (BLACK LUNG DISEASE):

The miner was determined to have "legal pneumoconiosis" as that term is defined at 20 C.F.R. 718.201(a)(2), and therefore has proven a chronic lung disease or impairment arising out of coal mine employment. This finding was supported by a reasoned medical opinion (see C.F.R. 718.202(a)(4)). Dr. Green, board certified in internal medicine and pulmonary disease, during physical examination of the claimant found coal workers' pneumoconiosis which is supported by radiographic findings and chronic obstructive pulmonary disease based on confirmed 27 years occupational history of exposure to irrespirable coal and rock dust. He stated that the claimant's history of chronic cough, wheeze, shortness of breath, and mucus expectoration support the diagnosis of coal workers pneumoconiosis and chronic obstructive pulmonary disease.

The medical evidence in the claim also establishes the presence of clinical pneumoconiosis. The presence of the disease is established by X-ray reading and corroborated by evidence of the disease based upon physical examination and a review of the objective testing. Dr. Crum, B-reader and board certified radiologist, interpreted the claimant's chest x-ray performed on 01/16/2015 as 1/1 profusion. Dr. Gaziano, B-reader, read the x-ray for quality purposes

only. Dr. Green stated that the claimant's 27 year history of exposure to irrespirable coal and rock dust is a significant contributing and aggravating factor for the diagnosis of coal workers pneumoconiosis and chronic obstructive pulmonary disease. The requirements of 20 CFR 718.202 are met and, therefore, presence of the disease has been established.

20 CFR 718.202(a)(4)—established by reasoned medical opinion

20 CFR 718.202(a)(1)—established by x-ray

RELATIONSHIP OF BLACK LUNG DISEASE TO COAL MINE EMPLOYMENT:

The miner was determined to have "legal pneumoconiosis" as that term is defined at 20 C.F.R. 718.201(a)(2), and therefore has proven a chronic lung disease or impairment arising out of coal mine employment. This finding was supported by a reasoned medical opinion (see C.F.R. 718.202(a)(4)). In light of this finding, no separate finding regarding disease causation is necessary.

The miner's pneumoconiosis was caused by his coal mine employment based upon the presumption in the regulations, 20 CFR 718.203(b) which states: If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. The miner has established at least ten years of coal mine employment.

A reasoned medical opinion also supports a finding that the disease arose at least in part out of coal mine employment. The presumption has not been rebutted.

20 CFR 718.203(b)—established by presumption

DISABILITY AND RELATIONSHIP OF DISABILITY TO BLACK LUNG DISEASE:

The results of breathing tests and blood gas studies do not meet the regulatory standards to establish total disability. Dr. Green, Board-certified in Internal Medicine and Pulmonary Medicine, stated that the patient is not totally disabled from a pulmonary standpoint and could return to his previous coal mine employment. The doctor examining the miner has not diagnosed a respiratory or pulmonary condition that would be considered to be totally disabling. The requirements of 20 CFR 718.204 are not met and, therefore, total disability and total disability due to pneumoconiosis have not been established.

20 CFR 718.204—not established

FIFTEEN YEAR PRESUMPTION:

This claim has been reviewed to determine if the changes in the Black lung Benefits Act mandated by the Patient Protection and Affordable Care Act of 2010 (PPACA), Public Law 111-148 §1556(a), apply. Section 411(c)(4) of the Act provides presumptions of total disability due to pneumoconiosis or death due to pneumoconiosis under certain circumstances. The presumptions are applicable

to claims that were filed before January 1, 1982 or after January 1, 2005, and were pending on or after March 23, 2010.

The presumption is available to miners who worked for a cumulative period of fifteen or more years in underground mining, or comparable surface mining, and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. If a survivor establishes that the miner worked for fifteen or more years in coal mine employment and that the miner suffered from a totally disabling chronic respiratory or pulmonary impairment prior to death, it is presumed that the miner's death was due to pneumoconiosis. The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purpose of applying this presumption, shall be made in accordance with section 20 CFR 718.204.

For rebuttal in a miner's claim, the party opposing entitlement must establish either that the miner does not or did not have pneumoconiosis or that the miner's impairment did not arise out of or in connection with coal mine employment. In a survivor's case, the party opposing entitlement must provide evidence sufficient to rebut the presumption of death due to pneumoconiosis.

As discussed in the analysis of the admissible medical evidence, the evidence is inadequate to establish that the miner has a disabling respiratory impairment. Accordingly, the fifteen year presumption is not invoked.

The claimant has filed a claim more than one year after the effective date of a final order denying a previous

claim. Therefore, in accordance with 20 C.F.R. 725.309, the current claim is considered to be a subsequent claim. 20 C.F.R. 725.309(d) requires that a subsequent claim be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The claimant has not demonstrated that any of the applicable conditions of entitlement have changed since the prior denial. If we were to make a decision at this time, the current claim would be denied on the same basis as the prior claim.

ENTITLEMENT

Based upon the above, the claimant would NOT be entitled to benefits.

EMPLOYMENT ANALYSIS

The claimant has alleged 30 years of qualifying coal mine employment from 1972 to 2002. Social Security Earnings Record covering the period 1967 to 2011 confirms 27 years of coal mine employment from 1972 to 2002. Last date of coal mine employment, 03/06/2002, was established by employer statement from Habet Mining.

LIABILITY ANALYSIS

Hobet Mining Inc., a self-insured coal operator through Patriot Coal Company has been identified as the Responsible Operator in this claim; however, Patriot Coal Company is in bankruptcy and no longer possesses

sufficient assets to secure the payment of benefits in this claim. Since the company was self-insured, a previous employer cannot be named liable in this matter. Therefore, this company is deemed not viable and now is considered to be the responsibility of the Black Lung Disability Trust Fund.

APPENDIX J — BULLETIN 16-01, ISSUED BY OWCP, DATED NOVEMBER 12, 2015

U.S. DEPARTMENT' OF LABOR
Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation
Washington, DC 20210

BLBA BULLETIN NO. 16-01

Issue November 12, 2015

Expiration Date: Indefinite

Subject: Patriot Coal Corporation Bankruptcy.

Background: On May 12, 2015, Patriot Coal Corporation and its subsidiaries filed for bankruptcy protection under Chapter 11. On October 9, 2015, Patriot received approval from the Bankruptcy Court to complete the sale of all its coal-mining operations. Patriot sold those operations to Blackhawk Mining and ERP Compliant Fuel, LLC (an affiliate of the Virginia Conservation Legacy Fund). Neither Blackhawk nor ERP is liable for federal black lung liabilities, except for those miners who continue to work for these companies after the sale.

Patriot was authorized to self-insure its federal black lung liabilities as well as the liabilities of its subsidiaries in the States of KY, WV, IL, IN, MO and PA. Some of Patriot's liabilities, however, are covered by commercial insurance policies. The Division of Coal Mine Workers' Compensation (DCMWC) has been notified that Patriot

will no longer administer, defend, or pay claims after October 31, 2015.

Applicability: Appropriate DCMWC Personnel

Purpose: To provide guidance for district office staff in adjudicating claims in which the miner's last coal-mine employment of at least one year was with one of the 50 subsidiary companies that have been affected by the Patriot Coal Corporation bankruptcy.

Action:

1. **Ensure no interruption of benefits for claims currently in approved/accepted status.**

For claims in approved/accepted status, claims examiners (CEs) will immediately place these claims into the Federal Black Lung Disability Trust Fund (BLDTF) by completing a Form CM-1261. CEs will mail letters to the affected beneficiaries advising them that the DCMWC will be the new payer for their Federal Black Lung benefits and that there will be no interruption in the processing and handling of said benefits. Once claims are placed into Trust Fund pay status, the bill pay vendor (ACS) will issue medical cards and Black Lung Medical Benefits Question and Answer booklets to the miners within 7 to 10 business days.

2. Coordinate efforts with Regional Solicitors to handle claims pending at the Office of Administrative Law Judges.

With respect to claims pending before the Office of Administrative Law Judges, the Regional Solicitors will review the claim and take appropriate action after Patriot's attorneys formally withdraw their appearances. The Regional Solicitor's Office will work with the Claims Support Section to determine whether cases at the OAU level should (1) be remanded to the District Director (DD) for Trust Fund payment, or (2) continue to be defended in litigation.

3. Procedures for handling newly filed claims.

For claims that are filed subsequent to the issuance of this Bulletin or that were filed prior to issuance but for which a Notice of Claim has not been issued staff will do the following:

a. **Review claim and identify commercial coverage where applicable and submit NOCs to carriers.** Several of Patriot's subsidiaries have valid commercial insurance coverage for limited periods issued by New Hampshire Insurance Company/Chartis, National Union, Employers Insurance of Wausau/Liberty Mutual Insurance Company, WV CWP Fund, or BrickStreet Mutual Insurance Company. A list of the relevant commercial insurance policies will be provided under separate cover titled Patriot Coal Subsidiary Companies.

For newly filed claims pending before district directors, it is imperative that staff check the subsidiary companies to determine whether commercial insurers can be identified as liable. If a commercial carrier is identified, send notices of claim to the insurance carrier, identifying the Patriot subsidiary as the responsible operator with the relevant valid insurance policy number.

b. **Determine whether the claim is covered by either Peabody Energy's self-insurance or a Peabody commercial insurance policy.** There are thirteen (13) subsidiary companies that were, at one time, under the self-insurance authority of Peabody Energy Corporation (NR261). Some of these subsidiaries were also covered, for a time, by commercial insurance policies. The thirteen Patriot subsidiary companies are:

1. Black Stallion Coal Co. LLC
2. Colony Bay Coal
3. Dodge Hill Mining
4. Eastern Associated Coal
5. Grand Eagle Mining
6. Heritage Coal
7. Highland Mining
8. Hillside Mining

9. Mountain View Coal

10. Patriot Coal Corp. (for last CME dates prior to 10/31/2007)

11. Pine Ridge Coal

12. Rivers Edge Mining

13. Squaw Creek Mining

If commercial coverage can be identified, submit a notice of claim (naming the relevant subsidiary as the responsible operator and identifying the relevant policy number) to the appropriate commercial carrier.

