No. _____

In the
# Supreme Court of the United States

APOGEE COAL CO. & ARCH RESOURCES, *ET AL.*,

*Petitioners*,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION & RUTLAND MELTON, *ET AL.*,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a span of two years, the Fourth, Sixth, and Seventh Circuits have addressed the same question under the Black Lung Benefits Act. The Fourth and Seventh decided it one way; the Sixth Circuit reached the opposite conclusion. All three circuits declined to rehear their decisions en banc. The divisive question is: do *Chenery* and the party-presentation principle preclude a circuit court from affirming an agency's assignment of liability based on regulatory provisions that an agency never identified while performing a quasi-judicial function?

## PARTIES TO THE PROCEEDING

Petitioners are Arch Resources and its former subsidiaries, Apogee Coal Co. and Arch of Kentucky, which no longer exist. They were the defendants-appellants below.

Respondents are the Director of Workers' Compensation Programs, U.S. Department of Labor, and eight former miners or their personal representatives because the miners passed away: Rutland Melton, Michael G. Cash, Mary Ison, Rush Creech, Kenny Johnson, Hal T. Woods, Sr., Steven Holbrook and Jerry Hall. Mrs. Ison is the personal representative of her late husband, Roger Ison, and also has her own survivor's claim. Mr. Holbrook is the personal representative of his late father, Donald Holbrook. Respondents were plaintiffs-appellees below.

## CORPORATE DISCLOSURE STATEMENT

Arch merged with CONSOL Energy to form Core Natural Resources (NYSE: CNR). Pursuant to Supreme Court Rule 29.6, Arch states that there is no parent or publicly held company owning 10% or more of its stock. Former Arch stockholders instead received shares representing approximately 45% ownership in the newly formed Core Natural Resources.

## STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioners state that the following proceedings are directly related to this case:

- *Arch Resources, Inc., et al., v. Director, OWCP, Robert Steely and Doris Browning,* Case Nos. 25-3857, 26-3024 (6th Cir. Consolidated Appeals)

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## PETITION FOR WRIT OF CERTIORARI

Circuit splits do not get cleaner than this. In less than two years, three circuits have ruled in identical cases involving benefits under the Black Lung Benefits Act ("BLBA"). Two of those circuits held for Petitioners, Arch Resources, Inc., Arch of Kentucky and Apogee Coal Company, LLC (collectively "Arch"); the other, the Sixth Circuit below, held the opposite. Compare App. 1a with *Hobet Mining, Inc.* v. *Dir., OWCP [Meredith]*, 156 F.4th 385 (4th Cir. 2025); *Apogee Coal Co.* v. *Dir., OWCP [Grimes]*, 113 F.4th 751 (7th Cir. 2024). All three circuits have declined rehearing en banc, leaving no room for debate over the need for this Court to resolve the intractable conflict.

What issue could so acutely divide the circuits that cover America's coal country? One that the Court answered 80 years ago in *Chenery*: whether courts can affirm the Department of Labor's assignment of BLBA liability on grounds different than those given by the agency at the time.

The BLBA and its implementing regulations make a mine "operator" liable for benefits that accrued on the last day of a miner's employment. 30 U.S.C. § 932(b); 20 C.F.R. §§ 725.494, 725.495. To assure resources are available to pay benefits to miners, the Department of Labor ("DOL") requires mine operators to have insurance—either commercial insurance or DOL-approved self-insurance. For self-insured operators, when they sell assets to another company, the accompanying liabilities go with it, and the new operator must satisfy DOL that it has insurance for those liabilities. When an operator proves unable to cover its black lung liabilities, as in the case of a

bankruptcy, and no earlier operators are available to pay benefits, the Black Lung Liability Trust Fund steps in.

Unfortunately, DOL has mismanaged the BLBA's self-insurance program. It routinely failed to require sufficient security from some operators it approved to self-insure. When several of those operators declared bankruptcy between 2014 and 2016, nearly $865 million in potential liability shifted to the Trust Fund. To reduce that exposure, DOL changed its policy regarding self-insurance. It had previously respected the difference between self-insurance and commercial insurance, specifically the fact that a self-insured parent company ceases to be responsible for the liabilities of a subsidiary that it sells—*i.e.*, that is no longer part of its "self." Suddenly, and without notice-and-comment rulemaking, that changed. In the cases at bar and many others like them, DOL assigned BLBA liability for a bankrupt subsidiary to its self-insured, former parent company on the theory that the latter is "an insurer." App. 285a.

That maneuver collapses the difference between commercial insurance and self-insurance, despite no BLBA statutory provision and in contradiction to DOL's own regulations. The Fourth and Seventh Circuits held that DOL had not identified any authority for its policy change. In the absence of a statutory or regulatory basis for holding Arch liable as a self-insurer of former subsidiaries that it sold to another DOL-approved self-insurer, the Department's action could not stand. That was the end of the matter for those circuits.

For the Sixth Circuit, however, the task had just begun. In the decision below and an earlier case, *Apogee Coal Co.* v. *Dir., OWCP [Howard]*, 112 F.4th 343 (6th Cir. 2024), the Sixth Circuit searched for an independent basis to hold Arch liable for its former, now-insolvent subsidiaries. In *Howard*, it alighted on a pair of regulatory provisions on which DOL had not relied—and, indeed, which the ALJ and Board affirmatively disclaimed—in its decision assigning liability to Arch. *Id.* at 354. That type of *post-hoc* justification offends *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Moreover, because DOL never argued the regulations in question, the Sixth Circuit's holding upends the party-presentation principle. *Clark* v. *Sweeney*, 607 U.S. 7 (2025).

The Sixth Circuit drew on a line of cases in that court to hold that *Chenery* does not apply to the BLBA because the agency performs a "quasi-judicial function." *Crockett Colleries, Inc.* v. *Barrett*, 478 F.3d 350, 358 (6th Cir. 2007) (Rogers, J., concurring). The Seventh and Fourth Circuits adamantly disagreed, holding that *Chenery* "applies with full force." *Grimes*, 113 F.4th at 761; *Meredith*, 156 F.4th at 397; *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421 (4th Cir. 2006). Nothing in *Chenery* suggests that its rule—*i.e.*, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"—varies with the task that an agency performs or the statute it implements. 318 U.S. at 87.

The *Chenery* doctrine is a "bedrock principle" of administrative law. *Food & Drug Administration* v. *Wages & White Lion Investments*, 604 U.S. 542, 587

(2025); *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015) (describing *Chenery* as providing "the foundational principle of administrative law."). The Court should not allow coal mining to crack that bedrock. If it does, nothing prevents other courts from inventing their own exceptions to *Chenery* for other statutes that they consider important.

The Court should grant certiorari because the circuits are incurably divided over a court's ability to affirm DOL's assignment of BLBA liability on grounds that DOL never argued. DOL itself petitioned the Fourth Circuit for rehearing en banc on this issue. App. 294a. *Chenery* and the party-presentation principle are essential protections for regulated parties. An acknowledged and persistent split on their applicability is intolerable.

## OPINIONS BELOW

The opinion of the Sixth Circuit is available at 2026 WL 1147618 and reproduced at App. 1a. The order of the Sixth Circuit denying rehearing en banc is only available on PACER and is reproduced at App 4a. Relevant excerpts of the orders of the Benefits Review Board and ALJs are unpublished but reproduced at App. 20a-50a, 55a-81a, 92a-122a, 127a-175a, 188a-213a, 228a-249a, 261a-284a.

## JURISDICTION

The Sixth Circuit entered its order affirming the agency's action on April 28, 2026, App. 1a, and denied a timely rehearing petition on July 24, 2026, App. 4a. The Sixth Circuit stayed its mandate on July 29, 2026. App. 6a. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

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;

20 C.F.R. § 726.110(a)(1).

DOL did not rely on these provisions before the ALJs in any of these cases. App. 8a-19a, 51a-54a, 82a-91a, 123a-126a, 176a-187a, 214a-227a, 250a-260a. It advocated reliance on 20 C.F.R. §§ 725.494 and 725.495. They provide:

> An operator may be considered a "potentially liable operator" with respect to a claim for benefits under this part if each of the following conditions is met:

(a) The miner's disability or death 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, or by a person with respect to which the operator may be considered a successor operator. For purposes of this section, there shall be a rebuttable presumption that the miner's disability or death arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis, or disability or death therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment.

(b) The operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973.

(c) The miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year (§ 725.101(a)(32)).

(d) The miner's employment with the operator, or any person with respect to which the operator may be considered a successor operator, included at least one working day (§ 725.101(a)(32)) after December 31, 1969.

(e) The operator is capable of assuming its liability for the payment of continuing benefits under this part. An operator will be deemed capable of assuming its liability for a claim if one of the following three conditions is met:

(1) The operator obtained a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter that covers the claim, except that such policy shall not be considered sufficient to establish the operator's capability of assuming liability if the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed;

(2) The operator qualified as a self-insurer under section 423 of the Act

> and part 726 of this subchapter 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 § 726.104(b) is sufficient to secure the payment of benefits in the event the claim is awarded; or
>
> (3) The operator possesses sufficient assets to secure the payment of benefits in the event the claim is awarded in accordance with § 725.606.

20 C.F.R. § 725.494.

> (a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the "responsible operator") shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner.
>
> (2) If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any benefits payable as a result of such employment shall be assigned as follows:
>
> (i) First, to the potentially liable operator that directed, controlled, or supervised the miner;

(ii) Second, to any potentially liable operator that may be considered a successor operator with respect to miners employed by the operator identified in paragraph (a)(2)(i) of this section; and

(iii) Third, to any other potentially liable operator which may be deemed to have been the miner's most recent employer pursuant to § 725.493.

(3) If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with § 725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator.

(4) If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph (a)(3) shall be

inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of § 725.494, the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

(b) Except as provided in this section and § 725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to § 725.410 (the "designated responsible operator") is a potentially liable operator. It 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).

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with § 725.606; or

(2) That it is not the potentially liable operator that most recently employed the

miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of § 725.494. In order to establish that a more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with § 725.606. The designated responsible operator may satisfy its burden by presenting evidence that the owner, if the more recent employer is a sole proprietorship; the partners, if the more recent employer is a partnership; or the president, secretary, and treasurer, if the more recent employer is a corporation that failed to secure the payment of benefits pursuant to part 726 of this subchapter, possess assets sufficient to secure the payment of benefits, provided such assets may be reached in a proceeding brought under subpart I of this part.

(d) In any case referred to the Office of Administrative Law Judges pursuant to § 725.421 in which the operator finally

> designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of § 725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. 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.

20 C.F.R. § 725.495.

## STATEMENT OF THE CASE

The *Chenery* question that has divided the circuits arises in the context of an insurance program under the BLBA.

### A. Commercial and Self-Insurance Under the BLBA

Congress enacted the BLBA to create a nationwide system for paying benefits to miners

disabled by pneumoconiosis (also known as black lung disease). 30 U.S.C. § 901 *et seq*. The BLBA assigns responsibility for benefits to the mine operator that last employed the miner and is capable of paying the benefits. 20 C.F.R. §§ 725.494, 725.495. If no operator can pay, then the claim goes to the Black Lung Disability Trust Fund ("Trust Fund"), which is funded by an excise tax on coal mined in the United States. 26 U.S.C. § 9501(d)(1)(B).

All mine operators must be insured for their black lung liability. They can satisfy that requirement in two ways: either through commercial insurance or self-insurance backed with financial security approved by DOL on an annual basis. 30 U.S.C. § 933(a).

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). Relevant here, Subpart C includes an endorsement that must appear in every commercial insurance contract. 20 C.F.R. § 726.203(a). The endorsement provides 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***." *Ibid*. (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 occurrence-based trigger in Subpart C is not among them.[1] 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.* at § 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.* at § 726.102(b)(3). An operator must have sufficient assets to cover the "annual" cost of financial security plus the estimated benefits it "may be expected to be required to pay during the ensuing year." *Id.* at § 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.

For self-insurers, there is nothing akin to the commercial endorsement covering all claims arising "during the policy period." Instead, self-insurance has

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[1] In fact, a recent proposed rulemaking would change 20 C.F.R. § 726.103 of the self-insurance regulations to incorporate the endorsement for commercial insurance. 91 Fed. Reg. 48002, 48006 (July 30, 2026). This proposal as much as admits that DOL has no authority to incorporate the occurrence trigger under the existing regulations.

a "claims-made trigger" that makes the self-insurer liable for claims asserted during a period of self-insurance (unless an earlier commercial policy covers the claims at issue). That 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"). It 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).

### B. Procedural Background

The Department of Labor is responsible for designating a responsible operator. 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 includes insurance, *id.* § 725.494. 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.

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 a DOL Administrative Law Judge ("ALJ"). 20 C.F.R. § 725.421. 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, the Fourth, Sixth and Seventh Circuits address nearly 70% of all BLBA appeals, reflecting the concentration of coal deposits in those circuits.

### C. Background Facts

This consolidated case involves eight miners' claims for benefits and one survivor's claim. All eight miners last worked at one-time Arch subsidiaries—Arch of Kentucky or Apogee—prior to December 31, 2005. Each last worked in the Commonwealth of Kentucky.

Until January 1, 2006, Arch of Kentucky and Apogee were separate corporations wholly owned by Arch. Arch sold both companies, along with their past, present and future black lung liabilities. The ultimate buyer was Patriot Coal, which DOL approved to self-insure its BLBA liabilities. Meanwhile, Arch also continued to self-insure its operations and disclosed to DOL that it no longer covered Arch of Kentucky and Apogee. DOL approved Arch's self-insurance for its then-existing portfolio of mines.

The claimants in this case filed their claims for federal black lung benefits years after Arch sold its subsidiaries and around the time that DOL adopted

its new policy retroactively changing the trigger for self-insurance.

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 Government Accountability Office ("GAO") described DOL's mismanagement of the BLBA self-insurance program as responsible for shifting $230 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 Report") at page 2 (Feb. 2020) available at https://www.gao.gov/products/gao-20-438t. Courts noted the same mismanagement decades before. *C&K Coal Co.* v. *Taylor*, 165 F.3d 254, 259 (3d Cir. 1999) (noting "the dismal history of the Act's administration").

Facing a reckoning, DOL announced a new policy for self-insurance in a guidance document called Bulletin 16-01. App. 285a. Bulletin 16-01 declared that, as of November 2015, claims against a bankrupt operator would now be chargeable to its former, self-insured parent based on an occurrence trigger—*i.e.*, who employed a miner on the last day of his work?—that DOL imported from the rules governing commercial insurance and operator liability. Instead of self-insurance liability ending when the former parent company no longer self-insured the mine (for example, because it sold that mine to another operator), Bulletin 16-01 makes the former owner responsible ***as an insurer*** of a different company's mine. DOL did not point to any statute, regulation, or

contract that would oblige a former owner to "self-insure" someone else's business.

Consistent with its newly announced policy—but departing from past practice—DOL named Arch's one-time subsidiaries as the responsible operators and Arch as their insurer. Arch contested its designation by arguing that it no longer self-insured the businesses that it sold and that the Trust Fund should pay the benefits. DOL disagreed. Though it offered no basis for a self-insurance relationship, DOL nonetheless assigned liability to Arch as the former subsidiaries' insurer.

When Arch challenged that designation, the ALJs below embraced DOL's new policy and relied on the regulations governing responsible operators (not insurers). 20 C.F.R. §§ 725.494 & 725.495. None of the decisions relies upon Part 726, and, in fact, two ALJs expressly rejected it as a source of liability. See App. 111a ("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") (emphasis added); App. 164a-165a (similar).

Arch appealed each decision to the Board, which blessed the agency's policy judgment that self-insurers should now be liable in perpetuity the way commercial insurers are. Like the ALJs before it, the Board did not identify any statute, regulation, or contract obliging Arch to insure its former subsidiaries. It, too, relied on sections 725.494 and 725.495 defining operator liability (*i.e.*, not insurance). App. 46a, 49a, 67a, 119a, 140a, 170a, 210a, 246a, 280a.

Arch timely appealed to the Sixth Circuit. After consolidating the cases, the Sixth Circuit affirmed, reasoning that it was bound by the panel decision 18 months earlier in *Howard*. App. 1a. Most of the *Howard* decision focused on other issues, but two short paragraphs approved DOL's decision to treat former owners as perpetual self-insurers. 112 F.4th at 354. *Howard* reasoned that liability was appropriate under a pair of provisions that DOL had not argued as the basis for liability to the ALJ, Board or Sixth Circuit. *Ibid*.

Notwithstanding *Howard*'s error and its rejection by two circuits in the intervening months, the panel applied *Howard* to affirm the ALJ and Board decisions on a rationale that DOL never argued to the ALJs and the ALJs and Board never embraced.

Just as the government had done when it lost in the Fourth Circuit, Arch petitioned for rehearing en banc. The Sixth Circuit denied that petition. App. 4a. Arch now petitions this Court to resolve the split that three circuits and both sides of this litigation have acknowledged.

## REASONS FOR GRANTING THE PETITION

"[T]he foundational principle of administrative law," *Michigan*, 576 U.S. at 758, has cracked. Two circuits insist that *Chenery* "applies with full force" regardless of the underlying statute that an agency is implementing. *Grimes*, 113 F.4th at 761; *Meredith*, 156 F.4th at 397. But the Sixth Circuit has dug in on its insistence that *Chenery* does not apply to benefits administration under the BLBA because that work is "quasi-judicial." If that position is correct, not only does it control the Longshore and Harbor Workers'

Compensation Act, from which the BLBA borrows the operative provisions, but it means that other circuits may exempt other statutes from *Chenery* as they see fit. That is not how "foundational principles" work.

The Fourth and Seventh Circuits have correctly rejected the Sixth Circuit's approach. All three circuits have declined to reconsider their positions en banc. Even DOL recognizes the "intractable" circuit split, as it explained in its petition for rehearing en banc in the Fourth Circuit. App. 295a-296a, 306a-307a.

Beyond the entrenched split, the decision below is exceptionally misguided on a topic of immense importance. The Sixth Circuit affirmed an agency action based on grounds that neither the Director, nor the ALJ, nor the Board articulated as "the grounds upon which the [agency] itself based its action." *Chenery*, 318 U.S. at 88. That flies in the face of both the party-presentation doctrine and the "bedrock principle" of administrative law articulated in *Chenery*. *White Lion*, 604 U.S. at 587.

The importance of preserving that legal bedrock adds to the reasons for review. As Respondent explained when petitioning the Fourth Circuit for rehearing, this case "raises profoundly important questions related to separation of powers [and] stewardship of the public fisc." App. 295a. Well said. This Court should not permit DOL to change its policy on self-insured parents without proper notice and to shift the costs of its mismanagement to private parties like Arch. Administrative law is a check on agencies' power. If courts can supply justifications that regulated parties never have a chance to address in

briefing, administrative law becomes an oxymoron. Only this Court's review can prevent the Sixth Circuit's approach from spreading to other circuits, other agencies, and other statutes.

The Court should grant certiorari to resolve the circuit split and restore the most basic principles of administrative law.

## I. The Circuit Split Is Entrenched and Acknowledged.

In the last two years, the Fourth, Sixth, and Seventh Circuits have addressed the same issue on indistinguishable facts. The Fourth and Seventh Circuits specifically recognized their split with the Sixth Circuit. They found that the Sixth Circuit's decision does not comply with *Chenery*. All three circuits have declined to reconsider their decisions en banc. Even Respondent agreed that the split is "intractable." App. 306a. Moreover, because coal deposits are not sprinkled evenly across the country, the three circuits forming the current split hear the vast majority of cases arising under the statute at issue. *Ibid.* n.7 (noting the same). This Court should grant the petition to resolve that split and restore uniformity to a statute that collects a tax at the same rate nationwide and should impose liability uniformly as well.

**1.** Beginning in 2007, the Sixth Circuit has committed to the view that *Chenery* does not apply in BLBA cases. That line of cases began with a concurring opinion in *Crockett Colleries, Inc.* v. *Barrett*, 478 F.3d 350 (6th Cir. 2007). In *Crockett*, the employer challenged a Board decision rejecting its appeal from an adverse ALJ ruling because the appeal

failed to meet the specificity requirements in 20 C.F.R. § 802.211(b). *Id.* at 353. The Sixth Circuit reversed the Board and held that the employer's petition for review was sufficiently specific in its objections to the ALJ decision. *Id.* at 354–355. It went on, however, to affirm the Board for reasons different from those in the Board's order. *Id.* at 355.