If no commercial insurance coverage can be identified, and the miner's employment falls within Peabody Energy Corporation's (NR261) self-insurance timeframe (this generally requires that the miner last worked for the subsidiary before October 31, 2007), send notices of claim to:

[Name of Subsidiary Company]
c/o Underwriters Safety & Claims
P.O. Box 23640
Louisville, KY 40223

Self-insured through Peabody Energy Corporation
c/o Underwriters Safety and Claims
P.O. Box 23640
Louisville, KY 40223

c. **Determine whether the claim is covered by Arch Coal's self-insurance or an Arch Coal commercial insurance policy.** There are three Patriot subsidiaries that were at one time, under the self-insurance authority of Arch Coal, Inc. (NR 106). Some of these subsidiaries were also covered, for a time, by commercial insurance policies:

1. Apogee Coal (which also did business as Arch of West Virginia; Arch of Illinois; Arch of Kentucky, Arch of Alabama; and Arch on the Green);

2. Catenary Coal (which also did business as Mountain Edge Mining);

3. Hobet Mining (which also did business as Old Hickory Division; Sharples Coal Corp.; Zapata Coal Corp.; and Dal-Tex Coal Corp.).

If commercial coverage can be identified, send a notice of claim (naming the relevant subsidiary as the responsible operator and identifying the relevant policy number) to the appropriate carrier.

If no commercial insurance can be identified, and the miner's employment falls within a period of Arch Coal's self-insurance (this generally requires that the miner last worked for the subsidiary before January 1, 2006). send notices of claim as follows depending on the state:

West Virginia:

[Name of Subsidiary Company]
c/o HealthSmart Casualty Claims,
P.O. Box 3389
Charleston, WV 25333

Self-insured through Arch Coal. Inc.,
c/o HealthSmart Casualty Claims,
P.O. Box 3389
Charleston, WV 25333

Kentucky, Virginia, and Illinois:

[Name of Subsidiary Company]
c/o Underwriters Safety & Claims
P.O. Box 23640
Louisville, KY 40223

Self-insured through Arch Coal. Inc.,
c/o Underwriters Safety & Claims
P.O. Box 23640
Louisville, KY 40223

d. **Preserve data in CAPS.** In order to preserve the Claims and Payment System (CAPS) record of claims and the relationships to their insurers, the insurer's codes (NR261 for Peabody Coal; NR316 for Patriot Coal; NR106 for Arch Coal) must continue to be utilized and maintained when processing claims on the Claim Master Screen.

e. **Do not request 725.495(d) statements.** If no coverage can be identified that aligns with NR261 (Peabody Coal), NR316 (Patriot Coal), or NR106 (Arch Coal), there is no need to request an uninsured statement from the RO Section; convert such claims to the BLDTF.

f. **If there is no coverage except Patriot's self-insurance.** With respect to new claims in which the subsidiary companies were never covered by either commercial insurance or the self-insurance authorization of Peabody Coal (NR261) or Arch Coal (NR106), there is no need to issue a notice of claim; transfer such claims directly to the BLDTF for claims processing.

4. Procedures for handling claims pending before the District Director

For cases pending before district directors, in which a NOC, SSAE, or PDQ has been issued, but the PDQ is not yet final, wherein Patriot Coal's attorneys have formally withdrawn their appearances from the claims, follow steps 3 (a) through (f) as outlined above. If Patriot's attorneys have not withdrawn their appearances from the claim, staff must contact the attorney and request a formal notice of withdrawal.

For pending claims that are not covered by either commercial insurance or by Peabody's or Arch's self-insurance authorization, and are therefore converted to BLDTF claims, follow these procedures:

a. If the responsible operator (RO) did not submit medical evidence, process the claims as you would any other Trust Fund claims.

b. If the RO submitted medical evidence, it should be considered by the DD if it complies with the limitation of evidence stipulated in 20 CFR 725.414; that evidence, along with examination reports from the DCMWC physician and any claimant evidence should be considered, and a PDQ issued on the basis of all that information.

    i. If the RO submitted medical evidence and the claim meets the criteria outlined in DCMWC Bulletin 14-05, CEs should process claims accordingly (unless those procedures have already been applied). That is, if the case files contain evidence that could result in a finding of 15 years or more of qualifying employment and otherwise meets the criteria for the pilot program, then obtain supplemental reports from the DCMWC examining physician. Once those supplemental reports are received, consider them along with all other evidence in the records before issuing PDOs.

Disposition: Retain this Bulletin until further notice, or its incorporation into the Black Lung Library.

/s/
Michael A. Chance
Director, Division of Coal Mine Workers' Compensation

Distribution: All DCMWC staff

APPENDIX K — GAO, BLACK LUNG BENEFITS PROGRAM: IMPROVED OVERSIGHT OF COAL MINE OPERATOR INSURANCE IS NEEDED (GAO-2021, FEBRUARY 2020)

UNITED STATES GOVERNMENT
ACCOUNTABILITY OFFICE

REPORT TO CONGRESSIONAL REQUESTERS

February 2020

BLACK LUNG BENEFITS PROGRAM

Improved Oversight of Coal Mine Operator Insurance Is Needed

GAO HIGHLIGHTS

Highlights of GAO-20-21, a report to congressional requesters

Why GAO Did This Study

In May 2018, GAO reported that the Trust Fund, which pays benefits to certain coal miners, faced financial challenges. The Trust Fund has borrowed from the U.S. Treasury's general fund almost every year since 1979 to make needed expenditures. GAO's June 2019 testimony included preliminary observations that coal operator bankruptcies were further straining Trust Fund finances because, in some cases, benefit responsibility was transferred to the Trust Fund.

This report examines (1) how coal mine operator bankruptcies have affected the Trust Fund, and (2) how

DOL managed coal mine operator insurance to limit financial risk to the Trust Fund. GAO identified coal operators that filed for bankruptcy from 2014 through 2016 using Bloomberg data. GAO selected these years, in part, because bankruptcies were more likely to be resolved so that their effects on the Trust Fund could be assessed. GAO analyzed information on commercially-insured and self-insured coal operators, and examined workers' compensation insurance practices in four of the nation's top five coal producing states. GAO also interviewed DOL officials, coal mine operators, and insurance company representatives, among others.

What GAO Recommends

GAO is making three recommendations to DOL to establish procedures for self-insurance renewals and coal operator appeals, and to develop a process to monitor whether commercially-insured operators maintain adequate and continuous coverage. DOL agreed with our recommendations.

View GAO-20-21. For more information, contact Cindy Brown Barnes (202) 512-7215, brownbarnesc@gao.gov, or Alicia Puente Cackley (202) 512-8678, cackleya@gao.gov.

What GAO Found

Coal mine operator bankruptcies have led to the transfer of about $865 million in estimated benefit responsibility to the federal government's Black Lung Disability Trust Fund (Trust Fund), according to DOL estimates. The Trust Fund pays benefits when no responsible operator is identified, or when the liable operator does not pay. GAO

previously testified in June 2019 that it had identified three bankrupt, self-insured operators for which benefit responsibility was transferred to the Trust Fund. Since that time, DOL's estimate of the transferred benefit responsibility has grown—from a prior range of $313 million to $325 million to the more recent $865 million estimate provided to GAO in January 2020. According to DOL, this escalation was due, in part, to recent increases in black lung benefit award rates and higher medical treatment costs, and to an underestimate of Patriot Coal's future benefit claims.

Self-Insured Coal Mine Operator Bankruptcies Affecting the Black Lung Disability Trust Fund, Filed from 2014 through 2016

Coal operator	Amount of collateral at time of bankruptcy	Estimated transfer of benefit responsibility to the Trust Fund	Estimated number of beneficiaries for whom liability has been transferred to the Trust Fund
Alpha Natural Resources	$12 million	$494 million	1,839
James River Coal	$0.4 million	$141 million	490
Patriot Coal	$15 million	$230 million	993
Total	**$27.4 million**	**$865 million**	**3,322**

Source: Department of Labor (DOL). | GAO-20-21

Appendix K

DOL's limited oversight of coal mine operator insurance has exposed the Trust Fund to financial risk, though recent changes, if implemented effectively, can help address these risks. In overseeing self-insurance in the past, DOL did not estimate future benefit liability when setting the amount of collateral required to self-insure; regularly review operators to assess whether the required amount of collateral should change; or always take action to protect the Trust Fund by revoking an operator's ability to self-insure as appropriate. In July 2019, DOL began implementing a new self-insurance process that could help address past deficiencies in estimating collateral and regularly reviewing self-insured operators. However, DOL's new process still lacks procedures for its planned annual renewal of self-insured operators and for resolving coal operator appeals should operators dispute DOL collateral requirements. This could hinder DOL from revoking an operator's ability to self-insure should they not comply with DOL requirements. Further, for those operators that do not self-insure, DOL does not monitor them to ensure they maintain adequate and continuous commercial coverage as appropriate. As a result, the Trust Fund may in some instances assume responsibility for paying benefits that otherwise would have been paid by an insurer.

[TABLES OMITTED IN PRINTING]

Appendix K

Abbreviations

BRB	Benefits Review Board
DOL	U.S. Department of Labor
Treasury	U.S. Department of the Treasury
NCCI	National Council on Compensation Insurance
NIOSH	National Institute for Occupational Safety and Health
OALJ	Office of Administrative Law Judges
OWCP	Office of Workers' Compensation Programs
EIA	U.S. Energy Information Administration

Appendix K

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE

February 21, 2020

The Honorable Robert C. "Bobby" Scott
Chairman
Committee on Education and Labor
House of Representatives

The Honorable Richard E. Neal
Chairman
Committee on Ways and Means
House of Representatives

The federal government's Black Lung Disability Trust Fund (Trust Fund) finances medical and cash assistance to certain coal miners who have been totally disabled due to pneumoconiosis (also known as black lung disease).[1] Black lung benefits are generally to be paid by responsible coal mine operators. However, the Trust Fund pays benefits in certain circumstances, including in cases where no responsible mine operator can be identified or when the liable mine operator does not pay.

1. A miner's surviving dependents can also receive compensation. Black lung is caused by breathing coal mine dust, and the severity of the disease can range from mild—with no noticeable effects on breathing—to advanced disease, which could lead to respiratory failure and death according to the Department of Health and Human Service's Centers for Disease Control, National Institute for Occupational Safety and Health. See https://www.cdc.gov/niosh/docs/2019-130/default.html.

As we reported in May 2018, the Trust Fund faces financial challenges.[2] Its expenditures have consistently exceeded revenue and the Trust Fund has essentially borrowed with interest from the Department of the Treasury's (Treasury) general fund almost every year since 1979, which was its first complete fiscal year.[3] In fiscal year 2019, the Trust Fund borrowed about $1.9 billion to cover its expenditures, according to Department of Labor (DOL) officials.

Trust Fund revenue is primarily obtained through a tax on coal produced and sold domestically, which we refer to in this report as the coal tax.[4] The coal tax rate has varied over the years. From 1986 through 2018, the coal tax rate was $1.10 per ton of underground-mined coal and $0.55 per ton of surface-mined coal, up to 4.4 percent of the

2. GAO, *Black Lung Benefits Program: Options for Improving Trust Fund Finances*, GAO-18-351 (Washington D.C.: May 30, 2018).

3. Under federal law, when necessary for the Trust Fund to make relevant expenditures, funds are appropriated to the Trust Fund as "repayable advances," and then those advances must be repaid with interest to the general fund of the Treasury. 26 U.S.C. § 9501(c). For reporting purposes, we refer to this process as "borrowing" from Treasury's general fund, which is distinct from the borrowing authority provided by law to some agencies. According to the Treasury, the general fund includes assets and liabilities used to finance the daily and long-term operations of the U.S. government as a whole.

4. The coal tax is imposed on the sale of all domestically produced coal with two exceptions: (1) lignite coal and (2) exported coal.

sales price. In 2019, the rate of the coal tax decreased to $0.50 cents and $0.25 cents per ton of underground-mined and surface-mined coal, respectively, up to 2 percent of the sales price. In 2020, the rate of the coal tax increased to pre-2019 levels. However, it is scheduled to decrease again beginning in 2021. With less revenue from the coal tax, the Trust Fund will likely need to borrow more from Treasury's general fund, and taxpayers will ultimately be responsible for repaying this accumulating debt.

In June 2019, we reported preliminary observations that coal operator bankruptcies were further straining Trust Fund finances because, in some cases, responsibility for benefit payments was transferred from the bankrupt operator to the Trust Fund.[5] This may occur, for instance, when the amount of collateral DOL requires from a self-insured coal operator does not fully cover the operator's benefit responsibility should the operator become insolvent.

This report examines (1) how coal mine operator bankruptcies have affected the Trust Fund, and (2) how DOL managed coal mine operator insurance to limit financial risk to the Trust Fund. To address both objectives, we reviewed relevant federal laws, regulations, and DOL procedures. We also interviewed DOL officials, coal mine operators, and insurance company representatives. Additionally, we interviewed officials from the National Mining Association, National Council

5. GAO, *Black Lung Benefits Program: Financing and Oversight Challenges Are Adversely Affecting the Trust Fund*, GAO-19-622T (Washington D.C.: June 20, 2019).

on Compensation Insurance (NCCI), National Council of Self-Insurers, and the American Academy of Actuaries, among others.

To assess how coal mine operator bankruptcies affected the Trust Fund, we analyzed Bloomberg Terminal (Bloomberg) data and consulted DOL to identify coal operators that filed for bankruptcy from 2014 through 2016, and whose cases had progressed far enough such that the outcome (or likely outcome) was known. During these years, domestic coal production declined from about 1 billion tons in 2014 to about 728 million tons in 2016, which was the lowest annual production level since 1978, according to U.S. Energy Information Administration (EIA) data.[6] Additionally, bankruptcies filed during these years were more likely to be resolved at the time we conducted our work than more recently filed bankruptcies, so their effects on the Trust Fund could be assessed.[7] We identified eight coal mine companies that filed for bankruptcy during our selected years.[8] To assess the reliability of the Bloomberg data, we interviewed Bloomberg officials and reviewed relevant system

6. EIA, *Annual Coal Report 2018* (Washington D.C.: October 2019).

7. Bankruptcies proceedings can vary in duration. We identified coal mine operator bankruptcies that were filed from 2014 through 2016 because they were more likely to be resolved. Bankruptcies filed more recently may still be ongoing and their effects on the Trust Fund may not yet be known.

8. Our search focused on the bankruptcies of parent operators rather than individual subsidiaries.

documentation. In addition, to assess the completeness of the Bloomberg data, we conducted a limited legal search for bankruptcy filings and verified our results with DOL. We determined that the data were sufficiently reliable for the purposes of this report. To examine how each of the eight coal mine operator bankruptcies affected the Trust Fund, we interviewed DOL officials and reviewed DOL-provided documentation. For instance, we reviewed bankruptcy settlement agreements and reorganization plans, where applicable. We did not conduct a legal analysis of the relevant bankruptcy court dockets, and relied solely on documentation DOL provided to describe these bankruptcies.

To examine how DOL managed coal mine operator insurance to limit financial risk to the Trust Fund, we analyzed data and documentation on commercially-insured and self-insured coal mine operators. Specifically, we reviewed NCCI data on the commercial workers' compensation insurance policies purchased by coal mine operators to secure their black lung benefit liability from 2016 through 2018, the most recent three complete years of data available.[9] We reviewed the data to identify, among other things, whether operators had lapses in coverage.

Specifically, we verified whether the 13 largest coal producers that were not authorized to self-insure maintained adequate and continuous commercial

9. NCCI officials said that once they transmit data to DOL it effectively becomes DOL data. Therefore, for reporting purposes, we will refer to this data as DOL data.

coverage during these years.[10] We also reviewed DOL documentation on each of the 22 coal mine operators that were self-insured at the time we conducted our work.[11] For instance, we identified the amount of collateral DOL required from these operators to self-insure and DOL's most recent reauthorization memo that documented its periodic review of these operators.

We assessed the reliability of the NCCI data in several ways. Specifically, we interviewed DOL and NCCI officials on how policy data is obtained, processed, stored, and shared; reviewed documentation including a data dictionary and users guide; reviewed DOL's procedures and error checks for validating that the NCCI data conforms to established parameters; and reviewed the data for obvious errors, outliers, or missing information and for logical connections between policy and endorsement data. We determined that the data were sufficiently reliable for the purposes of this report. However, we concluded that the beneficiary data we reviewed in an attempt to determine the extent to which the Trust Fund paid benefits during fiscal year 2018 on behalf of uninsured operators were not

10. The coal operators represented approximately 25 percent of all coal produced in 2017. *See* EIA, *Annual Coal Report 2017* (Washington D.C.: November 2018).

11. The self-insured arrangements can include those that cover legacy federal black lung liabilities (e.g., formerly employed miners only). This may arise when an operator no longer actively mines coal, owns subsidiaries that no longer actively mine coal, or is using commercial insurance for its current mining operations and self-insurance for its past operations. Self-insured operators and their subsidiaries may use a combination of self-insurance and commercial insurance to cover their liabilities, according to DOL.

sufficiently complete and consistently recorded. Thus, we were unable to assess the effect on the Trust Fund of DOL not monitoring coal operator compliance with commercial insurance requirements. This condition and its causes are further described in the report, which form the basis for one of our recommendations.

We also examined workers' compensation insurance practices in four states—Kentucky, Pennsylvania, West Virginia, and Wyoming—to identify relevant practices that could inform DOL's administration of coal operator insurance at the federal level. Such practices may be informative because both workers' compensation and federal black lung disability payments generally support workers with conditions, such as black lung, that were contracted as a result of their employment. Workers' compensation is generally mandated by state law and employers are typically required to purchase workers' compensation insurance to secure these liabilities, or may self-insure.[12] Thus, state practices in monitoring and overseeing workers' compensation insurance may provide informative context for examining DOL's practices in overseeing federal black lung insurance.

To review state practices for monitoring and overseeing workers' compensation insurance, we interviewed state insurance commissioners and reviewed selected workers' compensation laws, regulations, and guidance in the four

12. National Academy of Social Insurance, *Workers' Compensation: Benefits, Costs, and Coverage* (Washington, D.C.: October 2019). Also see Congressional Research Service (CRS), *Workers' Compensation: Overview and Issues*, R44580 (Washington D.C.: Sept. 6, 2019).

states we contacted. We selected Kentucky, Pennsylvania, West Virginia, and Wyoming because they were among the top five coal producing states in 2017, according to EIA data, and therefore may be most familiar with workers' compensation insurance that covers black lung. Additionally, these states provided geographic variation covering EIA's three main domestic coal producing regions: the Appalachian coal region, the Interior coal region, and the Western coal region. Kentucky is divided between EIA's Appalachian and Interior coal regions. These states also provided variation in terms of the options available to coal mine operators to secure their workers' compensation benefit liability. For instance, with the exception of Wyoming, all selected states allowed operators to self-insure. In Wyoming, coal mining is considered an "extra-hazardous" occupation and mine operators must purchase workers' compensation insurance from a state-provided option. In our selected states, we obtained information on, among other things, state practices for determining the amount of collateral required from coal mine operators to self-insure their workers' compensation benefit liabilities, if applicable. We also obtained information about the extent to which state officials reviewed self-insured coal mine operators to assess whether the amount of collateral they required changed based on an operator's changing financial condition.

We conducted this performance audit from May 2018 through February 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit

objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Black lung benefit payments include both cash assistance and medical care. Maximum cash assistance payments ranged from about $670 to $1,340 per month in 2019, depending on a beneficiary's number of dependents.[13] Miners receiving cash assistance are also eligible for medical treatment of their black lung-related conditions, which may include hospital and nursing care, rehabilitation services, and reimbursement for drug and equipment expenses, according to DOL documentation. DOL estimates that the average annual cost for medical care in fiscal year 2019 was approximately $8,225 per miner.

During fiscal year 2019, about 25,700 beneficiaries received black lung benefits (see fig. 1).[14] The number of

13. Benefit rates are set by federal law, which specifies that in the case of total disability, a miner receives 37.5 percent of the monthly pay rate of a federal employee at grade GS-2, step 1. Benefit levels are increased by 50 percent if the miner has one dependent, 75 percent if the miner has two dependents, and 100 percent if the miner has three or more dependents. If state workers' compensation benefits are less than federal black lung benefits, then the federal benefits cover the difference. Social Security Disability Insurance benefits are also reduced for recipients of black lung benefits.