Judge Rogers spotted the problem. In a concurring opinion, he noted the "conflict with the time-honored administrative law principle" in *Chenery*. *Id.* at 357 (Rogers, J., concurring). He nevertheless declared that "[t]he *Chenery* principle does not apply in this case, however, because the narrow, quasi-judicial function of the BRB distinguishes BRB orders from the ordinary instance of agency decision making." *Id.* at 358. Specifically, Judge Rogers reasoned that "the ordinary *Chenery* concerns melt away" when a circuit court and the agency appellate body both review an ALJ decision *de novo*. *Ibid.* In support, he cited a pair of decisions applying the same statutory scheme in the Longshore and Harbor Workers' Compensation Act, neither of which cited *Chenery* or addressed the problem that Judge Rogers rightly identified. *Id.* at 359 (citing *Lauderdale* v. *Director, OWCP*, 940 F.2d 618 (11th Cir. 1991); *Todd Shipyards Corp.* v. *Director, OWCP*, 848 F.2d 125 (9th Cir. 1988) (Reinhardt, J.)). Even if those cases had considered and rejected *Chenery*, that would only deepen the split.

Two years later, Judge Rogers's concurrence graduated to a majority opinion in *Arch of Ky.* v. *Director, OWCP [Hatfield]*, 556 F.3d 472 (6th Cir. 2009). That case asked whether a claim was time-

barred. The Sixth Circuit acknowledged "serious doubts" about the ALJ's reason for finding the claim timely. *Id.* at 480. It therefore pivoted to an alternative rationale that neither the ALJ nor Board had adopted. The Sixth Circuit stated that it was free to "affirm based on a ground other than the one actually relied upon by the Board." *Ibid.* (citing *Crockett*, 478 F.3d at 358–359 (Rogers, J., concurring)).

The Sixth Circuit's complete inversion of *Chenery* is now the rule in that court. By the time DOL began searching for rationales to treat Arch as a self-insurer for its former subsidiaries, the Sixth Circuit thought nothing of *Chenery* "melt[ing] away" in BLBA cases. In *Howard*, the issue earned only two short paragraphs. 112 F.4th at 354. In the current case, the panel simply noted that the issue was settled by a prior Sixth Circuit panel decision. App. 3a.

**2.** The Fourth and Seventh Circuits, however, recoiled from the Sixth Circuit's treatment of *Chenery*.

In no uncertain terms, the Seventh Circuit explained that it "cannot overstate the importance" of its disagreement with the Sixth Circuit over *Chenery*. *Grimes*, 113 F.4th at 759. Specifically, the Seventh Circuit held that it could not rely on the regulations that the Sixth Circuit made the basis for its affirmance because the ALJ and Board below did not rely on them. *Id.* at 761. Because "neither decisionmaker intimated, let alone held, that Arch's liability as a third-party self-insurer sprung from those regulations," the Seventh Circuit held that "*Chenery* thus precludes us from affirming the Board on the Sixth Circuit's theory." *Ibid.*

The Fourth Circuit was equally clear. Regarding the self-insurance argument that the Sixth Circuit injected on appeal, the Fourth Circuit noted that because "the Department did not raise it, neither the ALJ nor the Board considered this issue in their decisions." 156 F.4th at 397. "As a result, [*Chenery*] precludes us from affirming the Board's decision based on reasoning and grounds upon which the Board did not rely." *Ibid.* The Fourth Circuit acknowledged that it was taking sides in a circuit split. It noted "essentially the same factual situation" in the cases discussed above. *Id.* at 401. For the Fourth Circuit, surveying those decisions "reinforces our decision. We join the Seventh Circuit in its assessment of Arch's liability." *Ibid.*

Neither *Grimes* nor *Meredith* represent a novel respect for *Chenery* in their respective circuits. Both courts have been applying *Chenery* to BLBA cases for decades. See *Henline*, 456 F.3d at 426 ("[I]n reviewing an order of the Board directing payment of black lung benefits, our review is confined exclusively to the grounds actually invoked by the Board."); *Pate* v. *Director, OWCP*, 834 F.2d 675, 676 (7th Cir. 1987). The split is therefore entrenched not only through the Sixth Circuit's line of cases stretching back to Judge Rogers's concurrence in *Crockett*, but in the Fourth and Seventh Circuits as well.

Ultimately, every party recognizes that the circuits are divided on *Chenery*'s application to BLBA cases. So do the courts involved. In a span of two years, all three circuits have recommitted to their positions and declined rehearing en banc. Circuit splits do not get cleaner than that. This Court should

grant the petition and restore *Chenery*'s foundational assurance that regulated parties will not face shifting rationales to justify liability against them.

## II. The Decision Below Is Contrary to *Chenery* and the Party Presentation Principle.

The Sixth Circuit's insistence that "the *Chenery* doctrine does not preclude a federal court from affirming a BRB ruling on a different ground" is spectacularly wrong.

**1.** The basis for that rule is a misguided policy argument. Judge Rogers reasoned that *Chenery* protects an agency's "unique authority to make the kinds of judgments it is authorized to make." *Crockett*, 478 F.3d at 358 (Rogers, J., concurring). And, the argument goes, there is no "unique authority" where the agency performs a quasi-judicial function that a circuit court reviews *de novo*. *Ibid*. Using an analogy to district courts and citing *Chenery* itself, Judge Rogers reasoned that it would be "wasteful and unnecessary for this court to remand a case to the BRB when it is apparent that alternative legal grounds exist to support the Board's order." *Ibid.*

The problems with that argument are difficult to count. For starters, *Chenery* ***distinguished*** district courts from administrative agencies: "In confining our review to . . . the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct" based on other grounds in the record. 318 U.S. at 88. The Sixth Circuit's approach therefore errs in reasoning by analogy to appellate review of district court decisions.

More fundamentally, Judge Rogers and the Sixth Circuit panels that follow him misunderstand the rationale for *Chenery*. Fairness and the separation of powers are the cornerstones of the *Chenery* doctrine. Courts review what agencies have done. But it is the agency—not the courts—that Congress has authorized to make the determination in question. Unless courts are going to encroach on the task assigned to the Executive Branch, "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Id.* at 94. Therefore, an agency's "action must be measured by what [it] did, not by what it might have done." *Id.* at 93–94.

That separation of powers also avoids the unfairness on display in this case, namely the imposition of liability based on a theory that the regulated party never had an opportunity to dispute. The two regulatory provisions on which the Sixth Circuit relied appeared nowhere in the ALJ or Board decisions. That means that the first time Arch saw an argument for imposing liability based on 20 C.F.R. §§ 726.110(a) and 726.4(b) was in the Sixth Circuit's opinion in *Howard*.

Additionally, the Sixth Circuit's approach creates a roadmap for agencies to bypass *Chenery* in any context: simply interpose an internal review board between the agency's action and judicial review. Then the courts review a quasi-judicial action, and "the ordinary *Chenery* concerns melt away." If only the SEC had realized that possibility in *Chenery* itself, perhaps the entire pesky doctrine would not exist.

**2.** Although *Chenery* is the basis for the circuit split in this case, the Sixth Circuit's imposition of liability on a theory that no one advocated also offends the party presentation principle. That rule, more general in its application than *Chenery*, protects the core of "our adversarial system," by requiring "the parties to frame the issues for decision." *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008). That leaves courts the role of deciding "matters the parties present." *Ibid.* Courts do not themselves inject questions not raised by one of the parties. The party presentation principle allows the litigants to know the terrain on which their rights will be decided and to make their best arguments for and against liability. Where, as here, the court injects a theory of liability for the first time in its decision, the affected party has no opportunity to explain why that theory is mistaken. Here, that opportunity would have allowed Arch to articulate the merits arguments that the Seventh Circuit found persuasive "if we could overlook *Chenery*" and reach the merits. *Grimes*, 113 F.4th at 761. This Court's defense of the party-presentation principle forecloses the Sixth Circuit's contrary doctrine of judicial surprise.

Even DOL recognizes that the Sixth Circuit's approach is incorrect. In the Seventh Circuit, "both parties were quick at oral argument to agree . . . that the *Chenery* doctrine applies with full force in black lung appeals." *Grimes*, 113 F.4th at 759. Meanwhile, DOL continues to exploit the Sixth Circuit's incorrect rule in cases arising in that jurisdiction. That type of game-playing should be beneath the federal government, but it only underscores the need for this Court to vindicate *Chenery* and standardize the law

across America's coal country. And DOL's flash of candor in *Grimes* points to the correct answer. When the government's credibility was on the line, it was "quick . . . to agree" that *Chenery* applies.

## III. As The Director Argued in the Fourth Circuit, the Question Presented Is Exceptionally Important, And This Is an Excellent Vehicle to Resolve It.

As the government recognized in seeking rehearing en banc in the Fourth Circuit, this case raises "profoundly important questions related to separation of powers, stewardship of the public fisc, and the long-term health of the American miner." App. 295a. That is exactly correct. The claimants in these consolidated cases will all be paid benefits, but whether that payment comes from the Trust Fund or Arch is a question of great legal importance.

Congress enacted the BLBA to ensure uniform treatment of miners and their employers across the country. See *Glen Coal Co.* v. *Seals*, 147 F.3d 502, 513 (6th Cir. 1998) (lamenting circuit splits that "destroy the desired uniformity" of the BLBA). The Trust Fund assesses the same excise tax on coal mined in every State. But self-insured former parent companies are held liable for benefits in the Sixth Circuit that the Trust Fund pays in the Fourth and Seventh Circuits. That makes no sense for a program that Congress intended to be uniform in its application.

Neither does the circuit-specific bailout for DOL's mismanagement of the BLBA self-insurance program. According to the Government Accountability Office, DOL underestimated the liability from Patriot's bankruptcy by $230 million because it failed to obtain

sufficient security from Patriot to cover its liabilities. GAO report at 2; accord *C&K Coal*, 165 F.3d at 259 (nothing "the dismal history of the Act's administration"). The Sixth Circuit's search for a way to shift that liability to still-solvent companies—a search that was necessary because the grounds DOL advocated were transparently incorrect—sets a dangerous precedent. It creates a perverse incentive for agencies not to take seriously their regulatory duties, knowing that courts will bend over backwards to avoid the consequences of its mismanagement. When an agency proves to be a poor steward of the public fisc, the solution is not to add the rule of law to the list of casualties.

And among the many legal rules governing agency action, *Chenery* has a claim to being the most important. This Court has regularly affirmed *Chenery*'s central place time and again during the 80 years since it was decided. *E.g, White Lion*, 604 U.S. at 587; *Michigan*, 576 U.S. at 758. As explained above, *Chenery*'s importance reflects its centrality to the separation of powers, and it guarantees that regulated parties know which theories they must defend against.

More broadly, the Sixth Circuit's exception to *Chenery* misunderstands that decision's reasoning and opens the door to other policy-based exceptions. If *Chenery* "melt[s] away" simply because the Board performs a quasi-judicial function there are countless other quasi-judicial actions across other agencies that are likewise exempt from *Chenery*. This Court should reject that possibility in no uncertain terms.

Finally, this case is an excellent vehicle to resolve the important question presented. It reaches this Court on facts that are "essentially the same" as those in the Fourth and Seventh Circuits. *Meredith*, 156 F.4th at 399. The decision below was, by its own terms, controlled by *Howard* and the Sixth Circuit cases entrenching the view that *Chenery* has no place in BLBA cases. The Fourth and Seventh Circuits have rejected that view in reliance on their own established precedent. What remains is for this Court to break the logjam and restore uniformity on the foundational principles of administrative law.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED APRIL 28, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-3297, 23-3437, 23-3536, 23-3537, 23-3541, 23-3612, 23-3644, 23-3645, 23-3662

APOGEE COAL COMPANY, LLC, AND ARCH RESOURCES, INC. (23-3297/3541/3612/3644/3645/3662); APOGEE COAL COMPANY AND ARCH COAL, INC., NKA ARCH RESOURCES, INC. (23-3437); ARCH OF KENTUCKY, LLC, AND ARCH RESOURCES, INC. (23-3536/3537),

*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; RUTLAND MELTON (23-3297); MICHAEL G. CASH (23-3437); MARY ISON (23-3536/3537); RUSH CREECH (23-3541); KENNY R. JOHNSON (23-3612); HAL T. WOODS, SR. (23-3644); STEVEN HOLBROOK, OBO DONALD HOLBROOK (23-3645); AND JERRY HALL (23-3662),

*Respondents.*

Dated April 28, 2026

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR

*Appendix A*

**OPINION**

Before: KETHLEDGE, NALBANDIAN, and RITZ, Circuit Judges.

PER CURIAM. Arch Resources, Inc. and Apogee Coal Company, LLC petition for review of the Benefits Review Board's decision that Arch—the former parent corporation of Apogee—is responsible for paying, to the individual respondents here, benefits owed to them under the Black Lung Benefits Act. We deny the petitions.

In the 1990s, the miners involved in these consolidated cases worked for Apogee Coal Company in Kentucky. At that time, Apogee was Arch's subsidiary. Rather than purchase commercial insurance, Arch self-insured Apogee against black-lung claims. *See* 30 U.S.C. § 933(a). In 2005, Arch sold Apogee—along with its black-lung liabilities—to Magnum Coal. Three years later, Patriot Coal acquired Magnum and its subsidiaries, including Apogee. In 2015, Patriot went bankrupt.

Patriot's bankruptcy created a problem for the black-lung benefits system. Patriot owned dozens of subsidiary coal companies whose former employees sought black-lung benefits, so its bankruptcy could shift hundreds of millions of dollars in black-lung liabilities to the federal government. *See* 26 U.S.C. § 9501. As relevant here, however, the Department of Labor instructed its district directors to hold Arch liable as the responsible insurer for black-lung claims against Apogee that accrued during the period Arch owned and self-insured Apogee. U.S. Dep't of Labor, BLBA Bulletin No. 16-01, 3 (2015).

*Appendix A*

The miners in these cases applied for black-lung benefits between 2015 and 2017. Department of Labor district directors granted each miner benefits, and named Apogee the responsible operator and Arch the responsible insurer. Arch appealed these decisions, arguing that it had sold Apogee in 2005 and thus was no longer obligated to pay benefits. In each case, administrative law judges and the Board affirmed the district directors' decisions. Arch then petitioned our court for review.

We review the Board's legal conclusions de novo. *Cent. Ohio Coal Co. v. Dir., OWCP*, 762 F.3d 483, 488 (6th Cir. 2014). Petitioners argue that the Board erred in holding Arch liable for black-lung benefits owed by Apogee. But Arch and Apogee concede that they make here the very same arguments, based on materially identical facts, that we rejected in a published decision two years ago. *See Apogee Coal Co., LLC v. Director, OWCP* (*Howard*), 112 F.4th 343, 353-57 (6th Cir. 2024). As Arch and Apogee recognize, that decision binds us here. *See* Petitioner Br. 29. We must therefore deny the petitions.

The petitions for review are denied.

**APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED JULY 24, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-3297, 23-3437, 23-3536, 23-3537, 23-3541, 23-3612, 23-3644, 23-3645, 23-3662

APOGEE COAL COMPANY, LLC, AND ARCH RESOURCES, INC. (23-3297/3541/3612/3644/3645/3662); APOGEE COAL COMPANY AND ARCH COAL, INC., NKA ARCH RESOURCES, INC. (23-3437); ARCH OF KENTUCKY, LLC, AND ARCH RESOURCES, INC. (23-3536/3537),

*Petitioners,*

v.

DIRECTOR, OFFICE COMPENSATION OF WORKERS' PROGRAMS, U.S. DEPARTMENT OF LABOR; RUTLAND MELTON (23-3297); MICHAEL G. CASH (233437); MARY ISON (23-3536/3537); RUSH CREECH (23-3541); KENNY R. JOHNSON (23-3612); HAL T. WOODS, SR. (23-3644); STEVEN HOLBROOK, OBO DONALD HOLBROOK (23-3645); AND JERRY HALL (23-3662),

*Respondents.*

Dated July 24, 2026

**ORDER**

*Appendix B*

**BEFORE:** KETHLEDGE, NALBANDIAN, and RITZ, 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 cases. 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.

**ENTERED BY ORDER OF THE COURT**

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

**APPENDIX C — ORDER STAYING THE MANDATE PENDING RESOLUTION OF ARCH'S PETITION FOR CERTIORARI, DATED JULY 29, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 23-3297/23-3437/23-3536/23-3537/23-3541/23-3612/23-3644/23-3645/23-3662

APOGEE COAL COMPANY, LLC and ARCH RESOURCES, INC. (23-3297/3541/3612/3644/3645/3662); APOGEE COAL COMPANY, and ARCH COAL, INC. nka ARCH RESOURCES, INC. (23-3437); ARCH OF KENTUCKY, LLC and ARCH RESOURCES, INC. (23-3536/3537),

*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; RUTLAND MELTON (23-3297); MICHAEL G. CASH (23-3437); MARY ISON (23-3536/3537); RUSH CREECH (23-3541); KENNY R. JOHNSON (23-3612); HAL T. WOODS, SR. (23-3644); STEVEN HOLBROOK, OBO DONALD HOLBROOK (23-3645); JERRY HALL (23-3662),

*Respondents.*

Dated July 29, 2026

BEFORE: KETHLEDGE, Circuit Judge; NALBANDIAN, Circuit Judge; RITZ, Circuit Judge

*Appendix C*

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow Arch Resources, Inc. time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

**ENTERED BY ORDER OF THE COURT**
Kelly L. Stephens, Clerk

/s/ Kelly L. Stephens

Issued: July 29, 2026

## APPENDIX D — DIRECTOR'S ALJ CLOSING BRIEF IN *MELTON V. APOGEE COAL*, CASE NO. 2018-BLA-05969, FILED JULY 5, 2019

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 2018-BLA-05969

IN THE MATTER OF RUTLAND V. MELTON,

*Claimant,*

v.

APOGEE COAL CO., SELF-INSURED THROUGH ARCH COAL, INC.,

*Employer,*

and

DIRECTOR, OWCP,

*Party in Interest.*

Filed July 5, 2019

### DIRECTOR'S BRIEF ADDRESSING LIABILITY

The Director, Office of Workers' Compensation Programs, United States Department of Labor ("Director"), by counsel, hereby submits the following brief in support of a finding that Apogee Coal Company, LLC, self-insured through Arch Coal, Inc., is the proper responsible operator liable for the payment of the benefits that should be awarded in this claim.

*Appendix D*

## FACTS AND COURSE OF PROCEEDINGS

Coal miner Rutland Melton filed a claim for benefits under the Black Lung Benefits Act on May 4, 2017, alleging that his last day of coal mine employment was January 30, 1998 (DX 6). He completed an "Employment History" form indicating on page 1 that he worked for "U.S. Steel+ Arch" from 1975 to 1998, and on page 2 that he worked for U.S. Steel from 1975 to 1984 and for "Arch of KY" from 1984 to 1998 (DX 7). His Social Security Statement of Earnings reports earnings from Marathon Oil from 1975 to 1981, U.S. Steel from 1981 to 1984, Arch of Kentucky from 1984 to 1992, and Apogee Coal Company from 1993 to 1999 (DX 9, DX 10).

The district director issued a Notice of Claim to Apogee Coal, self-insured through Arch Coal Inc. (DX 28). Arch Coal responded that Apogee Coal was not the proper responsible operator, and that Arch Coal is not a proper party because "Arch Coal sold Apogee Coal's assets and liabilities in 2005 to Magnum Coal" and "in 2008, Patriot Coal acquired what used to be Apogee Coal's assets and liabilities when it purchased Magnum Coal" (DX 32, p. 1). It added that, due to bankruptcy, Patriot Coal "cannot cover any liabilities now" (DX 32, p. 2).

The district director issued a Schedule for Submission of Additional Evidence designating Apogee Coal, self-insured through Arch Coal Inc., as the responsible operator (DX 33). Arch Coal responded that the district director had improperly designated Apogee Coal and Arch

Coal as parties to the claim, and designated Mr. Melton as a witness pertaining to liability (DX 25, p. 4).

The district director issued a Proposed Decision and Order designating Apogee Coal, self-insured through Arch Coal Inc., as the responsible operator (DX 35). Arch requested a formal hearing (DX 40, p. 3), and the district director referred the case to the Office of Administrative Law Judges (OALJ) (DX 48).

After the case was referred to OALJ but several months before the hearing, Arch Coal requested the Administrative Law Judge to issue subpoenas compelling OWCP employees Michael Chance and Kim Kasmeier to appear and give deposition testimony related to Arch Coal's liability. The Director objected, and, in an Order issued September 12, 2018, Judge Golden declined to issue the requested subpoenas. Also before the hearing, Arch Coal proffered Employer Exhibits 10-14, and then Employer's Exhibit 15, all documents pertaining to the issue of Arch Coal's liability. The Director moved to exclude those exhibits, and at the hearing conducted on January 8, 2019, Judge Golden deferred a ruling on the Director's motion to exclude until after the Benefits Review Board had resolved Arch Coal's interlocutory appeal of Judge Golden's order declining to issue the requested subpoenas.

Mr. Melton, who had been identified as a liability witness while his claim was pending before the district director (DX 25, p. 4), testified at the formal hearing. He testified that he worked as an underground coal miner for

23 years (Tr. 18). His last employer was Apogee Coal, for which he worked from 1993 to 1998 (Tr. 26). He described his successive employers—first U.S. Steel, then Arch Coal, and finally Apogee Coal—as "the same company" (Tr. 28).

After the Board dismissed Arch Coal's appeal as interlocutory, Arch Coal proffered additional documents pertaining to the liability issue—identified as Employer's Exhibits 24 through 27—and the Director filed written objections to the admission of those exhibits. On May 31, 2019, Judge Golden issued an order excluding Employer's Exhibits 10 through 15 and 24 through 27.

In declining to issue the requested subpoenas and in excluding Employer's Exhibits 10 through 15 and 24 through 27, Judge Golden applied evidentiary limitations contained in the Department's regulations; primarily 20 C.F.R. §§ 725.414(c), (d); .456(b)(1); and .457(c). Those regulations require that a witness whose testimony pertains to liability must be identified to the district director while the claim is pending before the district director, and documents pertaining to liability must be submitted to the district director. *See generally Hancock v. Bull Creek Coal Corp.,* BRB No. 17-0151 BLA, 2018 WL 802046 * 2 (Ben. Rev. Bd. Jan. 18, 2018).

## ARGUMENT

### A. Regulatory framework.

The Department's regulations provide that the operator responsible for the payment of benefits in a

claim shall be the "potentially liable operator" that most recently employed the miner. 20 C.F.R. § 725.495(a)(l). Those regulations further provide that a "potentially liable operator" is an operator which meets each of the five conditions set forth in 20 C.F.R. § 725.494. The five conditions that must be met are: (a) the miner's disability or death arose at least in part out of employment in a mine when it was operated by the operator; (b) the operator was an operator for any period after June 30, 1973; (c) the miner was employed by the operator for a cumulative period of not less than one year; (d) the miner's employment with the operator included at least one working day after December 31, 1969; and (e) the operator is capable of assuming its liability for the payment of continuing benefits because, for example, it obtained a policy of insurance that covers the claim.

To avoid liability, a potentially liable operator designated as the responsible operator in the district director's proposed decision and order bears the burden of proving that it: **(1)** does not possess sufficient assets to secure the payment of benefits, or (2) is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002); *RB&F Coal Inc. v. Mullins*, 842 F.3d 279, 281-82 (4th Cir. 2016). It is presumed under§ 725.495(b) that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with§ 725.494(e). 20 C.F.R. § 725.495(b).

**B. Apogee Coal is the potentially liable operator that most recently employed the miner.**

Apogee Coal meets all the conditions to be a potentially liable operator under § 725.494. First, the miner's disability arose at least in part out of employment in or around a mine operated by Apogee Coal. Section 725.494(a) provides a rebuttable presumption that a miner's disability arose out of his employment in or around a mine operated by the operator, and further states that a miner's disability shall pe considered to have arisen out of that work if that work "caused, contributed to or aggravated the progression or advancement" of the miner's inability to work. The record here contains no evidence that could rebut the presumption. Moreover, the record demonstrates that the miner was exposed to dust while working for Apogee Coal underground as a shuttle car operator and general inside laborer (DX 7; DX 8; DX 15, p. 5; Tr. 40-41). Thus, Claimant's disability arose at least in part out of employment in or around a mine operated by Apogee Coal, and Apogee Coal meets the condition set forth in§ 725.494(a).

Second, the miner worked at a mine operated by Apogee Coal from 1993 to 1998, and he had no reported earnings from any other employers during that period (DX 9). Apogee Coal is his most recent employer (DX 9; Tr. 26). Apogee Coal was an operator after June 30, 1973; Apogee Coal employed the miner for a cumulative period of not less than one year; and the miner's employment with Apogee Coal included at least one day after December 31,

1969. Consequently, Apogee Coal meets the conditions set forth in § 725.494(b) through (d).

Finally, Apogee Coal was self-insured through Arch Coal at the time the miner last worked, so Apogee Coal meets the condition set forth in§ 725.494(e)(2) (DX 33, p. 9). And it is presumed under § 725 .495(b) that Apogee Coal is capable of assuming liability for the payment of benefits in accordance with § 725.494(e). 20 C.F.R. § 725.495(b). Apogee Coal and Arch Coal have failed to prove that Apogee Coal, self-insured through Arch Coal, is unable to pay. Under these circumstances, it is appropriate to designate Apogee Coal, self-insured through Arch Coal, as the responsible operator in this claim.

### C. Arch Coal's arguments against liability are incorrect and should be rejected.

We anticipate that Arch Coal will argue that it and Apogee Coal are not liable for the payment of benefits awarded to the miner because "Arch Coal sold Apogee Coal's assets and liabilities in 2005 to Magnum Coal" and "in 2008, Patriot Coal acquired what used to be Apogee Coal's assets and liabilities when it purchased Magnum Coal" (DX 32, p. **1).** And Arch Coal may add that, due to bankruptcy, Patriot Coal "cannot cover any liabilities now" (DX 32, p. 2). As a result, Arch Coal may assert, as it has in the past, that the Black Lung Disability Trust Fund is liable for the payment of benefits here. Arch Coal's attempt to avoid liability must be rejected.

*Appendix D*

**1. Operators cannot escape Black Lung Benefits Act liability through private contracts.**

Arch Coal's chief contention is that it sold away Apogee Coal's federal black lung liabilities to Magnum, which in turn sold them to Patriot. While an operator can arrange· for other companies to pay the operator's federal black lung liabilities on the operator's behalf, such private contracts do not release the operator from liability imposed by the BLBA. *See U.S. Dep 't of Labor v. Triplett,* 494 U.S. 715, 718 (1990) (provisions of a contract between private parties are invalid if they conflict with black lung regulations); *see also Connolly v. Pension Ben. Guar. Corp.,* 475 U.S. 211, 223-24 (1986) ("Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.") (quoting *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 307-308 (1935)); *Lovilia Coal Co. v. Williams,* 143 F.3d 317 (7th Cir. 1998) (holding that insurance contract could not be construed to limit an insurer's liability under the Black Lung Benefits Act); *Curry v. Eagle Energy, Inc.,* Case No. 2013-BLA-05263, slip op. at 7 (July 28, 2016) (where regulations clearly impose liability on an employer, contractual provisions to the contrary do not control).

Arch Coal's argument that operators may "sell" their BLBA liabilities through a private contract is especially incongruous in view of Congress's intent to "ensure that individual coal operators rather than the trust fund bear the liability for claims arising out of such operators' mines to the maximum extent feasible." S. Rep. No. 209, 95th

Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. on Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979); *see generally Old Ben Coal Co. v. Luker,* 826 F.2d 688,693 (7th Cir. 1987). Arch Coal's argument should be rejected, as it has been in other similar cases.[1]

---

1. *See, e.g., Halcomb v. Arch of Kentucky/Apogee Coal Co.,* Case Nos. 2017-BLA-5938, 2017-BLA-5537 Order (1) Denying Motion for Abeyance or to Cancel the Hearing and Provide a Schedule for Discovery on Liability; (2) Granting Director's Motion for Partial Summa1y Decision; and (3) Awarding Benefits (Nov. 30, 2017), p. 8 ("The Director's motion for partial summary decision is GRANTED, and Arch of Kentucky/ Apogee Coal Company is the responsible operator liable for payment of benefits in this matter."); *Pletcher v. Hobet Mining LLC,* Case No. 2017-BLA-05230, Order Denying Bifurcation and Denying Extension of Deadline to Develop Liability Evidence (Nov. 15, 2017), p. 9 ("Arch is properly named as a prior operator in this case as a self-insurer for its former subsidiary, Hobet Mining, and the self-insurer at the time the miner was most recently employed as a coal miner."). Similar arguments by Peabody Energy have also been rejected. *See Halstead v. Pine Ridge Coal Co.,* Case No. 2017-BLA-05009, Decision and Order Awarding Benefits (May 22, 2018) (finding Pine Ridge/Peabody liable); *Duncan v. Martinka Coal Co., Peabody Energy Corp., and Director, OWCP,* Case No. 2017-BLA-5074, Decision and Order Awarding Benefits (May 1, 2018) (ALJ Appetta) (finding Martinka Coal/Peabody liable); *Floyd v. E. Ass'd Coal Co.,* ALJ No. 2017-BLA-05519, Order Denying Motion to Dismiss Peabody Energy Corp. as Insurer (Aug. 21, 2018) (ALJ Appetta); *Burns v. Pine Ridge Coal Co.,* ALJ No. 2017-BLA-5319, Order Denying Employer's Motion to Bifurcate (Nov. 3, 2017); *Adkins v. Eastern Associated Coal. Corp.,* ALJ No. 2017-BLA-05130, Order Denying Employer's Motion to Dismiss Peabody Energy (Oct. 6, 2017).

**2. OWCP did not release Arch from liability for this claim.**

Arch Coal has also contended that a series of transactions—Arch Coal's sale of Apogee Coal to Magnum, Patriot's acquisition of Magnum, and DO L's approval of Patriot as a self-insurer of BLBA liabilities—somehow effected a release of Arch Coal from liability for claims of miners who last worked for Apogee Coal. Arch Coal has asserted that, having authorized Patriot's self-insurance, OWCP cannot hold Arch liable now that Patriot is bankrupt (DX 32; DX 40). There is no evidence in this record or otherwise to support Arch Coal's release theory that theory should be rejected as unsupported by the evidence.

In any event, OWCP never released Arch from liability for this claim. Patriot obtained authorization to self-insure its federal black lung liabilities in 2011. This authorization was retroactive, meaning that Patriot was liable for black lung claims based on employment with Patriot subsidiaries both before and after Patriot owned those subsidiaries. But Patriot's authorization was not exclusive; it did not provide that if Patriot's self-insurance failed, no other operator could be responsible for the claims of miners who worked for subsidiary companies before Patriot owned them. In other words, Arch Coal was never released from liability for the claims of miners who worked for it in the event Patriot's self-insurance failed. After filing for bankruptcy in 2015, Patriot's self-insurance did fail. Arch Coal remains liable for the claims of miners who worked for it but never for Patriot or one of its subsidiaries, as in this case. For that reason, the district director properly named Arch Coal as Apogee Coal's self-insurer.

**2. Section 725.495(a)(4) does not preclude Apogee Coal's and Arch Coal's designations as the parties responsible for the payment of benefits here.**

Arch Coal has also argued in this case that 20 C.F.R. § 725.495(a)(4) precludes it from being held liable in this claim (DX 32; DX 40). It misconstrues the regulation. Section 725.495(a)(4) provides that if the miner's "most recent employment by an operator ended while the operator was authorized to self-insure" and that operator no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be named as the responsible operator and liability falls to the Trust Fund. Arch Coal argues that Patriot is no longer capable of paying benefits and therefore Apogee Coal and Arch Coal cannot be responsible. But Mr. Melton's most recent employer was Apogee Coal, not Patriot or a Patriot subsidiary. In fact, he was never employed by Patriot. Therefore, Patriot's inability to pay benefits does not trigger § 725.495(a)(4). Nor does § 725.495(a)(4) bar Apogee Coal's and Arch Coal's designation as the responsible parties here, as they have failed to show that they are unable to pay benefits.

In sum, none of Arch Coal's arguments against liability are convincing. They should be rejected and Apogee Coal, self-insured through Arch Coal, should be found to be the responsible operator.

*Appendix D*

**CONCLUSION**

For the foregoing reasons, the Director respectfully requests that this Tribunal find that Apogee Coal, self-insured through Arch Coal, is the responsible operator liable for the payment of Mr. Melton's benefits.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

THERESA BALL
Associate Regional Solicitor

/s/ Christian P. Barber
CHRISTIAN P. BARBER
Attorney

U.S. Department of Labor
Attorneys for Director, OWCP

## APPENDIX E — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *MELTON V. APOGEE COAL*, CASE NO. 2018-BLA-05969, DATED NOVEMBER 21, 2019

**U.S. Department of Labor**
Office of Administrative Law Judges

Case No.: **2018-BLA-05969**

*In the Matter of*

RUTLAND MELTON,

*Claimant,*

v.

APOGEE COAL CO., SELF-INSURED THROUGH ARCH COAL,

*Employer/Carrier,*

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-In-Interest.*

**Issue Date: 21 November 2019**

Before: Jason A. Golden
Administrative Law Judge

*Appendix E*

## DECISION AND ORDER AWARDING BENEFITS[1]

This proceeding arises from a claim for benefits under the Black Lung Benefits Act.[2] The Claimant, Rutland V. Melton, alleges that he is totally disabled by pneumoconiosis.

I conducted a formal hearing on January 8, 2019, in Hazard, Kentucky. The Claimant, Employer Apogee Coal Company (Apogee or Employer), Arch Coal, through which Apogee was self-insured (Arch Coal or Carrier), and the Director, Office of Workers' Compensation Programs (OWCP) were afforded a full opportunity to present evidence and argument as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.[3] The Claimant was the only witness who testified. (Transcript (Tr.) 18-43.)

Director's Exhibits (DX) 1-21 and 23-49, Claimant's Exhibit (CX) 1, and Employer's Exhibits (EX) 1-9 were admitted in evidence without objection. (Tr. 7-14.) The Employer objected to the admission of Dr. John Forehand's supplemental medical report at DX 22. (Tr. 8.) I reserved ruling on DX 22. (Tr. 8.) However, Dr. Forehand's report is not in DX 22, but is in DX 23. I overruled the Employer's

1. This is a revised Decision and Order. The original Decision and Order issued on September 13, 2019, was vacated by a separate order of this court.

2. 30 U.S.C. §§ 901-945.

3. 29 C.F.R. Part 18, subpart A.

objection and admitted Dr. Forehand's report in my January 16, 2019 order. DX 22 is admitted in evidence.

I held the record open after the hearing to allow the parties to submit additional evidence and argument. (Tr. 46.) The Employer submitted EX 11-27. In a May 31, 2019 order, I granted the Directors motion to Exclude EX 10-15, and sustained the Director's objection to EX 24-27.[4] EX 16-23 are admitted in evidence. The Employer and Director submitted closing written arguments (briefs). The Claimant did not. The record is now closed.

In reaching my decision, unless noted otherwise herein, I have reviewed and considered all testimony and exhibits admitted in evidence and the arguments of the parties. I have not considered any evidence exceeding the evidentiary limitations in the regulations.

## I. PROCEDURAL HISTORY

On June 5, 2013, the district director, OWCP issued a proposed Decision and Order denying benefits in Claimant's most recent, previous "subsequent claim." (DX 4 at 3, 93.) The district director determined that the Claimant proved the presence of legal pneumoconiosis, but failed to prove that he was totally disabled by a respiratory or pulmonary impairment. (DX 4 at 6-7.) The Claimant did not appeal that determination.

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4. These exhibits were not timely offered before the district director and no extraordinary circumstances exist to justify their admission. *(See* May 31, 2019 order.)

The Claimant filed this subsequent claim for benefits on May 4, 2017. (DX 6 at 1.) This is Claimant's 5th claim for benefits. *(See* DX 1; DX 2; DX 3; DX 4; DX 6.) On March 21, 2018, the district director issued a proposed Decision and Order awarding benefits. (DX 35 at 2.) The Employer appealed on April 16, 2018. (DX 40.) The district director referred this claim to the Office of Administrative Law Judges (OALJ) for hearing on June 13 2018. (DX 48 at 4.)

## II. APPLICABLE STANDARDS

Because this claim was filed after January 19, 2001, the current regulations at 20 C.F.R. Parts 718 and 725 apply.[5] In order to establish entitlement to benefits under Part 718, Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling.[6]

Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least 15 years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment (the 15-year presumption).[7]

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5. 20 C.F.R. §§ 718.2, 725.2.

6. 20 C.F.R. §§ 718.1, 718.202, 718.203, 718.204, 725.103.

7. 30 U.S.C. § 92l(c)(4); 20 C.F.R. § 718.205.

*Appendix E*

## III. ISSUES

The issues contested by the Employer are:

1. How long Claimant worked as a miner;

2. Whether Claimant has pneumoconiosis;

3. Whether his pneumoconiosis arose out of coal mine employment;

4. Whether he is totally disabled by a respiratory or pulmonary impairment;

5. Whether his disability is due to pneumoconiosis;

6. Whether the named Employer is the Responsible Operator;

7. Whether the Employer has secured the payment of benefits; and

8. Whether the evidence establishes that one of the applicable conditions of entitlement has changed under 20 C.F.R. § 725.309.

(Tr. 44-46; DX 48.)

*Appendix E*

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Testimony and Miscellaneous Issues

The Claimant testified at the hearing. He was born on July 23, 1948. (Tr. 24.) He was 70 years old on the date of the hearing. (Tr. 24.) He has been married for 40 years. (Tr. 24; DX 13; EX 18 at 166.)

#### 1. Controlling Law

The Claimant's last coal mine employment was in Kentucky. (Tr. 18; DX 7 at 2.) Therefore, I will apply the law of the United States Court of Appeals for the Sixth Circuit.[8]

#### 2. Smoking History

The Claimant testified that he started smoking at age 18, around 1968. (Tr. 20, 34.) He smoked "about a pack and a half a day." (Tr. 20.) He stopped smoking "about 20 something years" ago, "before 2000." (Tr. 20-21, 34.)

Dr. John Forehand reported that Claimant smoked approximately 1 pack per day for about 18 or 19 years, until the late 1980s. (DX 15 at 3.) But, he agreed at deposition that Claimant may have smoked as much as 1.5 packs per day. (EX 22 at 36.) Dr. David Rosenberg reported

8. *Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (BRB 1989)(*en banc*).

that Claimant started smoking in high school, smoked 1.5 packs of cigarettes per day, and quit around 1998. (EX 2 at 1; *see also* DX 24 at 5.) Dr. Peter Tuteur reported that Claimant "smoked cigarettes beginning as early as 1962 and continuing at least through 2006 ... between one and two packages per day." (EX 3 at 2; see also EX 20 at 2 (Dr. Tuteur reported that Claimant smoked until 2010 based on his review of additional records).)

Records from Mountain Comprehensive Health Clinical (MCHC) report that Claimant is a "[n]ever smoker," even though Claimant reported on his intake form that he smoked 1 pack per day from 1967 to 2004. (CX 1.) Dr. Alam, Claimant's treating physician at MCHC, reported that Claimant smoked 1 pack per day from 1967 to 2004 in connection with Claimant's November 15, 2010 evaluation from Claimant's previously filed subsequent claim. (EX 4 at 3.) 2018 records from Quantum Healthcare of Cumberland note that Claimant was a never smoker. (EX 5.) And, 2018 records from the Department of Veteran's Affairs note that Claimant stopped smoking in 2006, and in November of 2011. (EX 8 at 61, 79.)