14. This number excludes black lung beneficiaries whose claims were filed on or before December 31, 1973, as these awards

beneficiaries has decreased from about 174,000 in 1982 as a result of declining coal mining employment and an aging beneficiary population, according to DOL. Black lung beneficiaries could increase in the near term due to the rise in the occurrence of the disease in its most severe form, progressive massive fibrosis, particularly among Appalachian coal miners, according to the National Institute for Occupational Safety and Health (NIOSH).[15] NIOSH reported that coal miners in central Appalachia are disproportionately affected; as many as 1 in 5 show evidence of black lung, which is the highest level recorded in 25 years.[16] NIOSH has attributed the rise in occurrence

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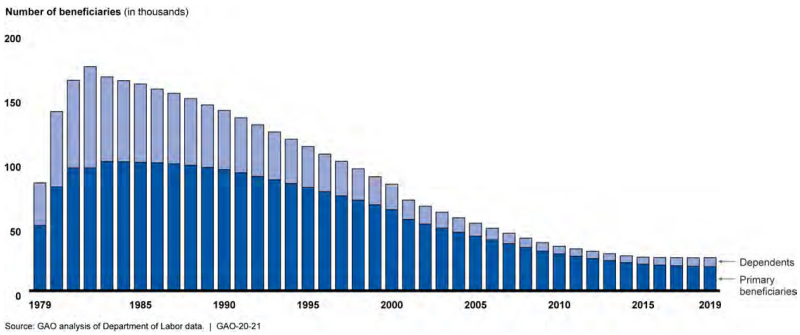
are generally funded from Treasury's general fund, and not the Trust Fund. It also excludes beneficiaries that receive medical-benefits only.

15. Recent NIOSH studies found increases in the prevalence of black lung disease among long-tenured Appalachian coal miners and have documented hundreds of miners with the most severe form of the disease, progressive massive fibrosis, receiving care at two clinics in Kentucky and Virginia. See D.J. Blackley, L.E. Reynolds, C. Short, R. Carson, E. Storey, C.N. Halldin, and A.S. Laney, "Progressive Massive Fibrosis in Coal Miners From 3 Clinics in Virginia," *Journal of the American Medical Association*, 319(5):500–501 (February 6, 2018); and D.J. Blackley, J.B. Crum, C.N. Halldin, E. Storey, and A.S. Laney, "Resurgence of Progressive Massive Fibrosis in Coal Miners—Eastern Kentucky, 2016," *Morbidity and Mortality Weekly Report*, 65:1385–1389 (December 16, 2016).

16. David J. Blackley, Cara N. Halldin, and A. Scott Laney, "Continued Increase in Prevalence of Coal Workers' Pneumoconiosis in the United States, 1970–2017," *American Journal of Public Health* 108, no. 9 (September 1, 2018).

of black lung to multiple factors, including increased exposure to silica.[17]

Figure 1: Black Lung Beneficiaries, Fiscal Years 1979 through 2019



Notes: We excluded black lung beneficiaries whose claims were filed on or before December 31, 1973, as these awards are generally funded from Treasury's general fund, and not the Trust Fund. For reporting purposes, we refer to a coal miner or their spouse (if the miner is deceased) as a primary beneficiary. If there is no surviving spouse, benefits can be awarded to certain dependents, such as surviving children, which we refer to as dependent beneficiaries.

Black lung claims are processed by the Office of Workers' Compensation Programs within DOL. Contested claims

17. NIOSH reported that there has been a transition in the coal industry to mine thinner coal seams, which increases a miners' potential exposure to crystalline silica. Department of Health and Human Services, *Current Intelligence Bulletin #64, Coal Mine Dust Exposures and Associated Health Outcomes: A Review of Information Published Since 1995*, NIOSH Publication No. 2011–172 (April 2011).

are adjudicated by DOL's Office of Administrative Law Judges, which issues decisions that can be appealed to DOL's Benefits Review Board.[18] Claimants and mine operators may further appeal these DOL decisions to the federal courts. If an award is contested, claimants can receive interim benefits until their case is resolved, which are generally paid from the Trust Fund, according to DOL. In fiscal year 2019, about 33 percent of black lung claims were approved, according to DOL data. Final awards are either funded by mine operators—who are identified as the responsible employers of claimants—or the Trust Fund, when responsible employers cannot be identified or do not pay. Of the approximately 25,700 beneficiaries receiving black lung benefits in 2019, 13,335 were paid from the Trust Fund; 7,985 were paid by responsible mine operators; and 4,380 were receiving interim benefits, according to DOL data. DOL officials told us that the more common reasons that beneficiary claims are paid from the Trust Fund include operator insolvency and unclear employment history of miners, among other reasons (see fig. 2). The operator responsible for the payment of benefits is generally the operator that most recently employed the miner.[19]

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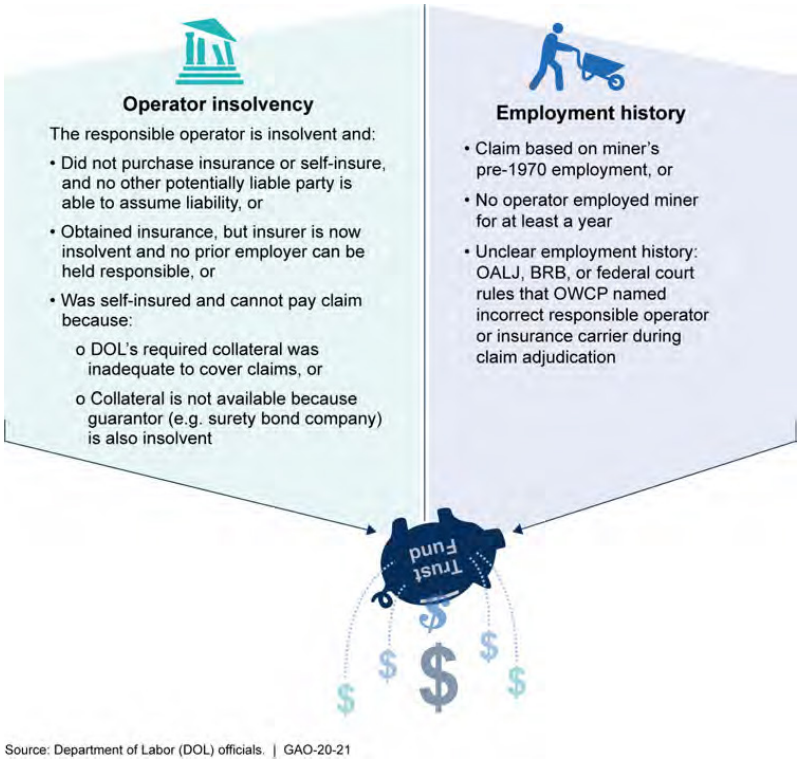
18. For additional information on the black lung claim adjudication process, see GAO, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims*, GAO-10-7 (Washington, D.C.: Oct. 30, 2009).

19. In cases where the operator that most recently employed the miner is no longer in business or otherwise unable to pay the claim, the responsible operator generally becomes the one that next most recently employed the miner. 20 C.F.R. § 725.495(a).

Appendix K

Figure 2: Most Common Reasons Black Lung Benefits May Be Paid from the Black Lung Disability Trust Fund



Notes: This figure depicts the most common reasons why a black lung claim may be paid by the Black Lung Disability Trust Fund (Trust Fund) instead of by a responsible mine operator, according to DOL officials. It is not intended to be an exhaustive list of all reasons why a claim may be paid by the Trust Fund. The Office of Administrative Law Judges (OALJ), Benefits Review Board (BRB), and the Office of Workers' Compensation Programs (OWCP) are part of DOL.

Black Lung Insurance

Federal law generally requires coal mine operators to secure their black lung benefit liability.[20] A self-insured coal mine operator assumes the financial responsibility for providing black lung benefits to its eligible employees by paying claims as they are incurred. Operators are allowed to self-insure if they meet certain DOL conditions. For instance, operators applying to self-insure must obtain collateral in the form of an indemnity bond, deposit or trust, or letter of credit in an amount deemed necessary and sufficient by DOL to secure their liability.[21]

Operators that do not self-insure are generally required to purchase coverage from commercial insurance companies, state workers' compensation insurance funds, or other entities authorized under state law to insure workers' compensation.[22] DOL regulations require commercial insurers to report each policy and federal black lung endorsement issued, canceled, or renewed in a form

20. 30 U.S.C. § 933(a). Employers that are not coal mine operators are not required to secure their liability with respect to employees engaged in the transportation of coal or in coal mine construction. 30 U.S.C. § 932(b).

21. A letter of credit may only be used in conjunction with another acceptable form of collateral.

22. According to DOL regulations, an endorsement affording coverage under the Federal Coal Mine Health and Safety Act of 1969, as amended, shall be attached and applicable to the standard workers' compensation and employer's liability policy prepared by NCCI. See 20 C.F.R. § 726.203(a). An endorsement, sometimes called a rider, amends a policy's coverages, terms, or conditions.

determined by DOL.[23] DOL accepts electronic reporting of this information from insurers via their respective rating bureaus.[24] DOL retains this information—insured company name, address, federal employer identification number, and policy and endorsement data—so that DOL staff can later research claims to determine which operator and insurer may be liable. As we have noted in prior reports, insurance companies are regulated primarily by the states with state law providing state regulators with the authority and funding to regulate insurance.[25] State insurance regulation is designed to, among other things, help insurers remain solvent and able to pay claims when due. Effective insurer

23. 20 C.F.R. § 726.208.

24. Rating bureaus collect statistical data for the purpose of developing rating information that is filed with state insurance regulators and that is used by insurers to develop premium rates. Beginning in 2012, NCCI began providing a daily file of policy and endorsement information reported to it by insurers domiciled in states that require this type of reporting to their respective rating bureaus. In addition to the data it collects as the rating bureau for various states, NCCI collects similar information from states with independent state rating bureaus and submits it to DOL as part of the daily data file. These electronic file submissions replaced a process wherein insurers submitted paper reports to DOL for issued, renewed, and cancelled policy and endorsement transactions.