Based on Claimant's testimony and physicians' reports, I find that Claimant started smoking around 1968, smoked about 1.5 packs per day, and stopped smoking in the mid-2000s. I estimate that Claimant has an approximate 55-pack year smoking history.[9]

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9. *See Grayson Coal & Stone Co. v. Teague,* No. 16-4152, 2017 U.S. App. LEXIS 8077 (6th Cir. May 3, 2017) (holding that an ALJ is not required to make a specific finding of a claimant's smoking history when doing so would potentially misconstrue the evidence).

*Appendix E*

### 3. Usual Coal Mine Work

A miner's usual coal mine work is the most recent job that he regularly performed over a substantial period of time.[10] Claimant bears the burden to establish the exertional requirements of his usual coal mine work to provide a basis of comparison for the administrative law judge to evaluate medical assessments and reach conclusions regarding total disability.[11] Physicians' opinions may be considered where there is no such evidence.[12]

The Claimant testified that his last regular job was shuttle car operator and general inside laborer. (Tr. 30-31, 37; *see also* DX 8.) His duties included "shoveling the beltline and rock dusting." (Tr. 31.) He spent the "[m]ajority of the day" sitting while operating the shuttle car. (Tr. 31.) Claimant testified:

> Well, when you – your shuttle car, you have what you call cuts at the face. After each cut, we would have to get like – get out of the car and you help the face man when their hanging the curtain for ventilation. But, the majority of the time, I was in the machine. But, that's my – that was the main goal. But, we helped the face man

10. *See Pifer v. Florence Mining Co.,* 8 BLR 1-153, 1-155 (1985).

11. *See McMath v. Director, OWCP,* 12 BLR 1-6, 1-9 (1988).

12. *See Cregger v. U.S. Steel Corp.,* 6 BLR 1-1219 (1984).

> hang the curtains. The rest of the time, I was running – loading coal and dumping it.

(Tr. 31-32.) Claimant would average "about seven or eight cuts a day," and load "about 14 shuttle cars out of a cut." (Tr. 32.) His job required him to lift bags of rock dust weighing 10 to 20 pounds and install tubing for ventilation. Claimant testified about the strenuous activity involved in hanging tubing in place of curtains for ventilation. He testified that the heavy tubing required 2 or 3 people holding it above their heads, while standing on top of equipment. They hung the tubing and used ropes to tie it up. (Tr. 39, 40, 42.) I find that operating the shuttle car and lifting bags of rock dust did not require heavy labor, but Claimant's other job duty required heavy exertion and heavy manual labor. Therefore, I find that Claimant's usual coal mine work required heavy manual labor.

### 4. Length of Coal Mine Employment

The Claimant alleged 23 years of coal mine employment on his application for benefits. (DX 6 at 1.) At the hearing, he testified that he worked 23 years in underground coal mines. (Tr. 18.) The district director determined that "[C]laimant has proven 22 years of coal mine employment" from "1975 to January 30, 1998." (DX 35 at 12, 2.) The Employer agrees that Claimant "worked for more than fifteen years" as a miner. (Emp. Brf. at 3.) But, Employer asserts that the district director's determination of 22 years is overstated because it used an incorrect method of calculation. *(See id.)* Based on my review of the record and Employer's stipulation, I find that the Claimant worked in underground mines for more than 15 years.

**5. Responsible Operator**

Black lung benefits are payable by the miner's last coal mine employer for a cumulative period of one year which is capable of assuming liability for payment. If there is no such operator, or if the district director fails to name the appropriate responsible operator, then benefits are paid by the Black Lung Disability Trust Fund.[13]

Claimant's Social Security Earnings Records (SSER) show that he worked for the Apogee from 1993 until sometime in 1999. (DX 9 at 5.)[14] Claimant reported that he worked for "Arch of Ky" from 1984 to 1998 on his Employment History form. (DX 7 at 1.) Claimant testified that he "worked at three locations during the whole time [he] was in the mine." (Tr. 28.) He "started with U.S Steel. Then, Arch. Then, Apogee .... But, it was all for the same company." (Tr. 28.) Further, Claimant testified that he worked for Apogee from 1993 to January 30, 1998. (Tr. 26.) Moreover, Apogee and/or Arch Coal agreed that "there is no dispute that the [] last coal mine operator for whom [Claimant] worked was Apogee Coal." (Tr. 45.)

The evidence supports the conclusion that the Claimant was a miner last employed by Apogee, a mine operator, for more than 1 year. The Notice of Claim identified Apogee Coal Co "Self-insured thru Arch Coal Inc." as the potentially liable operator and insurance

13. *See* 20 C.F.R. §§ 725.490, 725.494, 725.495.

14. The district director found that the Claimant worked for "Arch of Kentucky/Apogee Coal Co from 1984 until 1/30/1998. . . . (DX 35 at 10.)

carrier. (DX 28 at 1.) The Notice of Claim was served via certified mail. *(See* DX 28 at 3.) "Apogee Coal Co. and Arch Coal, Inc." responded to the Notice of Claim that "the alleged responsible parties, have been notified that they may be responsible for the payment of compensation and other benefits. . . ." (DX 32 at 4, 5.) And, the district director "confirm[ed] the responsible operator was self-insured on the date of the miner's last employment." (DX 35 at 10.)

> Once the Director has properly named a potentially liable operator, the Director no longer bears the burden of establishing that the named operator continues to be capable of paying benefits. Rather, the regulation specifically provides 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)."[15]

Therefore, in order to be relieved of liability, Apogee must establish that it is unable to pay benefits and may only be relieved of liability if it proves that it is financially incapable of doing so.[16]

There is no evidence that Apogee is unable to assume liability in the event the Claimant is found to be eligible for

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15. *Lynch v. Old Ben Coal Co.,* BRB Nos. 10-0209 BLA and 10-0209 BLA-A (Dec. 8, 2010) (unpub.), PDF at 15.

16. 20 C.F.R. § 725.495(c). *See Borders v. A.G.P. Coal Co.,* 9 BLR 1-32, 1-34 (BRB 1986); *Gilbert v. Williamson Coal Co.,* 7 BLR 1-289, 1-294 (BRB 1984).

benefits. Apogee was self-insured through Arch Coal when the Claimant last worked. (DX 33 at 9; *see also* (Emp. Brf. (Liability) 5 (Stating that prior to 2005, "Apogee coal and the other subsidiaries did not have commercial insurance for their federal black lung claims. They were covered by a self-insurance agreement between Arch Coal and DOL").)[17] Because there is no evidence to the contrary. it is presumed that the designated responsible operator is capable of assuming liability for the payment of benefits.[18]

In 2005, Arch Coal sold all its holdings of Apogee to Magnum. Apogee and/or Arch Coal assert that with the sale, Magnum "assumed Arch Coal's past, present and future liability for BLBA claims against Apogee." In 2008, Patriot Coal Corp. acquired Magnum, including the assets of Apogee. Then, "[i]n 2011 and 2015, Arch Coal filed applications to renew its self-insurance and specifically reasserted that its self-insurance no longer included claims against Apogee." Patriot subsequently filed for chapter 11 bankruptcy. Apogee and/or Arch Coal argue that "DOL approved Arch Coal's applications and such approval released Arch Coal of any liability. . . ." (Emp. Brf. (Liability) 5-7.)

The documents Apogee and/or Arch Coal rely on in support of their assertions are not in evidence.[19] But, more importantly, the Act and its regulations "require

17. *See generally* 20 C.F.R. Part 726 Subpart B-Authorization of Self-Insures.

18. 20 C.F.R. § 725.495(b).

19. *See* May 31, 2019 order.

that every coal operator's contract of insurance contain provisions agreeing to cover fully all of the coal operator's liabilities under the [ Act]."[20] The regulations state that "[E]ach policy or contract of insurance obtained to comply with the requirements of[] the Act must contain or shall be construed to contain . .. a provision that insolvency or bankruptcy of the operator or discharge therein (or both) shall not relieve the carrier from liability for such payments.[21] Moreover, while an operator can arrange for other companies to pay the operator's federal black lung liabilities on the operator's behalf, such private contracts do not release the operator from liability imposed by the Act.[22] Apogee and/or Arch Coal assert "[w]ere the ALJ to hold Arch Coal responsible for this claim, such an action would upset contractual expectations memorialized in 2005, robbing Arch Coal of the benefit of the bargain it made when it sold the assets-and liabilities-of Apogee at a discount." (Emp. Brf. (Liability) 18.) But, Apogee cannot contract out of its liability imposed under the Act.

Because I find that the Apogee meets all the criteria of 20 C.F.R. § 725.494, I find that it was properly designated

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20. *Lovilia Coal Co. v. Williams,* 143 F.3d 317 (7th Cir. 1998).

21. 20 C.F.R. § 726.204(b).

22. *See generally U.S. Dep't of Labor v. Triplett,* 494 U.S. 715, 718 (1990) (provisions of a contract between private parties are invalid if they conflict with black lung regulations); *see also Connolly v. Pension Ben. Guar. Corp. ,* 475 U.S. 211, 223-24 (1986) ("Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them") *(quoting Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 307-308 (1935).

as the responsible operator in this case under the applicable regulations.[23]

### B. Total Pulmonary or Respiratory 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.[24] ln a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony.[25] A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of complicated pneumoconiosis, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions.[26] There is no evidence in the record that Claimant suffers from complicated pneumoconiosis or car pulmonale with right-sided congestive heart failure. Thus, I will consider pulmonary function tests, blood gas studies, and medical opinions. In the absence of contrary probative evidence,

* * * *

23. 20 C.F.R. §§ 725.491-495.

24. *See* 20 C.F.R. § 718.204(b)(1).

25. 20 C.F.R. § 718.204(d); *Tedesco v. Director, OWCP,* 18 BLR 1-103, 1-106 (BRB 1994).

26. 20 C.F.R. § 718.204(b)(2)(i)-(iv).

**APPENDIX F — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *MELTON V. APOGEE COAL*, BRB NO. 20-0115 BLA DATED AUG. 30, 2022**

**U.S. Department of Labor**
Benefits Review Board

BRB No. 20-0115 BLA

RUTLAND MELTON,

*Claimant-Respondent,*

v.

APOGEE COAL COMPANY,

and

SELF-INSURED THROUGH ARCH COAL, INCORPORATED,

*Employer/Carrier-Petitioners,*

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

*Party-in-Interest.*

DATE ISSUED: 08/30/2022

**DECISION AND ORDER**

*Appendix F*

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-05969) issued on reconsideration in regard to a subsequent claim filed on May 4, 2017[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

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

1. This is Claimant's fifth claim for benefits. On June 5, 2013, the district director denied his most recent prior claim, filed on September 17, 2012, for failure to establish total disability. Director's Exhibit 4.

2. The ALJ issued a Decision and Order Awarding Benefits on September 13, 2019. Employer timely requested reconsideration, arguing the ALJ wrongly held Arch Coal, Incorporated (Arch) liable as the responsible operator and failed to fully address its Appointments Clause challenge. *See* Employer's Oct. 11, 2019, Motion for Reconsideration. The ALJ vacated his initial decision and issued a revised Decision and Order Awarding Benefits on November 21, 2019, that is the subject of this appeal. Nov. 21, 2019 Order on Arch Coal's Motion for Reconsideration.

on the last day of Claimant's coal mine employment with Apogee. He further accepted Employer's concession that Claimant has at least fifteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement[3] and invoked the presumption of total disability due to

* * *

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.*

3. When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish a totally disabling respiratory or pulmonary impairment in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 4.

*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 attempt to show that Section 7521 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 that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied. *Pehringer*, 8 F.4th at 1137-38.

**Responsible Insurance Carrier**

Claimant last worked in coal mine employment for Apogee from 1993 to 1999.[14] Director's Exhibit 9. Apogee was self-insured through Arch when Claimant last worked for Apogee. Employer's Brief at 28; Director's Response at 2; Director's Exhibit 32. In 2005, Apogee was sold to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 28; Director's Response at 2; Director's Exhibit 32. In 2015, Patriot went bankrupt. Director's Exhibit 32.

Employer does not directly challenge its designation as the responsible operator. Rather, it asserts Arch's

14. Claimant's Social Security Earnings Records reflect income from Apogee from 1993 to 1999. Director's Exhibit 9. Claimant reported working for Apogee from 1993 to January 30, 1998. Hearing Transcript at 26. Regardless, Employer contends Arch self-insured Apogee until December 31, 2005. Employer's Brief at 28.

self-insurance obligation, and thus its liability, ended on December 31, 2005, when it sold its assets and liabilities to Magnum in 2005 and Magnum purchased insurance to cover Apogee's liabilities. Employer's Brief at 24-31. Employer further maintains the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and that the DOL endorsed this shift of liability. *Id*. Similarly, it argues that responsibility to cover this claim further ended when DOL, after the sale of Apogee's assets to Patriot, authorized Patriot to self-insure. *Id.* In addition, Employer argues DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[15] reflects a change in policy, where DOL is retroactively imposing new liability on self-insured mine operators, bypassing traditional rulemaking. *Id*. at 29-31. Finally, Employer contends the ALJ abused his discretion in denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id*. at 32-38.

The Director responds that the ALJ did not err in finding Apogee, self-insured through Arch, is the responsible operator and carrier. Director's Response at 15-18. In addition, the Director asserts that the ALJ did not abuse his discretion in denying Employer's untimely request for discovery relating to its liability. *Id*. at 18-21. Finally, the Director argues the Board need not address Employer's challenges to the BLBA Bulletin No. 16-01. *Id*. at 21-24.

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15. The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum that the DOL issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" which Patriot's bankruptcy has affected.

*Appendix F*

**Relevant Procedural History**

On May 16, 2017, the district director issued a Notice of Claim to Apogee, as self-insured through Arch. Director's Exhibit 28. The Notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id.* Employer timely responded, denying liability and requesting the district director dismiss it, arguing Patriot was the proper self-insurer. Director's Exhibit 32.

On August 18, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch, as the responsible operator. Director's Exhibit 33. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until October 17, 2017, to submit evidence in support of their positions. *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.* (citing 20 C.F.R. §725.456(b)(1)). On September 14, 2017, Arch responded that the district director had improperly designated Apogee and Arch as parties to the claim, and also designated Claimant as a potential hearing witness pertaining to its liability. Director's Exhibit 25.

The district director issued a Proposed Decision and Order on March 21, 2018, designating Apogee, self-insured through Arch as the responsible operator and carrier. Director's Exhibit 35. On April 13, 2018,

Employer objected to the award of benefits, requested certain discovery from the district director pertaining to its liability, and requested a formal hearing before an ALJ. Director's Exhibit 40. The case was transferred to the OALJ on June 13, 2018. Director's Exhibit 48.

The record does not reflect, nor does Employer argue, that it submitted any liability evidence prior to the deadline or requested an extension of time while the claim was before the district director. Nor did Employer designate any witness other than Claimant as a witness relevant to its liability while the claim was before the district director.

However, on August 3, 2018, Arch requested that the ALJ issue subpoenas compelling Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation Program employees, to appear and give deposition testimony related to Arch's liability and provide documentary evidence pertaining to its liability. The Director objected.

The ALJ quashed the subpoenas as Employer did not designate Mr. Chance or Ms. Kasmeier as liability witnesses while the case was before the district director and did not establish extraordinary circumstances for failing to do so. Sept. 12, 2018 Order on Director's Objection to Employer's Request for Subpoena (Sept. 12, 2018 Order); *see* 20 C.F.R. §725.414(c). Further, the ALJ found Employer failed to show that the documentary evidence it sought could reasonably lead to the discovery of admissible evidence and therefore rejected its discovery

request. Sept. 12, 2018 Order at 4; Fed. R. Civ. P. 26(b)(2)(C)(iii). Employer appealed the ALJ's Order to the Board, which dismissed the appeal as interlocutory. *Melton v. Apogee Coal Co.*, BRB No. 19-0012 BLA (Mar. 26, 2019) (unpub.) (Order).

Employer subsequently submitted documentary liability evidence to the ALJ marked Employer's Exhibits 10 through 15 and deposition testimony from David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation (DCMWC) employees, marked Employer's Exhibits 24 through 27. The ALJ excluded this documentary evidence because he found it was not submitted to the district director and Employer did not establish extraordinary circumstances for failing to do so. *See* 20 C.F.R. §725.456(b)(1); May 31, 2019 Order on (1) Director's Motion to Exclude Employer's Exhibits 10-15; And (2) Director's Objection to Employer's Exhibits 24-27 (May 31, 2019 Order). The ALJ also excluded the depositions because Employer did not identify the liability witnesses before the district director and did not establish extraordinary circumstances for failing to do so.[16] *See* 20 C.F.R. §725.414(c); May 31, 2019 Order.

16. We affirm the exclusion of Employer's Exhibits 10 through 15 and the deposition testimony from David Benedict and Steven Breeskin as unchallenged on appeal. *See Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); May 31, 2019 Order on (1) Director's Motion to Exclude Employer's Exhibits 10-15; And (2) Director's Objection to Employer's Exhibits 24-27 (May 31, 2019 Order).

*Appendix F*

**Exclusion of Evidence**

Employer contends the ALJ's failure to compel discovery violated its due process rights. Employer's Brief at 32-38. The Director responds that the ALJ did not abuse his discretion in 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 18-21. Employer replies that the evidence it was seeking relates not to its liability but to whether the Director improperly changed its policy through the issuance of BLBA Bulletin No. 16-01. Employer's Reply at 16-19. We agree with the Director.

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 rejected Employer's arguments that its subpoena requests and related discovery requests were not subject to the requirement to identify witnesses and submit evidence before the district director because they were directed at determining whether the DOL violated the APA. September 12, 2018 Order at 3-4; Employer's Response to Director's Objections at 9-11. Rather, he found that regardless of its characterization of its arguments, Employer was seeking evidence to challenge its liability,

and he noted Employer stated it did not develop the evidence while the case was before the district director as it had not determined "the appropriate forum **for challenging Arch Coal's liability**." September 12, 2018 Order at 4 (citing Employer's Opposition to Motion for Protective Order at 14.) (emphasis in original). We see no abuse of discretion in the ALJ's determination.[17] *Blake*, 24 BLR at 1-113. Consequently, the ALJ rationally found Employer was required to designate Mr. Chance and Ms. Kasmeier as witnesses while the case was before the district director.[18] Sept. 12, 2018 Order at 4; 20 C.F.R. §725.414(c).

The ALJ further rejected Employer's alternative argument that extraordinary circumstances exist for its failure to designate Mr. Chance and Ms. Kasmeier as liability witnesses. Sept. 12, 2018 Order at 5. As

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17. 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 and a party must notify the district director of the identity of any potential liability witnesses. 20 C.F.R. §§725.414(c), 725.456(b)(1).

18. 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 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.

Employer does not challenge the finding that it did not establish extraordinary circumstances for its failure to timely designate its witnesses, we affirm the ALJ's determination.[19] *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ acknowledges Employer might obtain otherwise admissible documents relating to its liability through discovery. Sept. 12, 2018 Order at 4 (citing 20 C.F.R. §18.51(a)). However, as Employer failed to attempt to show that the documents[20] it sought could reasonably

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19. Employer states that subjecting the development of its liability evidence to time constraints would render "the district director an inferior officer in violation of *Lucia*." Employer's Brief at 37, n.7. As Employer has offered no explanation or argument to support this assertion, we decline to address this issue, as it is inadequately briefed. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b). We further note that this argument was not raised before the district director as the regulations require. 20 C.F.R. §§725.419(b); 725.451; *see Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021).

20. Employer sought all documents used in the development and adoption of BLBA Bulletin No. 16-01, any and all documents related to Patriot's self-insurance, any plan for the disposition of Patriot's self-insurance assets, all documents related to Arch's self-insurance from July 1997 to present, all documents related to how the DOL allocates liability for coal miners who worked for Magnum on or after January 1, 2006, all documents related to the allocation of liability in cases filed before BLBA Bulletin No. 16-01 was issued involving the parental liability of a self-insured mine operator for a subsidiary or affiliated company

lead to the discovery of admissible evidence, the ALJ reasonably rejected its discovery request. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii); Sept. 12, 2018 Order at 4 (citing *Synyngy, Inc. v. ZS Assocs.*, Civ Action No. 07-3536, 2010 WL 4400064 (E.D. Pa. Nov. 4, 2010) and *Alexander v. FBI*, 194 F.R.D. 315, 325 (D.D.C. 2000)). Moreover, while Employer generally asserts it is entitled to discovery, it does not challenge the ALJ's determination that it failed to establish that the documents it sought could reasonably lead to the discovery of admissible evidence. *Skrack*, 6 BLR at 1-711; Employer's Brief at 32-38.

Consequently, we affirm the ALJ's denial of Employer's request for subpoenas and discovery. Sept. 12, 2018 Order.

**Arch's Liability**

Employer argues the ALJ erred in finding Arch is the responsible carrier. Employer's Brief at 24-31. It contends the Black Lung Trust Fund is liable because Patriot should be considered liable as Apogee's parent company that was authorized to self-insure when Claimant filed his current claim. *Id.* The Director responds that the ALJ properly found Apogee, as self-insured through Arch, is the correctly designated responsible operator and carrier. Director's Response at 14-18. We agree with the Director.

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that later became insolvent, any and all documents from 1974 to the present providing instructions to claims examiners relating to the same, and any documents relating to the DOL's Oct. 30, 2017 "Proposed Collection of Information; Comment Request." *See* Employer's Attachment to Subpoena; List of Documents to Produce at Deposition.

*Appendix F*

The ALJ found Employer met the requirements for liability under the Act. Apogee, a mine operator, employed Claimant as a miner for one year or more; Claimant was not employed by any other coal mine operator after Apogee; and Apogee was self-insured through Arch during Claimant's employment with it. Decision and Order at 6-7; 20 C.F.R. §725.494(a)-(e). Employer identifies no error in these findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1- 120-21 (1987); 20 C.F.R. §802.211(b). The ALJ also correctly found Employer did not present any evidence that Arch is unable to assume liability if Claimant is found eligible for benefits. Decision and Order at 6-7; 20 C.F.R. §§725.494(e), 725.495(a)(3).

Nor has Employer cited any authority for its argument that, while commercial insurance liability is triggered by the date of the miner's last coal mine employment, self-insurance liability is triggered by the date the claim is filed. Employer's Brief at 24-28. Employer instead cites to Claimant's most recent prior claim in which Patriot and not Arch was named the responsible carrier and to other similar cases, arguing the DOL historically has placed liability on self-insured parent companies based on the date of filing of the claim. *Id.* at 28, 31, 33.

First, we note that although Patriot was named in Claimant's 2012 claim, Arch was named the responsible carrier in Claimant's 2006 and 2010 claims, even though they were filed after Apogee was sold to Magnum and Patriot. Director's Exhibits 2-3. Arch has not attempted to distinguish those prior claims, nor did Arch argue in

those claims that Magnum or Patriot was the responsible carrier. *Id*.

Based on the evidence of record, we agree with the Director that Employer has failed to show the Director changed its policy in naming the responsible carrier. Director's Response at 22-23. Employer cites three cases in which either Patriot or Magnum was named as the responsible carrier. Employer's Brief at 28, 31, 33. 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 22-23; Director's Exhibit 4; *Massey v. Apogee Coal*, 2019-BLA-05144; *Creech v. Apogee Coal*, xxx-xx-6408; *Allen v. Hobet Mining*, 2019-BLA-06231. In this case, however, Patriot is no longer of capable of paying benefits, reflecting a change in circumstances rather than a change in the DOL's policy.

Nor is there any evidence in the record to support Employer's suggestion that the DOL endorsed a shift in liability by approving the sale of Apogee to Magnum. Employer's Brief at 28-29. As discussed above, the ALJ permissibly excluded all of the evidence Employer relies on because it was not submitted by the deadline that the district director set for the submission of liability evidence. May 31, 2019 Order; *See* 20 C.F.R. §§725.414(c), 725.456 (b)(1). Employer has not specifically challenged that ruling. *Skrack*, 6 BLR at 1-711. Thus, the ALJ accurately found "[t]he documents Apogee Coal and/or Arch Coal rely on in support of their assertions are not in evidence." Decision and Order at 7. Further Employer presented

no evidence that Apogee did not last employ Claimant or Arch is financially incapable of paying benefits. *Id.* at 6-7. Therefore, we affirm the ALJ's finding that Apogee, as self-insured through Arch, is liable for the payment of benefits. Decision and Order at 7; 20 C.F.R. §725.494.

**BLBA Bulletin No. 16-01**

Employer argues the DOL's issuance of BLBA Bulletin No. 16-01 is a new "rule" retroactively imposing new liability on self-insured mine operators, bypassing rulemaking in violation of the APA. Employer's Brief at 29-31. The Director responds that Employer's argument is irrelevant under the facts of this case. Director's Response at 21- 24. We agree with the Director because Employer failed to timely submit evidence and argument on this point, as discussed above.

Based on the evidence of record, the ALJ permissibly found Employer meets all the requirements of a potentially liable operator: Claimant's presumed total disability arose 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 6-7. Employer has not challenged any of these findings. *Skrack*, 6 BLR at 1- 711.

Moreover, the D.C. Circuit Court of Appeals rejected Employer's argument that the Bulletin is a substantive rule affecting Arch's rights and interests or governing its

liabilities in any given case. *Arch Coal, Inc. v. Acosta*, 888 F.3d 393, 500-01 (D.C. Cir. 2018). As the ALJ found, based on the record before him, Arch's liability is established under the Act and regulations. 20 C.F.R. §§725.494-495; Decision and Order at 7. We therefore reject Employer's challenges to its liability based on BLBA Bulletin No. 16-01.

**Invocation of the Section 411(c)(4) Presumption**

Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 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 all relevant supporting evidence against all relevant contrary evidence.[21] *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines*

21. The ALJ found that the new medical reports, including the new objective testing results, indicated that Claimant's condition had changed since his previous claim was denied and "accord[ed] little weight to the old reports" and tests. Decision and Order 27.

*Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found the blood gas study and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv).[22]

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

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

/s/ Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

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

22. The ALJ found the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 7-9.

## APPENDIX G — DIRECTOR'S ALJ CLOSING BRIEF IN *CASH V. ARCH OF KY/APOGEE COAL*, CASE NO. 2019-BLA-05363, FILED DEC. 5, 2019

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 2019-BLA-05363

IN THE MATTER OF MICHAEL G. CASH,

*Claimant,*

v.

ARCH OF KENTCKY/APOGEE COAL CO. INC.,

*Employer,*

and

DIRECTOR, OWCP,

*Party in Interest.*

Filed December 5, 2019

### DIRECTOR'S BRIEF

Former coal miner Michael Cash filed a claim for benefits under the Black Lung Benefits Act on August 17, 2017 (DX 2). The district director issued a proposed decision and order awarding benefits and designating Arch

of Kentucky/Apogee Coal Company as the responsible operator (DX 49) and, upon the company's request (DX 51), referred the case to the Office of Administrative Law Judges. Chief Administrative Law Paul C. Johnson scheduled a formal hearing, and then granted the parties' request for a decision on the record. This brief will be limited to the question whether Arch of Kentucky/Apogee Coal Company is the properly designated responsible operator.

## ARGUMENT

**Arch of Kentucky/Apogee Coal Company is the properly designated responsible operator.**

The Department's regulations provide that the operator responsible for the payment of benefits in a claim shall be the "potentially liable operator" that most recently employed the miner. 20 C.F.R. § 725.495(a)(1). Those regulations further provide that a "potentially liable operator" is an operator which meets each of the five conditions set forth in 20 C.F.R. § 725.494. The five conditions that must be met are: (a) the miner's disability or death arose at least in part out of employment in a mine when it was operated by the operator; (b) the operator was an operator for any period after June 30, 1973; (c) the miner was employed by the operator for a cumulative period of not less than one year; (d) the miner's employment with the operator included at least one working day after December 31, 1969; and (e) the operator is capable of assuming its liability for the payment of continuing benefits.

*Appendix G*

There appears to be no dispute that Arch of Kentucky/Apogee Coal Company is a potentially liable operator. The miner worked for Arch/Apogee from 1984 through 1993, a period of well more than one year that occurred after 1969 and 1973 (DX 12, 3). Arch of Kentucky/Apogee Coal Company is capable of assuming liability because it is self-insured through Arch Coal. Thus, Arch of Kentucky/Apogee Coal Company meets the condition set forth in § 725.494(e) and, therefore, is a potentially liable operator. It may only escape liability by proving that it is not the potentially liable operator that most recently employed claimant. 20 C.F.R. § 725.495(c)(2).

Arch of Kentucky/Apogee Coal Company has failed to establish that it is not the potentially liable operator that most recently employed claimant. According to the Social Security Records, Mr. Cash's last coal mine employment was at Arch of Kentucky/Apogee Coal from 1984 through 1993 (DX 12). Moreover, there has been no evidence submitted either before the District Director or in the record before the Administrative Law Judge to contradict that Arch of Kentucky/Apogee Coal Company is the last coal company that most recently employed Mr. Cash.

In sum, the Director has established that Arch of Kentucky/Apogee Coal Company is a potentially liable operator, and that Arch of Kentucky/Apogee Coal Company has failed to prove that it is not the potentially liable operator that most recently employed claimant.

*Appendix G*

**CONCLUSION**

For the foregoing reasons, the Director respectfully requests that the ALJ find and conclude that Arch of Kentucky/Apogee Coal Company is the properly designated responsible operator liable for any benefits that may be awarded in this case.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

TREMELLE HOWARD
Acting Regional Solicitor

THERESA BALL
Associate Regional Solicitor

/s/ MaryBeth Zamer
MARYBETH ZAMER
MSHA Counsel

U.S. Department of Labor
Attorneys for Director, OWCP

**APPENDIX H — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *CASH V. ARCH OF KY/APOGEE COAL*, CASE NO. 2019-BLA-05363 DATED FEB. 12, 2021**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE NO.: 2019-BLA-05363

IN THE MATTER OF: MICHAEL G. CASH,

*Claimant,*

*v.*

ARCH OF KENTUCKY / APOGEE COAL COMPANY Self-Insured through ARCH COAL, INC.,

*Self-Insured Employer,*

*and*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

Issue Date: February 12, 2021

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

*Appendix H*

## DECISION AND ORDER AWARDING BENEFITS

This matter arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq., and the implementing regulations at Title 20, Chapter VI, Subchapter B of the Code of Federal Regulations. Living coal miners who are totally disabled due to pneumoconiosis and surviving dependents of coal miners whose deaths were caused by pneumoconiosis may recover compensation and benefits under the Act. Pneumoconiosis, commonly known as black lung, is defined as a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments that arise out of coal mine employment. 30 U.S.C. § 902(b). In this case, Claimant alleges he is entitled to benefits under the Act because he is totally disabled due to pneumoconiosis arising out of coal mine employment. For the reasons set forth below, I find that Claimant is entitled to benefits under the Act.

### Procedural History

Claimant Michael G. Cash (Claimant or "Mr. Cash") filed his initial claim for benefits on August 17, 2017. Director's Exhibit (DX) 2. On September 19, 2018, the Director issued a Proposed Decision and Order awarding benefits to Mr. Cash. DX 49. On October 3, 2018, Employer submitted a response to the Proposed Decision and Order, requesting the matter be held in abeyance pending the resolution of a discovery dispute with the Director, or that the case be forwarded to the Office of Administrative Law Judges for formal hearing. DX 51.

*Appendix H*

The case was docketed with the Office of Administrative Law Judges on January 8, 2019 and assigned to me shortly thereafter. By order dated August 6, 2019, I granted Employer's consent motion for a decision on the record. Claimant submitted one exhibit with his pre-hearing statement.[1] Employer submitted Employer's Exhibits (EX) 1-22. The Director timely objected to the admission of EX 1-13, and the Director's objections were sustained by order dated October 28, 2019.[2] Accordingly, Claimant's Exhibit (CX) 1, EX 14-22, and DX 1-60 were admitted into the record. Employer and the Director timely filed closing briefs; Claimant declined to do so. The following decision and order is based upon a thorough review of the whole record.

## Summary of Relevant Evidence

### I. Factual Background

#### A. Claimant's Coal Mine Employment History

(1) *Employment History*, Form CM-911a (DX 3)

Claimant's employer was Arch of KY (fka US Steel) in Corbin, Kentucky. He worked in a coal prep plant from

1. Claimant indicated his intention to file medical records from Dr. Lata Shah upon receipt *See* Claimant's Pre-Hearing Statement (filed Aug. 1, 2019). However, no such records were submitted, and the time for doing so has passed.

2. Even though I decline to consider these documents in rendering a decision in this case, the excluded documents remain in the case file for purposes of appellate review.

August 1977 to March 1993. Claimant indicated the reason he stopped working there was because the mine shut down. He confirmed he was exposed to dust, gases, or fumes.

(2) *Description of Coal Mine Work and Other Employment*, Form CM-913 (DX 4)

* * *

**D. Conclusion**

I conclude Employer has failed to rebut the 15-year presumption. The evidence demonstrates Claimant does not have clinical pneumoconiosis; however, Employer did not produce credible evidence establishing Claimant does not have legal pneumoconiosis or that no part of his totally disabling respiratory/pulmonary impairment was caused by pneumoconiosis. Therefore, Claimant is entitled to benefits under the Black Lung Benefits Act. Since the evidence does not establish the month Claimant became totally disabled due to pneumoconiosis, he is entitled to benefits beginning August 2017, the month he filed his claim. 20 C.F.R. § 725.503(b).

**V. Responsible Operator**

The District Director has designated Arch of Kentucky/Apogee Coal Company as the responsible operator. When a case referred to the Office of Administrative Law Judges, the Director bears the burden of proving the designated responsible operator is a "potentially liable operator." 20 C.F.R. § 725.495(b). Employer will escape liability for

the payment of benefits if it can prove it does not possess sufficient assets to secure the payment of benefits, or it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c).

Employer will be considered a "potentially liable operator" if: (a) Claimant'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 Employer; (b) Employer was an operator for any period after June 30, 1973; (c) Claimant was employed by Employer for a cumulative period of not less than one year; (d) Claimant's employment with Employer included at least one working day after December 31, 1969; and (e) Employer is capable of assuming its liability for the payment of continuing benefits. 20 C.F.R. § 725.494.

The record demonstrates Claimant worked for Arch of Kentucky/Apogee Coal Company from 1984 until 1993. DX 3, 4, 10, 13; EX 22 at 9-10. Arch of Kentucky/Apogee Coal Company clearly qualifies as an "operator" given that it operated a coal preparation plant where Claimant worked. *See* 20 C.F.R. §§ 725.491, 725.101(a)(12); DX 3, 4. As such, the evidence clearly establishes § 725.494(b), (c), and (d). The regulations establish presumptions that (a) and (e) are met. 20 C.F.R. §§ 725.491(a), 725.495(b). Employer has not presented any evidence or argument to rebut the presumptions that Claimant's disability arose at least in part out of his employment with Employer or that Employer is capable of assuming liability for the

payment of benefits.[17] Accordingly, I find the Director has met its burden of proving Arch of Kentucky/Apogee Coal Company is a potentially liable operator.

Employer will be liable for the payment of benefits, unless it can establish it lacks sufficient assets to secure the payment of benefits or that it is not the potentially liable operator that most recently employed Claimant. Employer did not submit any evidence or argument relevant to either condition. As such, Employer has not meet its burden of proof. Accordingly, I find and conclude that Arch of Kentucky/Apogee Coal Company is the properly-designated responsible operator.

**ORDER**

Based on the foregoing, IT IS ORDERED that Michael G. Cash's claim for black lung benefits filed on August 17, 2017 is GRANTED; and Employer shall pay Claimant all benefits to which he is entitled at the rate for a miner with no dependents, commencing in August of 2017.

**SO ORDERED.**

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17. The Director contends Arch of Kentucky/Apogee Coal Company is capable of assuming liability for the payment of benefits because it is self-insured through Arch Coal, Inc. Director's Brief at 2. Employer has not presented any evidence to demonstrate that Arch of Kentucky/ Apogee Coal Company was not self-insured through Arch Coal, Inc. in March 1993, or that Arch Coal, Inc. no longer qualifies as a self-insurer. *See* 20 C.F.R. § 725.491(e)(2).

*Appendix H*

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/PML/ksw
Newport News, Virginia

**APPENDIX I — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *CASH V. ARCH OF KY/APOGEE COAL*, BRB NO. 2021-0374 BLA DATED MARCH 17, 2023**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 2021-0374 BLA

MICHAEL G. CASH,

*Claimant-Respondent,*

v.

ARCH OF KENTUCKY/APOGEE COAL COMPANY,

and

ARCH COAL, INCORPORATED,

*Self-Insured Employer-Petitioner,*

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

*Party-in-Interest.*

Date Issued: March 17, 2023

*Appendix I*

**DECISION AND ORDER**

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05363) rendered on a claim filed on August 17, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Arch of Kentucky/Apogee Coal Company (Apogee)[1] 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. He 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

1. When Claimant worked for the responsible operator, its name was Arch of Kentucky. It later changed its name to Apogee Coal Company. Employer's Brief at 3 n.1.

he 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).[2] Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Employer further argues the ALJ erred in finding Arch is the liable insurance

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

3. 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.

carrier. On the merits, it contends he erred in finding Claimant established at least fifteen years of underground coal mine employment and total disability and thus improperly invoked the Section 411(c)(4) presumption. Finally, it argues he erred in determining it did not rebut the presumption. Claimant has not filed a response brief.

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 remand the matter so that the ALJ can fully consider Employer's arguments regarding whether Apogee is the responsible operator and Arch is liable for the payment of benefits. Finally, the Director contends Employer's arguments on the merits with respect to the ALJ's reliance on the preamble to the 2001 revised regulations and the denial of Employer's discovery requests are 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).

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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 4; Hearing Transcript at 18.

*Appendix I*

**Appointments Clause Challenge**

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S., 138 S. Ct. 2044 (2018).[5] Employer's Brief at 9-14; Reply Brief at 1-3. Although

* * *

**Removal Provisions**

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 13-23. 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, supra*. *Id.* 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), as well as 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). *Id.* The Board has previously addressed and rejected these arguments

5. *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the * * *

in *Howard v. Apogee Coal Co.*, __ BLR __, BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022). For the reasons set forth in *Howard*, we reject them here.

**Responsible Insurance Carrier**

Employer does not directly challenge the ALJ's findings that Apogee is the correct responsible operator and was self-insured by Arch[10] on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 36. In 2005, after Claimant ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 44. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 23. In 2015, Patriot went bankrupt. *Id.*; Director's Exhibit 24 at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch owned

10. Employer argues the ALJ improperly named Arch Coal as the responsible operator. Employer's Brief at 40. Contrary to Employer's argument, the ALJ clearly found that Apogee is the responsible operator and it is "[s]elf-[i]nsured through Arch Coal, Inc." Decision and Order at 1. Thus he did not find "Arch Coal Inc." employed Claimant, but rather is liable as the responsible carrier. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

that company and provided self-insurance to it. Director's Brief at 16-17.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 40-53; Employer's Reply Brief at 11-25. It argues the ALJ erred in finding Arch liable for benefits because: (1) the district director improperly "pierce[d] Arch's corporate veil [to] hold it responsible for" Apogee's employee, Claimant; (2) he evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (3) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (4) no evidence establishes Arch's self-insurance covered Apogee for this claim; (5) the Director changed its policy in naming Arch as the responsible carrier; (6) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[11] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (7) the ALJ abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01 as "irrelevant" because this

11. The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Department of Labor issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" which Patriot's bankruptcy has affected.

discovery is relevant to its argument that the Bulletin violates the APA.[12] *Id.*

Remand is not required because the Board has previously considered and rejected the same and similar arguments under the same dispositive material facts in *Bailey v. E. Assoc. Coal Co.*, __ BLR __, BRB No. 20-0094 BLA, slip op. at 10-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; and *Graham v. E. Assoc. Coal Co.*, __BLR __, BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). *Bailey*, *Howard*, and *Graham* control this case and establish -- as a matter of law -- that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

**Invocation of the Section 411(c)(4) Presumption**

In order to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground or substantially similar surface coal mine

* * *

Employer makes no further argument challenging the ALJ's finding that it failed to rebut the presumption by disproving legal pneumoconiosis or establishing no part of Claimant's total disability was caused by legal

12. The ALJ denied discovery regarding BLBA Bulletin No. 16-018 because Employer failed to establish the relevance of the material it sought. July 16, 2019 Order at 5. Employer has not adequately set forth how the ALJ has abused his discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), Decision and Order at 36. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. 20 C.F.R. §718.305(d)(1)(i),(ii); Decision and Order at 23-24.