25. GAO, *International Insurance Capital Standards: Collaboration Among U.S. Stakeholders Has Improved but Could Be Enhanced*, GAO-15-534 (Washington, D.C.: June 25, 2015); and *Insurance Markets: Impacts of and Regulatory Response to 2007-2009 Financial Crisis*, GAO-13-583 (Washington D.C.: June 27, 2013).

underwriting[26] and risk management practices—such as reinsurance[27]–serve a similar function. While insurer insolvency occurs infrequently, when it does state insurance commissioners are typically appointed as receiver and supervise the rehabilitation or liquidation of these insurers, and state guaranty funds may assume liability for paying covered claims of insolvent insurers that have liquidated.[28]

Some Self-Insured Operator Bankruptcies Shifted Liability to the Trust Fund, but Commercial Insurance Coverage Can Help Limit Trust Fund Exposure

Self-Insured Operators Transferred About $865 Million in Estimated Liability to the Trust Fund, More than Double DOL's Previous Estimate

Of the eight coal mine operator bankruptcies we identified, three resulted in a transfer of estimated benefit liability from the coal operator to the Trust Fund and five did not,

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26. Underwriting is the process by which an insurer examines the risks posed by a prospective policyholder to determine whether the insurer will accept the risk and, if so, establishes the appropriate rate for the coverage provided.

27. Reinsurance is a risk-management practice that involves one insurer transferring, or "ceding," all or part of a risk to another insurer who assumes responsibility for sharing in the cost of benefits under an insurance contract.

28. Property and casualty insurers, which provide black lung coverage, generally pay assessments to state guaranty funds based on the amount of premium written to finance the cost of resolving insolvent insurers.

according to DOL. Using Bloomberg data, we identified coal mine operators that filed for bankruptcy from 2014 through 2016.[29] Figure 3 shows how many operators were self-insured or commercially-insured at the time of bankruptcy, and if responsibility for benefits was shifted from the bankrupt operator to the Trust Fund.

Figure 3: Coal Mine Operator Bankruptcies Filed from 2014 through 2016

29. Our search focused on the bankruptcies of parent operators rather than individual subsidiaries. Bankruptcy proceedings can vary in duration. We identified coal mine operator bankruptcies that were filed from 2014 through 2016, in part, because they were more likely to be resolved. Bankruptcies filed more recently may still be ongoing and their effects on the Trust Fund may not yet be known.

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Three self-insured coal mine operator bankruptcies affected the Trust Fund. Specifically, the bankruptcies of Alpha Natural Resources (Alpha), James River Coal (James River), and Patriot Coal (Patriot) resulted in a transfer of benefit liability to the Trust Fund of an estimated $865 million, according to DOL.[30] DOL officials said that the amount of collateral they required from these three operators to self-insure was inadequate to fully cover their estimated benefit liability. When this occurs, benefit liability in excess of the collateral can be transferred to the Trust Fund. For example, the collateral DOL required from Alpha was about $12 million and approximately $494 million of estimated benefit liability transferred to the Trust Fund, according to DOL's estimate (see table 1).

Table 1: Self-Insured Coal Mine Operator Bankruptcies That Affected the Black Lung Disability Trust Fund, Filed from 2014 through 2016

Coal operator	Amount of collateral at time of bankruptcy	Estimated benefit liability transferred to the Trust Fund	Estimated number of beneficiaries for whom liability has been transferred to the Trust Fund[a]
Alpha Natural Resources	$12 million	$494 million	1,839

30. DOL officials said benefit liability transfers to the Trust Fund over time as claims accrue and are paid over future decades.

James River Coal	$0.4 million	$141 million	490
Patriot Coal	$15 million	$230 million	993
Total	**$27.4 million**	**$865 million**	**3,322**

Source: Department of Labor (DOL). | GAO-20-21

a These totals include claims in active pay status as of September 2019, and estimates of newly awarded claims in fiscal year 2020 and into the future, according to DOL.

DOL estimates for how these three operator bankruptcies will affect the Trust Fund have more than doubled from what DOL had previously reported.[31] In June 2019, we reported that DOL estimated that between $313 million to $325 million in benefit liabilities would transfer to the Trust Fund as a result of these bankruptcies.[32] In January 2020, however, DOL provided updated estimates stating that $865 million in benefit liabilities would transfer to the Trust Fund as a result of these bankruptcies. According to DOL, their estimates increased to account for higher black lung benefit award rates that occurred from fiscal years 2016 through 2019; higher medical treatment cost inflation in recent years; and different discount rate assumptions.[33] Additionally, DOL's prior estimate for the Patriot bankruptcy did not account for future claims and the effect of those claims on the Trust Fund.

31. Fiscal Year 2020 Congressional Budget Justification, Black Lung Disability Trust Fund.

32. GAO-19-622T.

33. Discount rates are interest rates used to determine the current value of estimated future benefit payments.

The three other self-insured coal mine operator bankruptcies we identified did not affect the Trust Fund. Specifically, Arch Coal, Peabody Energy, and Walter Energy were also self-insured operators, but DOL officials said that their federal black lung benefit liabilities were assumed by a reorganized company or by a purchaser, and therefore did not transfer to the Trust Fund.

DOL officials said that they take three key actions, as appropriate, to protect the financial interests of the Trust Fund during self-insured operator bankruptcies.

1. DOL officials said that they file a claim in every case with the bankruptcy court for the reimbursement of an operator's full estimated federal black lung benefit liability.[34]

2. If an operator plans to reorganize or if it is acquired by a purchaser, DOL officials said that they negotiate with the company or the purchaser, as appropriate, to help ensure benefit responsibility will be "passed through" to a reorganized operator or purchaser, rather than be discharged and become the responsibility of the Trust Fund.

3. If benefit liabilities are not "passed-through" to an operator, DOL officials said that they seek settlement agreements, whereby the Trust Fund receives an

34. The claim DOL submitted for the reimbursement of Patriot's estimated black lung benefit liability at the time of its bankruptcy in May 2015 did not include future claims for which the operator may be named liable for as claims accrue and are paid over future decades, according to DOL.

allowed general unsecured claim in an amount based on an operator's estimated benefit liability.

DOL officials said that during the bankruptcy of James River they negotiated a settlement agreement providing DOL with a general unsecured claim in an amount commensurate with its estimate of the operator's benefit liability at the time of bankruptcy. However, these officials said that given the low priority under bankruptcy law for their general unsecured claim, the payout they received was only about $400,000, which was just a small portion of the estimated benefit liability that transferred to the Trust Fund.[35]

DOL officials said that during the bankruptcy of Alpha they negotiated both a "pass through" and a settlement agreement in which certain liabilities would be transferred to the Trust Fund, while other liabilities would be retained by Alpha. DOL officials said that they received a payout from Alpha of $7.4 million, although $494 million in estimated benefit liability transferred to the Trust Fund. Further, as a condition of the agreement, DOL officials said that they agreed to let Alpha self-insure after it emerged from bankruptcy. Since 2016, several other self-insured operators have also filed for bankruptcy, according to DOL officials, including Cambrian Coal, Cloud Peak Energy, Murray Energy, and Westmoreland Coal. DOL officials said that $17.4 million in estimated black lung benefit liability will transfer to the Trust Fund as a result of Westmoreland Coal's bankruptcy. Given the

35. According to DOL officials, the settlement agreement of about $400,000 they received was in addition to the $400,000 that James River had in collateral.

uncertainty of the bankruptcy process in terms of whether liabilities will or will not transfer to the Trust Fund, however, DOL officials said that they could not speculate on how the other bankruptcies may affect the Trust Fund.

State Insurance Regulation and Insurer Practices Help to Protect the Trust Fund from Assuming Responsibility for Paying Benefits of Commercially-Insured Operators

Insurance contracts or policies to secure operators' benefit liabilities are required by law to include a provision that insolvency or bankruptcy of an operator does not release the insurer from the obligation to make benefit payments.[36] As previously discussed, state insurance regulation, insurer underwriting and risk management practices, and state guaranty funds also help to protect the Trust Fund from having to assume responsibility for paying black lung benefits on behalf of bankrupt coal operators. Thus, by being commercially insured, the two operator bankruptcies we identified that filed for bankruptcy between 2014 and 2016—Energy Future Holdings and Xinergy Ltd—did not affect the Trust Fund, according to DOL (see fig 3).

State insurance commissioners monitor the financial health of insurers, including performing periodic examination of insurer financial statements. Further, rating agencies, such as Standard & Poor's, Moody's, and AM Best, issue insurer financial strength ratings, which represent the agencies' opinions on insurers' financial strength and ability to pay policy and contract obligations.

36. 30 U.S.C. § 933(b)(2).

Eight of the nine insurers that issued approximately 90 percent of the workers' compensation policies with federal black lung coverage from 2016 through 2018, according to our review of DOL data,[37] had at least an "A-" financial strength rating from AM Best (with the one remaining being a state insurer that was not rated).[38]

In deciding whether to provide federal black lung coverage, insurers we interviewed said they consider an operator's historical black lung claim losses, financial condition, and mine location among other factors.[39] However, insurance company officials identified various challenges in writing and pricing black lung coverage that produces an appropriate amount of premiums to cover expected losses. The challenges cited by these officials included the long latency period of black lung disease; changes in law regarding benefit eligibility and how the

37. The DOL data included policies with federal black lung endorsements as reported by insurers in the 36 states, and the District of Columbia, for which NCCI collects data. The data also includes information from the Pennsylvania Compensation Rating Bureau and the Coal Mine Compensation Rating Bureau of Pennsylvania. These data did not include coverage provided to employers through the North Dakota, Ohio, Washington, or Wyoming state workers' compensation funds or the nine states other than Pennsylvania with independent rating bureaus.

38. AM Best is a worldwide provider of insurance ratings that help the financial industry and consumers assess an insurer's financial strength, creditworthiness, and ability to honor obligations to policyholders.

39. Insurers we interviewed also said that they inspect every coal mine before they provide coverage, including reviewing ventilation plans, dust sampling results from DOL's Mine Safety and Health Administration, and other workplace safety measures.

disease is defined; the ability of miners to refile claims indefinitely; and the inability of insurers and operators to settle claims.[40] One official noted that there is much risk and little profit in black lung coverage.

Insurance companies can use reinsurance to protect themselves from catastrophic losses that could threaten their solvency and ability to pay claims, and to reduce wide fluctuations in their annual losses. For example, workers' compensation claims can take years to fully develop after premiums have been set, which in turn can adversely affect an insurer's financial position if premiums have underestimated actual claims. Insurance company officials said that they reinsure their workers' compensation coverage, but some said that their reinsurance policies either explicitly excluded occupational disease claims, including black lung, or cover black lung but have conditions and loss thresholds that would generally result in the exclusion of such claims. However, reinsurance, even if it does not explicitly cover federal black lung claims, can help manage the risk of workers' compensation losses and losses in other lines of insurance that an insurer writes, thereby indirectly helping to ensure that the insurer can pay all types of claims, including federal black lung.

If an insurer becomes insolvent, state guaranty funds reduce the potential for the Trust Fund to assume responsibility for paying claims. States have different rules for guaranty fund benefit coverage and limits. In the states we reviewed, state guaranty funds generally pay

40. For example, a miner may file a claim many years after working for a mine operator because of the extended latency between exposure to dust and identification of black lung disease.

federal black lung benefits, although there may be certain limitations on the claims they will pay.[41] For example, in West Virginia, there is no maximum claim limit that the state guaranty fund will pay on standard workers' compensation claims; but in Kentucky, a state guaranty fund official told us that, in the guaranty fund's opinion, state law limits federal black lung claims to $300,000.[42] Also, a guaranty fund could reject a federal black lung claim, which could result in the Trust Fund having to assume responsibility for paying the claim. An official from one state guaranty fund that maintained data on rejected black lung claims said that the most common reason for rejection is that claims are filed after the date set by the bankruptcy court for receiving claims. DOL officials said it is very uncommon for the Trust Fund to assume responsibility for federal black lung claims of insolvent insurers. However, DOL does not maintain data to readily determine the extent to which this actually occurs, as discussed later in this report.

DOL's Limited Oversight Has Exposed the Trust Fund to Financial Risk, and Its New Self-Insurance Process Lacks Enforcement Procedures

In overseeing coal mine operator self-insurance in the past, DOL did not estimate future benefit liability

41. Wyoming requires employers in extra-hazardous industries to obtain workers' compensation coverage from a state insurance fund rather than from a commercial insurer. Therefore, a state guaranty fund would not be applicable for these claims.

42. The official noted, however, that no federal black lung claim handled by the association has reached the maximum per claim threshold.

when setting collateral; regularly review operators to monitor their changing financial conditions; or always use enforcement tools available to protect the financial interests of the Trust Fund, such as by revoking an operator's ability to self-insure, if warranted. In July 2019, DOL began implementing a new self-insurance process that, if implemented effectively, should help to address some of these past deficiencies. Specifically, DOL plans to consider an operator's future benefit liability when setting collateral and to review self-insured operators more frequently. However, the new process still lacks procedures for self-insurance renewals and coal operator appeals, which could hinder DOL from taking enforcement actions to protect the Trust Fund as needed. Additionally, DOL does not monitor whether operators that do not self-insure maintain adequate and continuous commercial insurance coverage as required by law.

DOL Did Not Estimate Future Benefit Claims When Setting Collateral and Regularly Review Self-Insured Operators

Agency regulations require DOL to obtain collateral from coal mine operators applying to self-insure in an amount deemed by DOL to be necessary and sufficient to secure the payment of the operators' liability.[43] To determine collateral amounts under the former process, agency procedures stated that DOL first assess an operator's net worth by reviewing, among other factors, the operator's audited financial statement and black lung claims information. DOL then determined the amount of collateral equal to 3, 5, or 10 years of the operator's

43. 20 C.F.R. § 726.105.

annual black lung benefit payments made at the time of the operator's self-insurance application, depending on its net worth. Specifically, if net worth was $1 billion or greater, agency procedures stated that DOL set collateral equal to 3 years of benefit payments. If net worth ranged from $500 million to $1 billion, DOL set collateral equal to 5 years of benefit payments. If net worth ranged from $10 million to $500 million, DOL set collateral equal to 10 years of benefit payments. Agency procedures did not permit operators with net worth less than $10 million to self-insure.

DOL's former process for determining collateral did not routinely consider potential future claims for which an operator could be responsible. DOL had periodically reauthorized coal operators to self-insure, by reviewing an operator's most recent audited financial statement and claims information, among other things. DOL prepared memos documenting these reviews and communicated with coal operators about whether their financial circumstances warranted increasing or decreasing their collateral. Estimating future costs based on sound actuarial practice is essential to the integrity of the insurance and the risk financing system and is key to fulfilling the promises embodied in insurance contracts, according to Actuarial Standards Board standards.[44] Additionally, in three of the four states we contacted, state insurance officials said that they used actuarial methods to assess an operator's future estimated benefit liability when considering how much collateral should be required

44. Actuarial Standards Board, Actuarial Standard of Practice, No. 53, Do. No. 190: *Estimating Future Costs for Prospective Property/Casualty Risk Transfer and Risk Retention.*

to self-insure.[45] The remaining state, Wyoming, did not allow coal mine operators to self-insure.

Table 2 provides information on the 22 operators that were self-insured under DOL's former process, including the date of each operator's last DOL reauthorization; the amount of DOL-required collateral; and the operator's estimated black lung benefit liability, if available.

Table 2: Self-Insured Coal Mine Operator Reauthorization Date, Collateral, and Estimated Benefit Liability Under DOL's Former Self-Insurance Process

Self-insured coal operator	Date of last reauthorization	Amount of collateral required by DOL to self-insure under its former process	Estimated black lung benefit liability
Coal operator 1	2018	$3.6 million	$18.4 million, as of 12/31/2017
Coal operator 2	2015	$1.1 million	No estimate available
Coal operator 3	2015	$2.5 million	$206 million, as of 8/03/2015

45. Kentucky state officials noted that they generally use the term "security" rather than "collateral". For reporting purposes, however, we use the term collateral both for DOL and for the states we contacted.

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Coal operator 4	2014	$29.5 million	$109 million, as of 12/31/2016
Coal operator 5	2013	$8 million	No estimate available
Coal operator 6	2013	$1 million	No estimate available
Coal operator 7	2012	$8.4 million	$668,000, as of 1/1/1992
Coal operator 8	2012	$20.3 million	$68.4 million, as of 4/13/2016
Coal operator 9	2012	$1 million	No estimate available
Coal operator 10	2012	$15 million	No estimate available
Coal operator 11	2012	$21 million	$21.8 million, as of 12/31/2014
Coal operator 12	2011	$5.5 million	$47 million, as of 12/31/1984
Coal operator 13	2003	$0.4 million	No estimate available
Coal operator 14	2001	$0.8 million	$7.8 million, as of 01/01/1993
Coal operator 15	2000	$0.4 million	No estimate available
Coal operator 16	2000	$1.5 million	No estimate available[a]
Coal operator 17	1999	$1.4 million	No estimate available
Coal operator 18	1999	$29.2 million	No estimate available

Coal operator 19	1998	$6.9 million	$90 million, as of 12/31/2015
Coal operator 20	1997	$1.4 million	No estimate available
Coal operator 21	1994	$7.7 million	No estimate available
Coal operator 22	1988	$24.8 million	$15.1 million, as of 1/31/2005

Source: Department of Labor (DOL) data. | GAO-20-21

a According to DOL officials, this operator was acquired by another self-insured operator who assumed their benefit liability.

Agency regulations state that DOL may adjust the amount of collateral required from self-insured operators when experience or changed conditions so warrant,[46] but DOL did not regularly monitor these operators to reauthorize their ability to self-insure. In reviewing DOL's most recent reauthorization memos for each of the 22 self-insured operators, we found that while some of these operators had been reauthorized more recently, others had not been reauthorized by DOL in decades. One operator in particular had not been reauthorized by DOL since 1988.

DOL officials stated that from 2009 to 2012, six employees handled coal operator reauthorizations and associated work actions. Due to attrition, however, this number dropped at times to three employees, according to DOL officials. Additionally, DOL had no written procedures that specified how often reauthorizations should occur

46. 20 C.F.R. § 726.105.

after an operator's initial 18-month reauthorization. In contrast, in two of the four states we contacted, state insurance officials were required to review self-insured employers at least annually.[47]

DOL Did Not Always Use Enforcement Tools to Protect the Trust Fund

Revoking an operator's ability to self-insure, fining mine operators for operating without insurance, and placing liens on operator assets are tools DOL has available to mitigate financial losses to the Trust Fund.[48] Based on our review of DOL documentation, however, we found instances when DOL did not use these tools to protect the Trust Fund, or was hindered from doing so because of an operator's ongoing appeal or bankruptcy.

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47. Wyoming does not allow coal mine operators to self-insure, as previously mentioned.

48. DOL regulations state that the agency, with good cause shown, may revoke the authority of any coal operator to self-insure. 20 C.F.R. § 726.115. Additionally, the Black Lung Benefits Act states that DOL can fine mine operators up to $1,000 a day for operating without insurance. 30 U.S.C. § 933(d)(1). However, DOL officials said that, per the Inflation Adjustment Act, they can actually charge operators up to $2,924. DOL officials said the last time they fined a coal operator for operating without insurance was in 2007, and that they do not have records of whether fines were used prior to 2007. If an operator is uninsured and is a corporation, the president, secretary, and treasurer of the operator can be liable for the assessed penalties and for benefit claims for the period in which the operator was uninsured. However, DOL officials said that they do not maintain records of those instances when DOL sought to hold company officials liable.

- In September 2001, DOL required $5 million in additional collateral from James River, which would have increased its collateral from $0.4 million to $5.4 million. Although DOL did not receive the additional collateral, it did not revoke the operator's authority to self-insure, which is a potential option under agency regulations. Further, DOL had not reauthorized James River at any point from August 2001 until it filed for bankruptcy in April 2014. If DOL had revoked James River's ability to self-insure, it could have potentially prevented the Trust Fund from being responsible for claims based on a miner's employment from 2001 through 2016, when James River liquidated. Additionally, if the operator had been unable to obtain commercial insurance, DOL could have potentially fined the operator for each day it operated without insurance. Instead, DOL took no action during these years and estimated benefit liability of $141 million was shifted to the Trust Fund, according to DOL. DOL officials stated that they do not have records explaining why James River did not provide the additional collateral or why they did not revoke its authority to self-insure.

- In August 2014, DOL required $65 million in collateral from Patriot, increasing its collateral from $15 million to $80 million. Patriot appealed this decision and, in the 8 months that followed before Patriot filed for bankruptcy in May 2015, DOL did not obtain additional collateral, or revoke Patriot's ability to self-insure because the appeal was still pending. DOL officials said they would not typically revoke an operator's authority to self-insure during an ongoing

appeal. As a result, DOL was hindered from using this enforcement tool.