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

SO ORDERED.

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

/s/ Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

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

**APPENDIX J — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *MARY ISON V. ARCH OF KY/APOGEE COAL*, CASE NO. 2022-BLA-05606 DATED AUG. 25, 2022**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No.: 2022-BLA-05606 (so)

IN THE MATTER OF:
MARY S. ISON, s/o ROGER D. ISON,

*Claimant,*

v.

ARCH OF KY/APOGEE COAL COMPANY,

*Employer,*

and

SELF-INSURED THRU ARCH COAL INC.,

*Carrier,*

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

Issue Date: August 25, 2022

*Appendix J*

## DECISION AND ORDER AWARDING CONTINUING BENEFITS UNDER THE AUTOMATIC ENTITLEMENT PROVISION OF THE BLACK LUNG BENEFITS ACT, DENYING EMPLOYER'S MOTION FOR SUMMARY JUDGMENT, AND CANCELLING HEARING SET FOR JUNE 9, 2023

This proceeding arises from a survivor's claim for benefits filed by Mary S. Ison (Claimant) under the Black Lung Benefits Act (Act), 30 U.S.C. §901, *et seq*. This claim is currently pending before the undersigned for hearing and decision. On February 25, 2020, benefits were awarded to the Claimant's deceased spouse Roger D. Ison (Miner), under Office of Administrative Law Judges (OALJ) Case Number 2017-BLA-05578.[1]

Effective March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) amended the Act to revive Section 422(l). Section 422(l) provides that a survivor of a miner who was eligible to receive benefits at the time of death is automatically entitled to benefits without having to establish that the miner's death was due to pneumoconiosis (automatic entitlement provision). Pub. L. No. 111-148, § 1556, 124 Stat. 119 (2010), codified at 30 U.S.C. § 932(l) (2011). Specifically, it provides that:

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1. On June 12, 2020, Administrative Law Judge (ALJ) Boucher issued an Order Granting Motion for Reconsideration and Amending Decision and Order (Amended Order). This Amended Order changed the onset date; it not affect Claimant's status as an eligible survivor of the Miner.

*Appendix J*

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.

30 U.S.C. § 932(l). The automatic entitlement provision is self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193, 1-201 (BRB 2010). The PPACA applies to claims filed on or after January 1, 2005, and pending on or after March 23, 2010. 30 U.S.C. § 921(c)(4) and 932(l); 20 C.F.R. § 718.205(b)(4).

Benefits were awarded to the Miner under OALJ Case Number 2017-BLA-05575. The Decision and Order Awarding Benefits (Decision) in that claim states that the parties agreed that Claimant was the Miner's spouse and an eligible dependent. *February 25, 2020, Decision and Order* at 4. Following the Decision in the Miner's claim, the Miner died. DX 4.

On August 8, 2022, I issued an Order to Show Cause (Order) and asked the parties to show why I should not award benefits in this claim under the automatic entitlement provision. On this same day, Claimant's counsel filed a Motion for Summary Judgment (Motion), asking that this claim be awarded under the automatic entitlement provision. Claimant's Motion noted that Employer had appealed the Miner's award to the Benefits Review Board (Board) but averred that a miner's award need not be final in order to provide a basis for an award

under the automatic entitlement provision. On August 12, 2022, counsel for the Director, OWCP responded in favor of an award.

On August 19, 2022, Employer's counsel responded and argued that this claim should be placed in abeyance pending the conclusion of its appeals in the Miner's claim or, in the alternative, this claim should proceed separately from the Miner's claim. Employer avers that this claim should be placed in abeyance because "[t]he outcome of the miner's claim will affect whether Ms. Ison is entitled to automatic survivor's benefits or whether she will need to prove all of the elements of survivor's entitlement under 20 C.F.R. part 718 with evidence." Employer argues that this claim should proceed notwithstanding the Miner's claim because "[i]ssues of fact and law apart from the merits still require resolution" in this claim. Employer argues specifically that the "responsible operator, coverage and Administrative Procedure Act issues" that were raised in the Miner's claim should also be decided in this claim. In support of its argument, Employer avers that evidence that was excluded in the Miner's claim should be admitted in this claim. Employer also notes that the Claimant is receiving interim benefits.

**The Miner's claim need not be final to support an award in this claim**

Employer's appeal of the Miner's award has no bearing on whether this claim should be awarded. A miner's award need not be final in order to determine eligibility for derivative benefits under Section 932(l). *Rothwell v.*

*Heritage Coal Co.*, 25 BLR 1-141 (2014). In *Rothwell*, the Board held that an eligible survivor should be awarded benefits where a miner has been "determined to be eligible to receive benefits," not after such a determination has become final. *Id.*

**The responsible operator issue is not ripe for adjudication**

Employer concedes that the Claimant is an eligible survivor of the Miner. As such, Claimant need not relitigate the Miner's claim responsible operator issue or any of the issues associated with it in order to show entitlement under the automatic entitlement provision. *See* 30 U.S.C. § 932(l) (eligible survivors need not "revalidate" a miner's claim to be eligible for benefits). Claimant need only be an eligible survivor of a Miner who was eligible to receive benefits at the time of their death. Claimant is such. *February 25, 2020, Decision and Order Awarding Benefits* at 4 (addressing dependency) and generally (awarding benefits); DX 4 (Miner's death certificate).

If the Board or another appellate body overturns the Miner's award, then the scope of issues to be decided in this claim will change and the responsible operator issue will become ripe for litigation and adjudication. Unless this happens, however, the responsible operator issue, and the issues surrounding it need not be litigated here.

*Appendix J*

## CONCLUSION

Based on the foregoing, I find that Claimant is automatically entitled to benefits under the Act, as amended by the PPACA.

Because this decision resolves Claimant's Motion for Summary Judgment, it is **DENIED** as moot.

## DATE OF ENTITLEMENT

Pursuant to 20 C.F.R. § 725.503(c), benefits are payable beginning with the month of the Miner's death, which was December 2021. DX 4.

## ATTORNEY'S FEES

An administrative law judge may award attorney's fees in cases in which a claimant is entitled to benefits.[2] The Claimant's attorney has not yet filed an application for fees. The Claimant's attorney is hereby allowed thirty (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The other parties have ten (10) days following service of the application within which to file objections. The Act and regulations prohibit an attorney from charging the Claimant a fee in the absence of an approved application.

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2. 33 U.S.C. § 928 (incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932); *see also* 20 C.F.R. §§ 725.362-725.367

I encourage the parties to use the eFile/eServe System (EFS). Alternatively, parties may file documents by emailing them to OALJ-Cincinnati@DOL.gov.[3] **Do NOT file the same document by both email and EFS.**

**ORDER**

**IT IS ORDERED** that Claimant's claim for benefits is **GRANTED**. Benefits are payable by the Employer.

**IT IS FURTHER ORDERED** that the hearing set for June 9, 2023 is **CANCELLED**.

WILLOW EDEN FORT
Administrative Law Judge

3. If a party chooses to file a document by email, include my last name, the Claimant's last name, and case number in the subject line to ensure that the email is delivered to me. A proper email subject would read as follows: "Judge Doe; Jones v. Coal Co.; OALJ No. 2020-BLA-05555; Motion for Continuance."

**APPENDIX K — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *MARY ISON V. ARCH OF KENTUCKY/APOGEE COAL*, BRB NO. 22-0526 BLA DATED JUNE 16, 2023**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 22-0526 BLA

MARY S. ISON (SURVIVOR OF ROGER D. ISON),

*Claimant-Respondent,*

v.

ARCH OF KENTUCKY/APOGEE COAL COMPANY,

and

ARCH RESOURCES, INCORPORATED,

*Employer/Carrier-Petitioners,*

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

*Party-in-Interest.*

Date Issued: June 16, 2023

*Appendix K*

## DECISION AND ORDER

Appeal of the Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act, Denying Employer's Motion for Summary Judgment, and Cancelling Hearing Set for June 9, 2023, of Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act, Denying Employer's Motion for Summary Judgment, and Cancelling Hearing Set for June 9, 2023 (22-BLA05606) rendered on a survivor's claim filed on January 19, 2022.

The ALJ found Claimant is the widow and eligible dependent of the Miner who died on December 14, 2021.[1]

1. The ALJ accurately observed that, at the July 18, 2019 Hearing in the Miner's claim, Employer stipulated Claimant is the Miner's spouse and an eligible dependent. Decision and Order at 2; 20-0350 BLA Miner's Claim (MC) Hearing Transcript at 54-55; *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (voluntary stipulations are binding); *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996) (same).

Decision and Order at 2; Director's Exhibit 4. As the Miner was awarded benefits on his lifetime claim (2017-BLA-05578), the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

Employer appealed the ALJ's award to the Benefits Review Board. Prior to filing a brief however, Employer requested the Board to hold the matter in abeyance pending its consideration of Employer's appeal of the Miner's lifetime claim.

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.[2] 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).

Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018). The Board recently upheld the award in the miner's claim. *Ison v. Arch of Ky./Apogee Coal Co.*, BRB No. 20-0350 BLA (Nov. 30, 2022) (unpub.), *aff'd on recon.* (May 3, 2023) (Order) (unpub.). Consequently, we reject, as moot, Employer's

2. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4; MC Hearing Transcript at 22.

request to hold the case in abeyance. As Employer's challenge to the survivor's claim award was premised on its assertion that the Miner was not entitled to benefits during his lifetime and it conceded that Claimant is an eligible survivor of the Miner before the ALJ, we find it unnecessary to further delay this case and affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[3] 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act, Denying Employer's Motion for Summary Judgment, and Cancelling Hearing Set for June 9, 2023.

SO ORDERED.

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

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

/s/ Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

3. As Employer conceded Claimant is an eligible survivor of the Miner, briefing from the parties is unnecessary under the limited facts of this case.

**APPENDIX L — DIRECTOR'S ALJ CLOSING BRIEF IN *ROGER ISON V. ARCH OF KY/APOGEE COAL*, CASE NO. 2017-BLA-05578, FILED NOVEMBER 19, 2019**

**UNITED STATES DEPARTMENT OF LABOR**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

Case No. 2017-BLA-05578
OWCP No. XXX-XX-6024

IN THE MATTER OF

ROGER DALE ISON,

*Claimant,*

v.

ARCH OF KY/APOGEE COAL COMPANY,

*Employer,*

and

DIRECTOR, OWCP,

*Party-in-Interest.*

Filed November 19, 2019

**DIRECTOR'S POST-HEARING BRIEF REGARDING RESPONSIBLE OPERATOR DESIGNATION**

The Director, Office of Workers' Compensation Programs, United States Department of Labor, by counsel, submits the following brief in support of a finding

that the Employer, Arch of KY/Apogee Coal Company ("Employer"), self-insured through Arch Coal, Inc. ("Arch"), is the proper responsible operator, liable for the payment of any benefits that should be awarded in the above-referenced claim.

**Facts**

The claimant, Roger Dale Ison, filed this claim for benefits under the Black Lung Benefits Act on January 29, 2016 (DX 3). The District Director identified the Employer, self-insured through Arch, as the responsible operator (DX 29), and issued a proposed decision and order awarding benefits (DX 46-3). The Employer, disagreeing with the award, requested that the district director refer the claim to the Office of Administrative Law Judges for hearing (DX 47). The District Director referred the case on March 17, 2017. (DX 53-4).

The case was set for hearing on November 1, 2017, in Middlesboro, Kentucky. The Employer entered a "Special Appearance" and did not appear at the November 1, 2017 hearing. Ultimately, however, this case was set for a *de novo* hearing before ALJ Boucher, which took place via telephone on July 18, 2019.[1]

At the July 18th hearing, ALJ Boucher properly excluded Employer's proffered liability evidence. (EX 13 through EX 21), which had not been submitted to the

1. In this brief, "Tr." refers to the transcript of the July 18, 2019 telephone hearing.

district director in accordance with the rules. Tr. at 13. For more detail, *see* the Director's Objection to Arch Coal's Request for Subpoenas and ALJ Boucher's Order Denying Request for Subpoenas issued May 24, 2019, in this case.

**Argument**

The Employer has been properly designated the responsible operator in this black lung claim. Mr. Ison worked for the Employer from 1976 to 1991. DX 9; Tr. at 24. At the time Mr. Ison ended his employment with the Employer, the Employer was a subsidiary of and self-insured through Arch.[2] Under these circumstances, it is appropriate to identify the Employer as the responsible operator in this claim. 20 C.F.R. § 725.494(c) (an operator may be considered a "potentially liable operator" if "[t] he miner was employed by the operator for a cumulative period of not less than one year."); *see also* 20 C.F.R. § 725. 495 (a)(1) ("[t]he operator responsible for the payment of benefits in a claim adjudicated under this part (the 'responsible operator') shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner").

2. Because Mr. Ison' s employment with the Employer ended in 1991 and Patriot was not created until 2008, he never worked for Patriot or any Patriot-owned subsidiary.

**a. The Employer satisfies the criteria for a potentially liable operator as set forth in 20 C.F.R. § 725.494(a)(e).**

A potentially liable operator is an operator that meets each of five conditions set forth in 20 C.F.R. §725.494(a) through (e). The Director bears the burden of proving that the designated responsible operator is a potentially liable operator. 20 C.F.R. § 725.495(b). Once the Director has met this burden, the burden shifts to the designated responsible operator to prove that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). In order to meet its burden, the operator must demonstrate that a more recent operator meets each of the requirements set forth in 20 C.F.R. § 725.494. *Id.* § 725. 495(c)(2). The burdens of proof provided in Section 725.495 are rational and consistent with the Administrative Procedure Act. *See Nat'l Mining Ass'n v. Dep't of Labor,* 292 F.3d 849, 871-72 (D.C. Cir. 2002).

The Director has met her burden of showing that the Employer is the responsible operator. 20 C.F.R; §§ 725.494(a)(e), 725.495. "The operator responsible for the payment of benefits in a claim shall be the potentially liable operator, as determined in accordance with§ 725.494, that most recently employed the miner." 20 C.F.R. § 725.495 (a)(1). The Employer is the responsible operator under this standard. It is undisputed that Mr. Ison was not employed by another operator that qualifies as a potentially liable operator after he stopped working for the Employer. Thus, the Employer is liable.

Pursuant to 20 C.F.R. § 725.494, the Employer qualifies as a potentially liable operator because (1) Mr.

Ison's disability is alleged to have arisen at least in part from employment in a mine while it was operated by the Employer; (2) the Employer operated a coal mine after June 30, 1973; (3) the Employer employed Mr. Ison for at least one year; (4) that employment included at least one working day after December 31, 1969; and (5) the Employer is capable of assuming liability for the payment of benefits. Absent contradictory evidence, it is presumed that the named responsible operator is financially capable of paying benefits. 20 C.F.R. § 725.495(b); 20 C.F.R. § 725.494(e).

The Employer can pay for benefits because it was self-insured through Arch at the time it last employed Mr. Ison (DX 23-1). On Mr. Ison's last date of employment with Arch of KX/Apogee Coal Co., it was a subsidiary of Arch and self-insured through Arch. Because the Employer was self-insured by Arch at the time it employed Mr. Ison, and Arch still qualifies as a self-insurer, the Employer is financially capable of assuming liability for the payment of any benefits that may be awarded.[3] 20 C.F.R. § 425.494(e)(2).

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3. Although Arch commenced a case under chapter 11 of the Bankruptcy Code in January 2016, it reorganized and emerged from bankruptcy nine months later. Under the terms of Arch's plan of reorganization and the bankruptcy court order confirming it, the bankruptcy did not impact Arch's obligation to satisfy its black lung liabilities. *See* Exhibit A, Order Confirming Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, at ¶ 77 ("Nothing in the Plan or this Confirmation Order . . . releases, discharges, exculpates, precludes, or enjoins the enforcement of . . . any liability or obligation of the Debtors, the Reorganized Debtors, or any predecessor thereto under. the Black Lung Benefits Act, 30 U.S.C. §§ 901-944 . . . ."). The ALJ may take official notice of this and other court documents. *See Hill v. Avondale Industries.,* 32 BRBS 186 (1998).

Furthermore, the Director is not required to introduce evidence that the Employer has sufficient funds to pay benefits. *See* 20 C.F.R. § 725.495(b) ("It 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)."); *see also* 20 C.F.R. § 725.495(c) ("The designated responsible operator shall bear the burden of proving either: (1) That it does not possess sufficient assets to secure the payment of benefits in accordance with § 725.606; or (2) That it is not the potentially liable operator that most recently employed the miner.") Therefore, to defeat the presumption that the Employer is able to pay benefits in this claim, the Employer must prove that it does not possess sufficient assets to do so. The Employer has not done so.[4] The Employer is therefore the responsible operator.

**b. The Employer's arguments as to why it is not the proper responsible operator fail to relieve it from liability.**

During the pendency of this claim, the Employer has argued that it should not be held liable as the responsible operator because Patriot Coal Corporation ("Patriot") should be liable instead (DX 53). In light of Patriot's bankruptcy, the Employer further argues that the Black Lung Benefits Trust Fund ("Trust Fund") should be liable. The Employer's arguments must be rejected.

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4. The Employer instead argues that events occurring after Mr. Ison ceased working for the employer absolve it of liability for claims against the Employer (DX 53). For reasons explained in section b, the Employer is wrong.

The Employer's liability is straightforward. In 1991, when Mr. Ison last worked for the Employer, that company was a subsidiary of Arch and covered by Arch's self-insurance authorization (DX 23). The Employer has argued that instead of naming it the responsible operator, the Department should have named Patriot as the responsible operator (DX 53). But Mr. Ison never worked for Patriot or a Patriot-owned subsidiary. Indeed, Patriot did not even exist until 2008, approximately seventeen years after Mr. Ison's last coal-mine employment.

Moreover, the Employer has never been released from liability for black lung claims by miners who last worked for subsidiaries while those subsidiaries were owned by Arch. On Mr. Ison' s last day of work for the Employer, the company was an Arch subsidiary covered by Arch's self-insurance. Through a series of transactions years after Mr. Ison stopped working for the Employer, the company was acquired by Magnum Coal Company, which was in turn acquired by Patriot (DX 53). But even assuming that certain contract terms purport to release Arch from liability for federal black lung claims, they cannot do so. *See U.S. Department of Labor v. Triplett,* 494 U.S. 715, 718 (1990) (provisions of a contract between private parties are invalid if they conflict with black lung regulations); *see also Connolly v. Pension Ben. Guar. Corp.,* 475 U.S. 211, 223-24 (1986) ("Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.") (quoting *Norman v. Baltimore & Ohio R.* Co., 294 U.S. 240, 307-308 (1935)); *Lovilia Coal Co. v. Williams,* 143 F.3d 317 (7th Cir. 1998). (holding that insurance contract could not be construed to limit an insurer's liability under the Black Lung Benefits Act);

*Appendix L*

*Curry v. Eagle Energy, Inc.*, Case No. 2013-BLA-05263, slip op. at 7 (July 28, 2016) (where regulations clearly impose liability on an employer, contractual provisions to the contrary do not control).

Patriot obtained authorization to self-insure its federal black lung liabilities in 2011. This authorization was retroactive, meaning that Patriot was liable for black lung claims based on employment with Patriot subsidiaries both before and after Patriot owned those subsidiaries. But Arch was never released from liability for the claims of miners who worked for it if Patriot's self-insurance failed. After filing for bankruptcy in 2015, Patriot's self-insurance did fail. Arch remains liable for the claims of miners who worked for it and never for Patriot or one of its subsidiaries, as in this case. For that reason, the District Director properly named Arch as the Employer's self-insurer after Patriot's·self-insurance funding failed.