Liens on operator assets can be an effective tool to protect the Trust Fund if an operator defaults on its benefit liabilities, but DOL officials said that they are hindered from using this tool if an operator files for bankruptcy. DOL can place a lien on a coal operator's assets under federal law if they refuse the demand to pay the black lung benefit payments for which they are liable. In the event of bankruptcy or insolvency, federal law states that the lien imposed shall be treated in the same manner as a lien for taxes due and owing to the United States under certain laws.[49] However, DOL officials said that operators rarely stop paying benefits until after they file for bankruptcy. Once a bankruptcy occurs, DOL officials said that they are generally prevented by the court from placing a lien and taking an operator's assets in lieu of payment of current and future benefit liabilities. Under bankruptcy law, DOL officials said that they have no special status over other creditors with outstanding financial claims. Instead, DOL officials said that obtaining sufficient collateral is a better way to protect the Trust Fund.

DOL Has Implemented a New Self-Insurance Process, but It Lacks Procedures to Help Ensure Enforcement Actions

In July 2019, DOL began implementing a new process for coal mine operator self-insurance that should help to

49. 30 U.S.C. § 934(b).

address some past deficiencies if implemented effectively. Specifically, DOL is to consider an operator's future benefit liability when setting collateral and plans to more frequently review self-insured operators (see text boxes). Under the new process, DOL officials plan to assess the risk of operator bankruptcy using various financial metrics related to profitability and solvency. As a result, DOL officials said that the amount of collateral they will require from operators to self-insure going forward will be based on both an estimate of an operator's current and future black lung liability and the risk of default due to insolvency. As of October 2019, DOL officials said that most self-insured operators had submitted their application and supporting documentation and that they were reviewing this information to decide whether these operators should continue to be self-insured.[50]

50. DOL officials said 18 of the 22 self-insured coal mine operators would be required to renew their self-insurance authority under the new process. These officials said that they did not ask Cambrian Coal, Cloud Peak Energy, or Westmoreland Coal to renew their self-insurance authority given their ongoing bankruptcies. Additionally, DOL officials said that they did not require one other operator to renew its self-insurance authority because it was acquired by a purchaser, and is now covered under the purchaser's self-insurance authority.

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DOL's New Self-Insurance Process Will Include Estimates of Future Benefit Liability

Coal mine operators applying to DOL to self-insure will be required to submit:

- a completed application;
- a certified consolidated financial statement for each of the 3 years prior to its application;
- recent black lung claims information; and
- a certified actuarial report on the operator's existing and future black lung benefit liabilities.

DOL plans to use the information submitted by coal mine operators to assess the insolvency risk of each operator using various financial metrics related to profitability and solvency. Depending on the results of their analysis, DOL plans to categorize the risk-level of each applicant as low, medium, or high. DOL will then set the amount of collateral required to self-insure by linking the operator's risk category to a corresponding percentage of the operator's actuarial estimated benefit liability. DOL policies state that they would require a high-risk operator to secure with collateral 90 percent of estimated benefit liability, a medium-risk operator to secure 45 percent, and a low-risk operator to secure 15 percent. However, in February 2020, DOL officials said they plan to revise these percentages to 100 percent, 85 percent, and 70 percent for high-risk, medium-risk, and low-risk operators, respectively.

Source: Department of Labor (DOL) officials and coal mine operator self-insurance policies. | GAO-20-21

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DOL's New Self-Insurance Process Will Require More Frequent Coal Mine Operator Reviews

Coal mine operators that are already authorized to self-insure will be required to submit:

- a self-insurance renewal application (annually);
- a financial summary (quarterly);
- a certified consolidated financial statement (annually);
- black lung claims information (annually); and
- actuarial estimate of benefit liability (to be submitted every three years).

DOL plans to use the information self-insured operators submit to update their insolvency risk analysis. If an operator's risk category changes (e.g., from low-to medium-risk), DOL plans to send a form to the operator requiring an additional amount or type of collateral. Upon receiving the completed form, and proof that the collateral has been obtained, DOL stated that they will notify the operator that its authority to self-insure has been reauthorized.

Source: Department of Labor (DOL) coal mine operator self-insurance policies. | GAO-20-21

DOL's new self-insurance process made important changes, but overlooked other key internal control improvements that are needed to protect the financial interests of the Trust Fund. DOL's new requirements for setting collateral and for the annual and quarterly review

of self-insured operators are key components of internal controls, which call for agency management to implement control activities through policy.[51] However, DOL's new self-insurance process lacks procedures that could help to prevent past oversight deficiencies from reoccurring. Among other things, DOL's procedures do not specify (1) the duration of an operator's self-insurance authority, (2) the time frames for submitting renewal applications and supporting documentation, and (3) the conditions under which an operator's self-insurance authority would not be renewed. Without such procedures, DOL has no basis to take enforcement action should an operator not submit its self-insurance renewal application and supporting documentation.

DOL staff are also hindered from taking enforcement action during an operator's ongoing appeal, as previously mentioned. DOL policies state that an operator may request reconsideration if its self-insurance application has been denied or if it believes the collateral required by DOL is too high to secure its benefit liabilities. However, DOL lacks procedures that specify, among other things, the length of time that operators have to submit supporting information. Further, DOL does not specify a goal for how much time DOL appeals decisions should take. For example, in October 2015, DOL recommended revoking Murray Energy's (Murray) authority to self-insure due to deteriorating financial conditions. Murray appealed this decision, and DOL officials said they postponed responding

51. GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington D.C., September 2014).

to the appeal until their new self-insurance process was implemented so that they could evaluate Murray under its new process along with the other self-insured operators. However, Murray filed for bankruptcy in October 2019 and DOL had not revoked its authority to self-insure or requested additional collateral because Murray's appeal was still pending and DOL was still evaluating how much collateral it would require from the operator under its new self-insurance process.

DOL Does Not Monitor Whether Coal Mine Operators Maintain Commercial Insurance Coverage

DOL does not monitor coal mine operators that do not self-insure and, thus, must commercially insure their federal black lung liabilities to make certain they maintain adequate and continuous coverage as required by law. DOL previously monitored operators' compliance with the program's insurance requirements by annually sending letters to a selection of operators seeking confirmation that they had maintained adequate coverage, but discontinued the process once the agency began receiving NCCI policy data. In order to use the policy data for the purpose of identifying operators that have not maintained coverage, DOL would, as a starting point, have to maintain a record of all employers that operate a coal mine. However, DOL officials explained that they do not currently maintain such a record.

In the absence of effective DOL monitoring of operator compliance, we evaluated the potential risk that uninsured

operators could pose to the Trust Fund. Specifically, in examining the 13 largest coal operators that were not approved to self-insure their federal black lung liabilities and, therefore, had to obtain commercial coverage, we found that some insurers erred in reporting endorsements and in one instance an operator did not have adequate coverage.

- We found six operators (parent or subsidiary) that were not insured for the entire 3 year period from 2016 through 2018, according to our review of DOL data. When we discussed our findings with DOL, agency officials had to research each operator individually and in some cases contact the operator or their insurer to find out whether or not they had been covered. DOL concluded that these entities were insured. However, the insurers had not properly reported the federal black lung endorsement on new policies or subsequent renewals, in addition to other reporting issues.[52]

- One of these six operators also had, inadvertently, not maintained adequate commercial coverage for its mining operations in Texas, and had not self-insured those operations. In this instance, the operator obtained an excess loss policy that only pays claims once they exceed a high threshold and, therefore, is not sufficient by itself to secure the payment of the

52. We found similar reporting issues with two self-insured coal operators that had subsidiaries that were commercially insured or insured by a state workers' compensation insurance fund.

operator's benefit liabilities.[53] DOL data does not include information on excess loss policies and, while the data NCCI provides on standard workers' compensation policies with federal black lung endorsements lists operators' addresses, they do not provide the specific states for which endorsements apply.

Designing processes to achieve agency objectives and respond to risks is a principle of effective internal controls.[54] Without a process to monitor operator compliance with program insurance requirements, DOL risks not identifying a lapse or cancellation of operator coverage. This could result in the Trust Fund having to assume responsibility for paying benefits that would otherwise have been paid by an insurer.[55]

DOL officials said the Trust Fund infrequently pays claims on behalf of uninsured operators due to the civil penalties that it can impose on operators and certain

53. When we raised the issue with the operator's insurer, they said they had inadvertently omitted Texas from the list of states covered by the federal black lung endorsement on the operator's standard workers' compensation policy. According to the insurer, they have corrected the error and made the changes retroactive to the endorsement's original effective date to ensure the operator's Texas operations will be covered.

54. GAO-14-704G.

55. Another potential consequence of DOL's failure to monitor operator compliance with program insurance requirements is that responsibility for the payment of benefits can shift from operators that most recently employed a miner and are uninsured to other operators that previously employed the miner and are insured.

company officers. These officials also said that operators that do not maintain insurance coverage typically employ few miners and are out of business by the time a claim is filed and, thus, cannot be held liable for benefit claims. However, DOL officials acknowledged that they do not track how often claims are paid by the Trust Fund on behalf of uninsured operators that should have been insured.

We attempted to examine the extent to which claims were paid by the Trust Fund in fiscal year 2018 on behalf of uninsured operators that should have been insured.[56] We found that DOL's black lung claimant and payment system does not identify whether potentially responsible operators should have had commercial insurance coverage. The data on responsible operators and insurers, as well as the basis on which an operator was determined to be responsible, were not consistently recorded. DOL officials said that the data fields that identify responsible operators and their insurers should reflect the information collected from DOL's initial determination. DOL officials said that in some cases, after an adjudication decision determined the Trust Fund was responsible for paying benefits, claim examiners may have deleted the previously recorded responsible operator and insurer data, creating potential inconsistencies in the data.

DOL officials acknowledged that its processes and guidance for recording information on responsible

56. Such a figure, had we been able to calculate it, would have represented the losses the Trust Fund could have avoided that year had operators complied with the program's insurance requirements.

operators and the basis for those decisions resulted in inconsistent and potentially inaccurate recording of claim and benefit data. As a result, DOL issued preliminary guidance in February 2019 to field supervisors and claims examiners. However, the revised guidance does not include how to identify potentially responsible operators that should have had commercial coverage but did not.