If the Employer were to suggest that the security posted by Patriot as a condition of its self-insurance authorization could be used to pay Mr. Ison, then the Employer would be incorrect. That security was fully exhausted by claims of miners who, *unlike* Mr. Ison, worked for Patriot after Patriot acquired the Aich subsidiaries. Exhibit B, Proof of Claim filed in Patriot Bankruptcy, Declaration of Michael Chance at ¶¶ 3, 7. The Employer, self-insured through Arch, was the last entity to employ Mr. Ison for one year and it is financially capable of paying benefits in this case because it was self-insured and was properly identified as the responsible operator.

Employer has also argued that 20 C.F.R. § 725.495 (a)(4) precludes it from being the responsible operator in this case. (DX 53-20). "The Employer misreads the regulation. Section 725.495(a)(4) provides that if the miner's most recent employer is self-insured and no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be named as the responsible operator and liability falls to the Trust Fund. 20 C.F.R. § 725.495(a)(4). Because Patriot did not employ Mr. Ison, its inability to pay benefits did not trigger section 725.495(a)(4) and bar the Employer's designation as the responsible operator.[5]

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5. In another case in which Arch raised similar arguments, ALJ Johnson rejected them. *See Halcomb v. Arch of Kentucky/ Apogee Coal* Co., *and Director, OWCP,* Case Nos. 2017-BLA-5938 and 2017-BLA-5537, Order (1) Denying Motion for Abeyance or to Cancel the Hearing and Provide a Schedule for Discovery on Liability; ( 2) Granting Director's Motion for Partial Summary Decision; and (3) Awarding Benefits, Nov. 30,. 2017.

In cases in which Peabody Energy Corporation ("Peabody") has raised similar, Patriot-related arguments against Peabody's liability, ALJs have rejected those arguments as well. *See Adkins v. Eastern Assoc. Coal Co., Peabody Energy Corp., and Director, OWCP,* Case. No. 2017-BLA-5130, Order Denying Employer's Motion to Dismiss Peabody Energy, Oct. 6, 2017; *Burns v. Pine Ridge Coal Co., Peabody Energy, and Director, OWCP,* Case No. 2017-BLA-5319, Order Denying Employer's Motion to Bifurcate, Nov. 3, 2017; *Duncan v. Martinka Coal Co., Peabody Energy Corp., and Director, OWCP,* Case No. 2017-BLA-5074, Order Denying Employer's Motion to Dismiss Martinka Coal Co. and Peabody Energy/Motion to Designate as Trust Fund Case, Reiterating Denial of Employer's Request for Extension of Discovery, and Excluding Employer's Exhibit 9-15, Nov. 30, 2017.

*Appendix L*

**Conclusion**

For the foregoing reasons, the Director respectfully requests that the ALJ find the Employer to be the proper responsible operator, liable for the payment of any benefits that may be awarded in this claim.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

TREMELLE HOWARD
Acting Regional Solicitor

THERESA BALL
Associate Regional Solicitor

/s/ Christopher M. Smith
CHRISTOPHER M. SMITH
Attorney

U.S. Department of Labor
Attorney for the Director

**APPENDIX M — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *ROGER ISON V. ARCH OF KY/APOGEE COAL*, CASE NO. 2017-BLA-05578 DATED FEB. 25, 2020**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No.: 2017-BLA-05578

IN THE MATTER OF: ROGER DALE ISON,

*Claimant,*

v.

ARCH OF KY/APOGEE COAL COMPANY,

*Employer,*

and

ARCH COAL, INC.,

*Carrier,*

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

Issue Date: February 25, 2020

*Appendix M*

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 Roger Dale Ison ("Claimant") against Arch of KY/Apogee Coal Company ("Apogee"), as insured by Arch Coal, Inc. ("Arch"),[1] under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2019) ("Act"). The Act and its implementing regulations, 20 C.F.R Parts 718 and 725 (2019), 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 or while disabled by 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 ("ALF) 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 M*

## I. Procedural History

On September 18, 1992, Claimant filed a claim for benefits under the Act. (DX 1 at 296)[2] On May 1, 1996, the ALJ denied benefits in a Supplemental Decision and Order on Remand, finding that Claimant had not established that he suffers from pneumoconiosis or that he is totally disabled. (DX 1 at 69.) Claimant appealed to the Benefits Review Board ("Board"), which affirmed the ALJ's denial of benefits on January 29, 1997. (DX 1 at 2.)[3]

On January 29, 2016, Claimant filed the current claim. (DX 3.) Because this claim was filed more than one year after the denial of Claimant's prior claim, it is considered a "subsequent claim" pursuant to 20 C.F.R. § 725.309(c). On December 8, 2016, the district director issued a Proposed Decision and Order awarding benefits. (DX 46.) On January 4, 2017, Employer appealed. (DX 47.) On March 17, 2017, the district director referred this claim to OALJ. (DX 53.)

On July 18, 2019, I held a telephonic hearing in this matter. Claimant testified at the hearing. Claimant's counsel and Employer's counsel participated in the

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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 18, 2019.

3. Claimant filed a subsequent claim on September 3, 2013. However, because this claim was withdrawn, it is considered not to have been filed. 20 C.F.R. § 725.306(b).

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 the deadline for briefs as November 29, 2019. Claimant, Employer, and the Director each timely submitted 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 31, 2020, the Director submitted an amended post-hearing brief that does not contain the two exhibits or any reference thereto. 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.

* * *

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. 150294 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.

## IX. Pneumoconiosis Causation

If Claimant establishes the existence of legal pneumoconiosis, it is not necessary to separately determine the etiology of the disease under § 718.203 because a finding of legal pneumoconiosis, pursuant to §§ 718.201(a)(2) and 718.202(a)(4), necessarily subsumes that inquiry. *See Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-256, 1-259 n.18 (2006). Additionally, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that his clinical pneumoconiosis arose out of coal mine employment. § 718.203(b); *Andersen v. Dir., Office of Workers' Comp. Programs*, 455 F.3d 1102 (10th Cir. 2006),

Here, Claimant has established the existence of both clinical and legal pneumoconiosis by operation of the § 718.305 presumption (and Employer's failure to rebut that presumption). Additionally, Claimant has established that he engaged in more than ten years of coal mine employment, so Claimant may invoke the § 718.203(b) presumption.[20] Therefore, Claimant has established, by a preponderance of the evidence, that his pneumoconiosis arose from his coal mine employment.

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20. Employer has presented no evidence that the source of Claimant's clinical pneumoconiosis was any cause other than coal mine dust exposure, so Employer has not rebutted the presumption that his clinical pneumoconiosis arose 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.

## IX. 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").

Employer explains that, on Claimant's last day of employment, Apogee was self-insured through Arch. According to Employer, Arch sold Apogee's 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.[21] In 2015, Patriot filed for bankruptcy. In 2015, the Department issued Bulletin 16-01, which, according to Employer, effectively imposed

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

liability on Arch for certain claims, including this one. Employer's legal challenge to the Bulletin was dismissed by a federal 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, and Employer notes that the Department has not provided an accounting of the assets it received from Patriot or explained why those assets could not be applied to this claim.

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 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.[22] 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. Because there is no evidence that Arch had any obligation to insure Apogee's liabilities after 2005, Employer concludes Arch must be dismissed from this claim.

Employer next asserts Arch is not a responsible operator 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).

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

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 argues that the Department's actions and its interpretation of the applicable regulations constitutes 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;[23]

(2) the potentially liable operator operated a coal mine after June 30, 1973;

(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

23. 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).

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 March 15, 2016. (DX 23.) 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 June 29, 2016. (DX 29.)[24]

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24. Specifically, the notices name "Arch of KY/Apogee Coal Co. LLC" as the potentially liable operator and then the designated responsible operator. *See supra* note 9; *see also* Order Denying Motion to Transfer Liability (July 10, 2019) (finding Arch was properly notified of this claim).

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 1976 to 1991.[25] (Tr. 21-24, 38-39; DX 3; DX 4; DX 6; DX 7; DX 8; DX 9; DX 42.) 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.[26] 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

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25. *See* Part V.A, *supra.*

26. 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 May 24, 2019, Order Denying Request for Subpoenas, I determined extraordinary circumstances are not present here.

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.

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 9; Tr. 24.) 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.[27] 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 C.F.R. § 725.492(d).[28] Therefore, Employer has not shown that it is not liable under § 725.495(c)(1).

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27. 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.

28. 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.

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.

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 23; DX 29; DX 46.) 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,[29] 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

29. 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.

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 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. Employer concludes that the Department has improperly imposed "perpetual parental liability for an subsidiary coal mine operators even when the parent has sold the subsidiary and its liability to a willing buyer and the purchase price reflects the buyer's adoption of the liability." (Empl. Brief at 25.)

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 May 24, 2019, Order Denying Request for Subpoenas, and my July 10, 2019, Order Denying 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 "to impose 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

20.) 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 May 24, 2019, Order 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.[30] Rather, it is the Act itself and the 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

30. Likewise, any argument that the Department released Arch from liability also fails because, though an operator choosing to self-insure is required to receive authorization from the Department, it is not the Department's actions that create liability.

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.[31]

## X. 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*, 11 B.L.R. 1-32 (1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990).

Claimant argues that the onset date should be January 2013 based on Claimant's qualifying pulmonary function test administered by Dr. Alam. (DX 17 at 94.) Claimant asserts he has proven that his pulmonary disability is caused by pneumoconiosis, so his benefits should be awarded as of the date he first proved total pulmonary disability.

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31. 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.

*Appendix M*

The pulmonary function test on which Claimant relies to make this argument is contained in his treatment records, and no party designated it as affirmative evidence. (DX 17 at 94.) The test is not in fact qualifying for disability. Though the $FEV_1$ value (1.67) is qualifying, neither the FVC value (2.70) nor the $FEV_1$/FVC ratio (62% is qualifying), and the MVV was not measured.

**APPENDIX N — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *ROGER ISON V. ARCH OF KENTUCKY/APOGEE COAL*, BRB NO. 20-0350 BLA DATED NOV. 30, 2022**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 20-0350 BLA

ROGER DALE ISON,

*Claimant-Respondent,*

v.

ARCH OF KENTUCKY/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: 11/30/2022

**DECISION AND ORDER**

*Appendix N*

Appeal of Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order (2017-BLA-05578) rendered on a miner's subsequent claim filed on January 29, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Apogee Coal Company doing business as Arch of Kentucky (Apogee) is the responsible operator and Arch Coal, Incorporated (Arch Coal) is the responsible carrier. On the merits, she found Claimant established 15.23 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition

1. Claimant filed an initial claim on September 18, 1992, which was denied in a decision issued by All Charles P. Rippey that the Benefits Review Board affirmed on January 29, 1997, for failure to establish total disability. Director's Exhibit 1 at 3-4; *see Ison v. Arch of Ky., Inc.,* BRB No. 96-1048 BLA (Jan. 29, 1997) (unpub.). Claimant took no further action on that claim. *See* Director's Exhibit 1.

of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Further, she concluded Employer did not rebut the presumption and awarded benefits commencing January 2016, the month in which Claimant filed his claim. However, after considering Claimant's Motion for Reconsideration, the ALJ amended her Decision and Order to reflect benefits commence in March 2015.

On appeal, Employer argues remand is required because removal provisions applicable to ALJs render her appointment unconstitutional. It further argues the ALJ erred in finding Arch Coal is the liable insurance carrier. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and

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2. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish a totally disabling respiratory or pulmonary impairment in his prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id.*

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

that Employer did not rebut it. It further challenges the All's finding on reconsideration that benefits commence in March 2015. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenge and her conclusion that Employer is the responsible operator. Employer filed a combined reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the All's Decision and Order and Order on reconsideration if they are 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'Keefe 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 17-21; Employer's Reply Brief at 5-8. 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

4. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as 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 4; Hearing Transcript at 22.

and the Solicitor General's argument in *Lucia v. SEC,* 585 U.S. —, 138 S. Ct. 2044 (2018).[5]

Employer's Brief at 13-17; Reply at 1-4. Employer also 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), as well as the United States Court of Appeals for the Federal Circuit's holding 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 13-17; Reply at 1-4.

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). The Board also rejected this argument in *Howard v. Apogee Coal Co.,* BLR —, BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022).

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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)).

*Appendix N*

**Responsible Insurance Carrier**

Employer does not challenge the All's findings that Apogee is the correct responsible operator and was self-insured by Arch Coal on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 3944. In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 24, 31. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 16. In 2015, Patriot went bankrupt. *Id.;* Director's Exhibit 24 at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal ofliability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company, as the Director states. Director's Brief at 16-17.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 20-32. It maintains the DOL is estopped from holding it liable because the district director: (1) did not properly serve it with notice of the claim; and (2) did not identify it as the liable carrier in his Proposed Decision and Order (PDO), nor properly

serve the PDO on the company. Employer's Brief at 20-22. Employer further maintains the All erred in finding Arch Coal liable for benefits because: (3) the district director is an inferior officer not properly appointed under the Appointments Clause;[6] (4) he evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (5) the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (6) the Director changed its policy in naming Arch Coal as the responsible carrier; (7) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[7] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (8) the All abused her discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id.* at 22-32.

The Board has previously addressed arguments (2) through (8) and rejected them in *Bailey v. E. Assoc. Coal Co.,* BLR —, BRB No. 20-0094 BLA, slip op. at 3-13 (Oct. 25, 2022) (en Banc); *Howard,* BRB No. 20-0229 BLA, slip op. at 5-16; and *Graham v. E. Assoc. Coal Co.,* BLR —,

6. Employer first contested the district director's appointment in its closing brief to the ALJ. Employer's Closing Brief at 32.

7. The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Department of Labor issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" which Patriot's bankruptcy has affected.

BRB No. 20-0221 BLA, slip op. at 6-7 (June 23, 2022). For the reasons set forth in *Bailey, Howard,* and *Graham,* we reject Employer's arguments with regard to arguments (3) through (7). We also reject Employer's argument (2) concerning the adequacy of the district director's service of the notice of the claim and the PDO, and argument (8) concerning the All's denial of discovery. In order to establish the relevant factual context for those issues, we describe the relevant procedural history in this case below.

**ALJ's Denial of Discovery**

On March 15, 2016, the district director issued an Amended Notice of Claim, identifying Apogee, self-insured through Arch Coal, as the potentially liable operator and self-insurer for the claim.[8] Director's Exhibit 23. The Notice gave Employer thirty days

* * *

8. The district director erroneously served the initial February 8, 2016 Notice of Claim to "Underwriters Safety & Claims," the wrong third-party claims administrator for Arch Coal. Director's Exhibits 22, 24, 25. On March 4, 2016, counsel for Arch Coal filed his combined appearance and response, notifying the district director of the error and identifying HealthSmart Casualty Claims Solutions as the correct claims administrator. Director's Exhibit 24. On March 15, 2016, the district director dismissed Underwriters as

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

## APPENDIX O — DIRECTOR'S ALJ CLOSING BRIEF IN *CREECH V. APOGEE COAL*, CASE NO. 2018-BLA-06053, FILED JULY 17, 2019

UNITED STATES UEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case Nos. 2018-BLA-06053

IN THE MATTER OF RUSH CREECH,

*Claimant,*

v.

APOGEE COAL CO. INC.,

*Employer,*

and

DIRECTOR, OWCP,

*Party in Interest.*

### DIRECTOR'S BRIEF

Former coal miner Rush Creech, filed a claim for benefits under the Black Lung Benefits Act on July 28, 2016 (DX 3). The district director issued a proposed decision and order awarding benefits and designating Apogee Coal Company as the responsible operator (DX 32) and, upon the company's request (DX 38), referred

the case to the Office of Administrative Law Judges. Administrative Law Judge Morris conducted a formal hearing on April 15, 2019. This brief will be limited to the question whether Apogee Coal Company is the properly designated responsible operator.

## ARGUMENT

### Apogee Coal Company is the properly designated responsible operator.

The Department's regulations provide that the operator responsible for the payment of benefits in a claim shall be the "potentially liable operator" that most recently employed the miner. 20 C.F.R. § 725.495(a)(l). Those regulations further provide that a "potentially liable operator" is an operator which meets each of the five conditions set forth in 20 C.F.R. § 725.494. The five conditions that must be met are: (a) the miner's disability or death arose at least in part out of employment in a mine when it was operated by the operator; (b) the operator was an operator for any period after June 30, 1973; (c) the miner was employed by the operator for a cumulative period of not less than one year; (d) the miner's employment with the operator included at least one working day after December 31, 1969; and (e) the operator is capable of assuming its liability for the payment of continuing benefits.

There appears to be no dispute that Apogee Coal Company is a potentially liable operator. The miner worked for Apogee Coal Company at a surface operation from 1993 until 1999, a period of well more than one year

that occurred after 1969 and 1973 (DX 4, DX 6, DX 7, Tr. p. 22). Apogee Coal Company is capable of assuming liability because it is self-insured through Arch Coal. Thus, Apogee Coal Company meets the condition set forth in § 725.494(e) and, therefore, is a potentially liable operator. It may only escape liability by proving that it is not the potentially liable operator that most recently employed claimant. 20 C.P.R. § 725.495(c)(2).

Apogee Coal Company has failed to establish that it is not the potentially liable operator that most recently employed claimant. According to the Social Security Records, Mr. Creech's last employment of any kind was at Apogee Coal from 1993 through 1999. Mr. Creech testified at the hearing that he worked at the tipple for Apogee from 1993 until 1998 (Tr. p. 22). He stated that he worked in 1998 until the mine was shut down and then he retired (Tr. p. 36-7). Moreover, there has been no evidence submitted either before the District Director or at the hearing to contradict that Apogee Coal Company is the last coal company that most recently employed Mr. Creech.

ln sum, the Director has established that Apogee Coal Company is a potentially liable operator, and Apogee Coal Company has failed to prove that it is not the potentially liable operator that most recently employed claimant.

**CONCLUSION**

For the foregoing reasons, the Director respectfully requests that the ALJ find and conclude that Apogee Coal

Company is the properly designated responsible operator liable for any benefits that may be awarded in this case.

Respectfully submitted,

Kates. O'Scannlain
Solicitor of Labor

Stanley E. Keen
Regional Solicitor

Theresa Ball
Associate Regional Solicitor

/s/ Marybeth Zamer
Marybeth Zamer
MSHA Counsel

U.S. Department of Labor
Attorneys for the Director, OWCP

**APPENDIX P — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *CREECH V. APOGEE COAL*, CASE NO. 2018-BLA-06053 DATED MAY 11, 2020**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No.: 2018-BLA-06053

IN THE MATTER OF RUSH CREECH,

*Claimant,*

v.

APOGEE COAL CO., LLC, *et al.*,

*Employer,*

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

Issue Date: May 11, 2020

Before: SCOTT R. MORRIS
Administrative Law Judge

*Appendix P*

## DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

The Act awards benefits to coal miners who are totally disabled due to pneumoconiosis, or to the survivors of coal miners whose deaths were due to pneumoconiosis. Pneumoconiosis, commonly known as "black lung," is a disease of the lungs resulting from coal dust inhalation.

### I. PROCEDURAL BACKGROUND

This matter involves a subsequent claim. Claimant filed the current claim for benefits on July 28, 2016. DX 3.[1] By Proposed Decision and Order dated March 27, 2018, the District Director, Office of Workers' Compensation Programs awarded benefits based on a finding that Claimant had met all elements for entitlement. DX 32. Employer requested a formal hearing and on May 16, 2018, the District Director referred this matter to the Office of Administrative Law Judges ("OALJ"). DX 42. Subsequently, this Tribunal received assignment of this matter and issued the Notice of Hearing on August 6, 2018.

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1. This Decision uses the following abbreviations: "DX" (Director's Exhibits); "CX" (Claimant's Exhibits); "EX" (Employer's Exhibits); and "Tr." (Transcript of the April 15, 2019 hearing).

At the hearing, the undersigned admitted DX 1 through DX 51[2], CX 1 through CX 3, and EX 1 through EX 5.[3] Tr. at 6-10. The Tribunal set July 19, 2019 as the deadline for the submission of closing briefs. Tr. at 63. Employer and Director timely submitted their closing briefs; however, Claimant did not submit a brief.