Monitoring agency internal control systems and evaluating the results of those activities is a principle of effective internal control.[57] Without complete and consistently recorded information on potentially responsible operators and insurers, and the basis for determination decisions, DOL is not able to effectively evaluate the financial impact claims paid on behalf of uninsured operators have on the Trust Fund. Determining the financial impact of these claims would be important to DOL's evaluation of the effectiveness of a process for monitoring operator compliance with black lung program insurance requirements.

Conclusions

The Black Lung Disability Trust Fund faces financial challenges, and DOL's limited oversight of coal mine operator insurance has further strained Trust Fund finances by allowing operator liabilities to transfer to the federal government. DOL's new self-insurance process may help to address past deficiencies in setting collateral

57. GAO-14-704G.

and reviewing self-insured operators if implemented effectively. However, DOL still lacks procedures on self-insurance renewals and coal operator appeals that could help to ensure that DOL staff will take enforcement actions when needed. Establishing clear self-insurance renewal procedures could better position DOL to take action to protect the Trust Fund should an operator not submit its renewal application and supporting documentation, or comply with DOL's collateral requirements. Procedures that identify time lines for self-insured operators to submit documentation supporting their appeals, and that identify a goal for how much time DOL should take to make appeals decisions could help to ensure that DOL is able to revoke an operator's ability to self-insure, when warranted.

Commercially-insured federal black lung liabilities can limit the Trust Fund's exposure to financial risk, but only if operators maintain adequate and continuous coverage as required. Currently, DOL does not identify lapses or cancellations in coverage among commercially-insured operators until after a claim is filed. Establishing a process to identify lapses and cancellations in coverage before claims get filed could help prevent the Trust Fund from becoming responsible for these claims.

Recommendations for Executive Action

We are making the following three recommendations to the Department of Labor:

- The Director of the Office of Workers' Compensation Programs should develop and implement procedures

for coal mine operator self-insurance renewal that clarifies how long an operator is authorized to self-insure; when an operator must submit its renewal application and supporting documentation; and the conditions under which an operator's self-insurance authority would not be renewed. (Recommendation 1)

- The Director of the Office of Workers' Compensation Programs should develop and implement procedures for self-insured coal mine operator appeals that identify time lines for self-insured operators to submit documentation supporting their appeals and that identify a goal for how much time DOL should take to make appeals decisions. (Recommendation 2)

- The Director of the Office of Workers' Compensation Programs should develop and implement a process to monitor operator compliance with commercial insurance requirements and periodically evaluate the effectiveness of this process. This process should be designed to detect errors and omissions in reporting insurance coverage using complete, accurate, and consistently recorded data. (Recommendation 3)

Agency Comments and Our Evaluation

We provided a draft of this report to the Department of Labor (DOL) for review and comment. Their written comments are reproduced in appendix I. DOL also provided technical comments and clarifications, which we have incorporated, as appropriate. DOL agreed with our three recommendations and said it is acting to implement

them to achieve further improvements in ensuring the effective oversight of coal mine operator insurance.

DOL acknowledged the importance of improving oversight of coal mine operator insurance and commented that it made major oversight improvements in recent years. DOL commented that it began developing a new coal mine operator self-insurance process in 2015, before GAO began its review, and DOL formally approved this process in 2017. In July 2019, DOL stated that its new process was finalized when the Office of Management and Budget (OMB) approved the forms to collect financial and other information from coal mine operators. DOL stated that it is now set the amount of collateral required to self-insure under its new process in the first half of 2020. We commend DOL's efforts to address the deficiencies of its past self-insurance process. However, we remain concerned about continuing coal operator bankruptcies and the looming unsecured black lung benefit liabilities that still threaten the Trust Fund.

DOL commented that adopting GAO's recommendations would further improve its oversight of coal mine operator insurance going forward. Specifically, DOL reported that it will (1) ensure letters granting or renewing self-insurance authority will inform operators that their authorization expires in one year and that they must submit renewal information three months in advance of the expiration date, (2) ensure letters denying self-insurance will inform operators that they have a 30-day appeal period (limited to one extension) and that DOL has set a goal of resolving all appeals within 90 days of the denial letter, and (3) modify existing computer systems to

identify lapses or cancellations of commercial insurance coverage, and require operators identified as having lapsed or cancelled coverage to obtain or provide proof of coverage within 30 days.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees, the Secretary of Labor, and other interested parties. In addition, the report will be available at no charge on GAO's web site at http://www.gao.gov.

If you or your staffs should have any questions about this report, please contact Cindy Brown Barnes at (202) 512-7215 or brownbarnesc@gao.gov, or Alicia Puente Cackley at (202) 512-8678 or cackleya@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.

/s/_____
Cindy Brown Barnes
Director, Education, Workforce,
and Income Security Issues

/s/_____
Alicia Puente Cackley
Director, Financial Markets
and Community Investment

Appendix K

Appendix I: Comments from the U.S. Department of Labor

U.S. Department of Labor
Office of Workers Compensation Program
Washington, DC 20210

Cindy Brown Bames
Director, Education. Workforce, and Income Security
U.S. Govemment Accountability Office
441 G Street, NW
Washington, DC 20548

Via email

Dear Ms. Brown Barnes:

Thank you for the opportunity to review and comment on the U.S. Government Accountability Office (GAO) draft report entitled "Black Lung Benefits Program: Improved Oversight of Coal Mine Operator Insurance Is Needed' (GAO-20-2l). The Department of Labor (DOL), Office of Workers' Compensation Programs (OWCP), administers the coal mine operator insurance provisions of the Black Lung Benefits Act (BLBA). OWCP agrees with GAO on the importance of improving oversight of coal mine operator insurance and, as GAO acknowledges, has made major oversight improvements in recent years. OWCP also agrees with GAO's three recommendations to achieve further improvement, is acting to implement them, and is committed to ensuring effective oversight of coal mine operator insurance.

Appendix K

The BLBA requires coal mine operators to compensate coal miners and eligible survivors if the miner becomes totally disabled or dies as a result of pneumoconiosis (commonly referred to as "black lung disease"). Coal mine operators are required to secure the payment of their potential benefits liability either by qualifying as a self-insurer or by purchasing a commercial insurance policy. OWCP has the authority to authorize operators to self-insure and set security deposit amounts. Securing benefits liability helps protect the government's Black Lung Disability Trust Fund (the Trust Fund), which pays benefits when operators fail to make benefits payments due to bankruptcy or other reasons. Federal law requires the U.S. Treasury to make repayable advances to the Trust Fund to meet all benefit obligations; so, benefit payments to miners and survivors are never in jeopardy, even when operators do not pay them.

We appreciate that GAO has recognized the significant improvements OWCP has made in recent years to its process for authorizing self-insurers. Prior to these improvements, OWCP did not always consider potential future benefits claims in setting operators' security amounts, or regularly review operators to assess their continued eligibility to self-insure. Bankruptcies of several self-insured coal mine operators transferred benefits liability to the Trust Fund because inadequate security was required from them. OWCP has replaced that process with one that incorporates major improvements designed to address past deficiencies. *Report p. 16; see also report pp. 20. 25 (same).* Under the new process. OWCP will set security amounts based on operators' actuarial-estimated

liabilities and financial health/risk of default. The actuarial estimates used in the new process are based on OWCP's latest and most refined approaches for estimating black lung liability - the same updated information and revised assumptions that recently led DOL, as GAO observes, to increase its estimate of Trust Fund liability resulting from several bankruptcies. *See report p. 12*. The improvements in the new self-insurance process allow OWCP to estimate operator liability more accurately, require adequate initial security, recalculate security amounts as necessary in response to emerging developments, and better protect the Trust Fund from any future defaults by operators on benefits payments.

OWCP began developing the new self-insurance process in 2015, long before GAO issued its report or even initiated its engagement on this matter. Over a two-year period, OWCP staff worked with outside experts (actuaries and financial analysts) to review existing self-insurance practices and devise changes to them. The new self-insurance process that emerged from this work was formally approved by OWCP in 2017. OWCP then proceeded to develop, and secure Office of Management and Budget (OMB) approval of, forms to collect financial and other information from coal mine operators for the new process. In July 2019, OMB approved the forms, and OWCP began implementing the new process. The agency is now reviewing information obtained from coal mine operators, and expects to set security amounts under the new process in the first half of this year.

Appendix K

Adopting GAO's recommendations will further improve OWCP's oversight of coal mine operator insurance arrangements. To implement GAO's first recommendation (clarification of self-insurance procedures), OWCP's letters granting or renewing self-insurance authority will inform operators their authorization expires in one year and that they must submit renewal information three months in advance of the expiration date. For the second recommendation (procedures for self-insured coal mine operator appeals), OWCP letters denying self-insurance will inform operators that they have a 30-day appeal period (limited to one extension); also, OWCP has set a goal of resolving all appeals within 90 days of the denial letter. For the third recommendation (procedures to monitor commercial insurance compliance), OWCP will modify existing computer systems to identify lapses or cancellations of commercial insurance coverage, and will require operators identified as having lapsed or cancelled coverage to obtain or provide proof of coverage within 30 days.

Finally, as noted by GAO, the Trust Fund is currently $5.8 billion in debt, and that debt is projected to exceed $12.6 billion (in today's dollars) by 2044. Coal mine operator bankruptcies are not the major driver of Trust Fund debt; only $1.0 billion of the projected 2044 debt of $ 12.6 billion is due to recent bankruptcies; almost all of the remainder ($11.4 billion) is due to accrued interest on the advances from the U.S. Treasury to ensure benefits payments. Nevertheless, effective oversight of coal mine operator insurance is essential for ensuring that bankruptcies do not add further to the Trust Fund's already sizeable debt.

Appendix K

Thank you again for the opportunity to review and comment on the draft report. GAO's engagement has been helpful and productive. OWCP has appreciated the opportunity to continue its critical review and improvement of oversight practices.

Sincerely,

Julia K. Hearthway
Director

Appendix K

Appendix II: GAO Contact and Staff Acknowledgments

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Staff Acknowledgments

In addition to the contacts named above, Blake Ainsworth (Assistant Director), Patrick Ward (Assistant Director), Justin Dunleavy (Analyst-in-Charge), Monika Gomez, Courtney LaFountain, Rosemary Torres Lerma, and Scott McNulty made key contributions to this report. Also contributing to this report were James Bennett, Nancy Cosentino, Caitlin Cusati, John Forrester, Alex Galuten, Ellie Klein, Emei Li, Corinna Nicolaou, Almeta Spencer, Curtia Taylor, and Shana Wallace.

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