On May 13, 2019, the Tribunal received Claimant's Motion to Extend. Claimant's Counsel requested an additional 5 days to turn over radiographic films that Claimant had taken shortly before the hearing. Claimant explained that Claimant's Counsel had been ordered to turn over an MRI that Claimant had taken shortly before the hearing for treatment purposes to Employer.[4] Claimant's Counsel also indicated that the radiographic films were CT scans (there were two CT scans recently taken) and not an MRI, and that both parties had agreed to allow Counsel for Employer several more days to obtain the CT Scan. Claimant's Counsel and Employer's Counsel

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2. On 09/04/2018, the Director notified the Tribunal that the Director's Exhibits were misnumbered beginning with DX 16. Thus references to DX are based on the numbering that appears on the exhibits themselves and not as they appear on the table of contents.

3. Employer offered EX 6 through EX 21 at the hearing but the undersigned did not accept them. Tr. at 10-11. Those exhibits pertained to Employer's liability argument as the Responsible Operator. The undersigned explained that the evidence should have been presented first at the District Director level which Employer failed to do.

4. *See* Tr. at 57-59.

also agreed that they would not oppose a reasonable extension of time for the submission of the readings of the two CT Scans.

After the hearing, Employer submitted EX 22 and offered it into the record.[5] Employer explained that the submission was timely and that the undersigned had left the record open post hearing for Employer to receive, review, and respond to the CT scans.[6]

Given the development of the existence of the CT Scan at the hearing, the fact that both parties had an understanding that Claimant was ordered to turn over the radiographic film to Employer, and the fact that both parties agreed that they would not oppose a reasonable extension of time for the submission for the readings of the two CT Scans, the undersigned formally admits EX 22 into evidence.

## II. ISSUES

At the hearing, the parties stipulated to the following issues:

1. That Claimant is a miner;

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5. The Tribunal received Employer's filing on May 30, 2019. The filing contained a revised evidence summary form and Dr. Meyer's reading of the 12/31/2018 and 1/16/2019 CT scans.

6. Tr. at 57-59; *see also infra* Factual Background and Testimonial Evidence.

Accordingly, Claimant has established that his 29.47 years of coal mine employment are qualifying under the Act.

### c. Responsible Operator

The responsible operator is the "potentially liable operator" who most recently employed Miner for a year, or periods of cumulative employment of not less than one year. § 725.495. The Director bears the burden to show that Employer is a potentially liable operator within the meaning of § 725.494. § 725.495(b). Once the Director shows that Employer meets the first four conditions necessary for an employer to be considered a potentially liable operator (*see* § 725.494(a)-(d)), the burden shifts to Employer to demonstrate either that that (1) it does not possess sufficient assets to secure payment of benefits, or (2) that it is not the potentially liable operator that most recently employed the miner. § 725.495(c).

Employer does not contend that it does not possess sufficient assets to secure payment of benefits, nor does it allege that any other potentially liable operator more recently employed Claimant. Rather, Employer argues that Arch Coal should be dismissed because Arch Coal is neither an operator nor employer and that the DOL authorized its self-insurance program which excluded

coverage for Apogee. *See* Employer's Closing Brief at 12-16.[16]

Arch Coal sold Apogee to Magnum (which is unrelated to Arch Coal). Emp. Br. at 9. Magnum in turn assumed all of Arch Coal's BLBA liability—past, present, and future. *Id.* at 9-10. DOL was informed of the sale and Magnum's assumption of Arch Coal's liability. *Id.* at 10. DOL also approved Arch Coal's renewal of its self-insurance, which excluded Apogee. *Id.* Patriot coal later bought out Magnum and thus gained ownership of Apogee. *Id.* at 11. Patriot filed for bankruptcy in 2015. *Id.* DOL issued BLBA Bulletin 16-01, which directed DOL Claims Examiners to identify Arch Coal as the responsible party for claims involving Apogee. *Id.*

The Director argues that Apogee Coal is the properly designated responsible operator since it meets the conditions of potentially liable operator under the regulations. *See* Director's Closing Brief. Claimant worked for Apogee Coal Company from 1993 until 1999 and Apogee Coal is capable of assuming liability because it is self-insured through Arch Coal. *Id.* at 2. Also no evidence was submitted at the hearing nor at the District Director level to demonstrate that Apogee Coal is not the last coal mine company to most recently employ Claimant. *Id.*

16. Employer's Closing Brief will be cited at Empl. Br. followed by the page number.

At the hearing, Employer sought to introduce evidence regarding its liability (or lack thereof). Tr. at 8-10. The undersigned did not allow the evidence into the record because Employer essentially waived its liability argument by failing to present them at the District Director level. Tr. at 13. The undersigned reiterated that he addressed Employer's failure to offer evidence of its incapability to assume liability in previous orders, thus preserving Employer's liability contentions for appeal. *See* Tr. at 14-16.

The Tribunal finds that Apogee Coal Company was properly identified as the responsible operator and that Employer has not established that there is any other operator that qualifies as a potentially liable operator. Claimant's Social Security Earnings record shows that he worked for Employer from 1993 to 1998 and no more recent coal mine employment appears in the record. DX 7. Claimant's testimony and reported coal mine employment history line up with this finding. Thus, Employer is the most recent potentially liable operator to employ Claimant for a period of one year. For these reasons, the Tribunal finds that the Director correctly designated Employer as the responsible operator in this claim.

**d. Claimant's Usual Coal Mine Work**

A claimant bears the burden to establish the exertional requirements of his usual coal mine employment. *See McMath v. Dir., OWCP*, 12 B.L.R. 1-6 (1988). The Board has held that a miner's "'usual coal mine work' is the most recent job he performed regularly and over a substantial period of time." *Shepherd v. Wilder Coal Corp.*, BRB No.

12-0082 BLA, slip op. at 10 (Nov. 28, 2012) (unpub.) (citing *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982)).

Claimant testified that he worked in a prep plant. He mentioned that he had to lift heavy items including screens. On the form CM-911, Claimant indicated his job title was "prep plant" from 1992 to 1998. DX 3. He worked 7 days a week. *Id.* He run a "back dump loader and bulldozer, [and] worked in plant-coal washer." *Id.* His other job titles included: braddish man (1968-1985), shuttle car operator (1985-1987), and supply man (1987-1992). *Id.* He sat 8-10 hours and the number of hours he stood was varied. *Id.* His lifting varied as well. *Id.* He did not mark down how many pounds he had to carry. *Id.* His job involved the use of tools, machines, or equipment. *Id.* He ran heavy equipment. *Id.* Based on Claimant's unrebutted testimony, the undersigned finds that his usual coal mine employment required heavy exertion.

**3. Total Disability**

According to § 718.204(b)(1), a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment that requires the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

*Appendix P*

Nonpulmonary and nonrespiratory conditions, which cause 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. § 718.204(a). *See also Beatty v. Danri Corp.*, 16 B.L.R. 1-11 (1991).

The term "pulmonary or respiratory impairment" refers to a loss of pulmonary or respiratory function. *Clay v. Dir., OWCP*, 7 B.L.R. 1-82, 1-84 (1984). A physician's mere recitation of respiratory symptoms—such as breathing difficulties or shortness of breath—does not constitute the finding of an impairment. *Cozart v. Powell Mountain Coal Co.*, BRB No. 15- 0277 BLA (March 7, 2016); *Heaton v. Dir., OWCP*, 6 B.L.R. 1-1222, 1-1224 (1984).

The regulations provide that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: (1) pulmonary function tests with values

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**APPENDIX Q — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *CREECH V. APOGEE COAL*, BRB NO. 20-0322 BLA DATED NOV. 28, 2022**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 20-0322 BLA

RUSH CREECH,

*Claimant-Respondent,*

v.

APOGEE COAL COMPANY,
LIMITED LIABILITY COMPANY,

and

ARCH COAL, INCORPORATED,

*Employer/Carrier-Petitioners,*

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

*Party-in-Interest.*

Date Issued: 11/28/2022

**DECISION AND ORDER**

*Appendix Q*

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-06053) rendered on a miner's subsequent claim filed on July 28, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The All found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal, Incorporated (Arch Coal) is the responsible carrier. He found Claimant established 29.47 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable

1. This is Claimant's third claim. Director's Exhibits 1-3. Claimant filed an initial claim on October 2, 2008, which he withdrew. Director's Exhibits 1, 50. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. All Adele Higgins Odegard denied Claimant's second claim on June 18, 2013, for failure to establish total disability. Director's Exhibit 2 at 35. Claimant took no further action on that claim. *See* Director's Exhibit 2.

condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The All further concluded Employer did not rebut the presumption and awarded benefits.

[3] On appeal, Employer argues the ALJ lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further asserts

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2. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the All must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because All Odegard denied Claimant's second claim for failure to establish total disability, Claimant had to submit new evidence establishing this element in order to obtain review of the merits of his current claim. *Id.*

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

4. 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,

remand is required because removal provisions applicable to ALJs render his appointment unconstitutional. Next, it contends the All erred in finding Apogee, self-insured through Arch Coal, is the responsible operator. On the merits, Employer argues the All erred in finding Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it. Claimant responds urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenge and affirm the All's responsible operator determination. Employer filed a combined reply brief.

The Board's scope of review is defined by statute. We must affirm the All's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by

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> 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.

5. The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

30 U.S.C. §932(a); *0 'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.,* 380 U.S. 359 (1965).

**Appointments Clause**

Employer requests the Board vacate the All's Decision and Order and remand the case to be heard by a constitutionally appointed All pursuant to *Lucia v. SEC,* 585 U.S. —, 138 S. Ct. 2044 (2018).[6] Employer's Brief at 15-19; Employer's Reply at 5-8. It

* * *

[6] *Co.,* BLR —, BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

**Responsible Insurance Carrier**

Employer does not challenge the All's findings that Apogee is the correct responsible operator and it was self-insured by Arch Coal on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 13-14. In 2005, Arch Coal sold Apogee to Magnum Coal

6. *Lucia* involved a challenge to the appointment of an All at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers"

* * *

(Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 28. In 2011, Patriot was authorized to insure itself and its subsidiaries. Director's Brief at 19. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. *Id.* at 2, 19. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company, as the Director states. *Id.* at 19-20.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (Trust Fund), not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 23-38; Employer's Reply Brief at 11-19. It argues the ALJ erred in finding Arch liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[9] (2) the ALJ erroneously excluded its liability evidence; (3) he evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (4) the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability in authorizing Patriot to retroactively self-insure Apogee's liabilities; (5) the

9. Employer first contested the district director's appointment in its brief before the Board. Employer's Brief at 36 n.10.

Director changed its policy by naming Arch Coal as the responsible carrier; (6) the DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[10] reflects a change in policy where the DOL began to retroactively impose new liability on self-insured mine operators and bypass traditional rulemaking; and (7) the ALJ abused his discretion and [7] violated Employer's procedural due process rights in denying its request for discovery regarding BLBA Bulletin No. 16-01. Employer's Brief at 23-38; Employer's Reply Brief at 11-19.

The Board has previously addressed arguments (1) and (3) through (7) and rejected them in *Bailey v. E. Assoc. Coal Co.,* BLR —, BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard,* BRB No. 20-0229 BLA, slip op. at 5-17; and *Graham v. E. Assoc. Coal Co.,* BLR —, BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey, Howard* and *Graham,* we reject Employer's arguments.[11] We also reject

10. The 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.

11. As Claimant filed his 2010 claim before Patriot's bankruptcy, we reject Employer's assertion that "the Department's decision to name Amvest as the self-insurer responsible for [Claimant's] [2010] claim, proves that, without [BLBA Bulletin No. 16-01], Arch Coal would not be a party to this claim." Employer's Brief at 30 (internal citations omitted); *see* Director's Exhibit 2 at 396, 423. We agree with the Director that Amvest's designation as the self-insurer in Claimant's prior claim is immaterial to Arch Coal's liability in his current claim, as Employer does not dispute that Arch Coal self-insured Apogee on the date of Claimant's last coal mine employment. Director's Brief at 24 n.15.

Employer's argument (2) with respect to the exclusion of evidence for the reasons set forth in those decisions; however, in order to establish the relevant factual context in this appeal, below we describe the relevant procedural history of this claim.

**Procedural History**

On September 4, 2016, the district director issued a Notice of Claim identifying Apogee, self-insured through Arch Coal, as the potentially liable operator and self-insurer for the claim. Director's Exhibit 24. The Notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id.* Employer responded, denying liability and requesting the district director dismiss it, arguing Patriot was the proper self-insurer and the Trust Fund must assume Patriot's liability for this claim. Director's Exhibit 27.

On June 22, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch Coal, as the responsible operator. Director's Exhibit 30. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until August 21, 2017, to submit evidence in support of their positions. *Id.* at 3. Moreover, the district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges [8] [(OALJ)]." *Id.*

(citing 20 C.F.R. §§725.414(b),(c), 725.456(b)(1)). Employer responded on July 20, 2017, asserting that the district director had improperly designated Apogee and Arch Coal as parties to the claim, but did not submit any liability evidence or designate any liability witnesses aside from Claimant. Director's Exhibit 31 at 3.

On March 27, 2018, the district director issued a Proposed Decision and Order (PDO) awarding benefits and designating Apogee, self-insured through Arch Coal, as the responsible operator and carrier, respectively. Director's Exhibit 32.

On April 23, 2018, Employer requested reconsideration of the award or, in the alternative, a formal hearing before an ALJ. Director's Exhibit 38. On July 11, 2018, the district director transferred the case to the OALJ for a hearing. Director's Exhibit 50.

On June 20, 2018, after the district director issued the PDO but before he transferred the case to OALJ, Employer submitted an initial request to Chief ALJ Henley to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation Programs' employees. June 20, 2018 Subpoena Requests; March 11, 2019 Order Correcting Recitation of Procedural History in the February 14, 2019 Order. The requested discovery related to various liability-related topics, including BLBA Bulletin No. 16-01 and the DOL's authorization of Patriot Coal and Arch Coal to self-insure. *See* June 20, 2018 Subpoena Requests.

*Appendix Q*

On November 28, 2018, the ALJ issued a Notice of Assignment, Notice of Hearing, and Pre-Hearing Order, which stated in relevant part that documentary liability evidence not submitted to the district director, and testimony by liability witnesses not identified to the district director, would not be admitted absent extraordinary circumstances. On January 9, 2019, Employer renewed its request for subpoenas to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier related to Arch Coal's liability for this claim. *See* Jan. 9, 2019 Subpoena Requests. The Director objected, and Employer responded to the Director's objection.

The ALJ denied Employer's request, finding the requested liability documents and testimony is inadmissible under the relevant regulations unless Employer established extraordinary circumstances excusing its failure to timely designate liability witnesses before, or submit liability evidence to, the district director. Feb. 14, 2019 Order Denying Employer's Request to Issue Subpoenas (Feb. 14, 2019 Order); *see* 20 C.F.R. §§725.414(c), 725.456(b)(1). Further, the ALJ found Employer did not establish extraordinary circumstances that would warrant the admission of its requested discovery. He concluded "Employer did not present any liability evidence or name any liability witnesses [except for Claimant] before the District Director," despite "having been afforded the opportunity to do so." Feb. 14, 2019 Order at 9; *see* 20 C.F.R. §§725.414(c), 725.456(b)(1).

[9] While the case was pending before the All, Employer submitted documentary liability evidence

that it designated as Employer's Exhibits 6-21. Hearing Transcript at 8. The All excluded this liability evidence because he found Employer did not establish extraordinary circumstances for failing to submit it to the district director. Hearing Transcript at 8-11 (excluding Employer's Exhibits 6-21 as untimely submitted liability evidence), 15-16 (referencing disposition of Employer's request to develop liability evidence in prior orders); *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000); Decision and Order at 13. Subsequently, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Apogee and Arch Coal are the properly designated responsible operator and carrier pursuant to 20 C.F.R. §§725.494, 725.495. Decision and Order at 13-14.

For the reasons set forth in *Bailey,* BRB No. 20-0094 BLA, slip op. at 11-13; *Howard,* BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham,* BRB No. 20-0221 BLA, slip op. at 6-7, we affirm the All's determination that Employer's failure to timely submit the evidence or establish extraordinary circumstances justifying its failure to do so precluded its admission by the ALJ. Thus we affirm the All's determination that Apogee and Arch Coal are the responsible operator and carrier, respectively, and are liable for this claim.

*Appendix Q*

## Due Process Challenges

### Loss of Medical Evidence in Claimant's Prior Claim

We next reject Employer's assertion that the unavailability of various medical exhibits contained in the record of Claimant's prior claim compromises Employer's ability to defend against a "material change in condition[s]."[12] Employer's Brief at 22-23. Under the revised regulations applicable to this and other claims filed after January 19, 2001, a

* * *

[18] pulmonary disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 39.

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

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12. Employer correctly notes various medical exhibits contained in the record of Claimant's prior claim were not made part of the record in his current claim as the regulations require. Employer's Brief at 22-23; *see* 20 C.F.R. §§718.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim."), 725.102(a) (DOL is responsible for maintaining the records of a claim). We note, however, that All Odegard's decision denying Claimant's prior claim is available and enables us to determine the applicable conditions of entitlement upon which the denial was based.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

**APPENDIX R — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *JOHNSON V. APOGEE COAL*, CASE NO. 2018-BLA-06169 DATED JUNE 29, 2021**

**U.S. Department of Labor**
Office of Administrative Law Judges

Case No.: 2018-BLA-06169

In the Matter of

**KENNY R. JOHNSON,**

*Claimant,*

v.

**APOGEE COAL COMPANY, LLC,**

*Self-insured Employer,*

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,**

*Party-in-Interest.*

**Issue Date: 29 June 2021**

Before: SCOTT R. MORRIS
Administrative Law Judge

*Appendix R*

## DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

The Act awards benefits to coal miners who are totally disabled due to pneumoconiosis, or to the survivors of coal miners whose deaths were due to pneumoconiosis. Pneumoconiosis, commonly known as "black lung," is a disease of the lungs resulting from coal dust inhalation.

## I. PROCEDURAL BACKGROUND

This matter involves an initial claim. Claimant filed the current claim for benefits on January 4, 2017. DX 2.[1] By Proposed Decision and Order dated May 3, 2018, the District Director, Office of Workers' Compensation Programs awarded benefits based on a finding that Claimant established all elements of entitlement. DX 29. Employer requested a formal hearing on May 30, 2018, and the District Director referred this matter to the Office of Administrative Law Judges ("OALJ") on July 25, 2018. DX 29; DX 41. Subsequently, this Tribunal received assignment of this matter and issued the Notice of Hearing on November 28, 2018.

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1. This Decision uses the following abbreviations: "DX" (Director's Exhibits); "CX" (Claimant's Exhibits); "EX" (Employer's Exhibits); "ALJX" (Administrative Law Judge Exhibits); and "Tr." (transcript of the November 6, 2020 hearing).

At the hearing, the undersigned admitted DX 1 through DX 41, CX 1 through CX 5 and CX 8, and EX 1 through EX 4 and EX 14 through EX 18. Tr. at 6-14. The Tribunal set January 22, 2021 as the deadline for the submission of closing briefs. Tr. at 52. The Tribunal thereafter extended the briefing deadline until March 1, 2021.

Claimant submitted his closing brief on February 24, 2021, the Director submitted its brief on March 1, 2021, and Employer submitted its closing brief on March 1, 2021.

## II. ISSUES

At the hearing, Employer withdrew controversion to the following issues: timeliness, miner, post 1969 employment, and dependency. Tr. at 50.

The parties present the following issues for adjudication:

(1) The length and nature of Claimant's coal mine employment;

(2) Whether Claimant has a totally disabling respiratory or pulmonary impairment;

(3) Whether Claimant suffers from pneumoconiosis;

(4) Whether Claimant's pneumoconiosis, if any, arose out of his coal mine employment; and

(5) Whether Claimant's total disability, if any, is due to pneumoconiosis; and

(6) Whether Employer is the responsible operator.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Factual Background and Testimonial Evidence

Claimant was born in February 1952. DX 2. He is married. DX 2; DX 7; Tr. at 16. Claimant last worked for Employer in 1998.[2] DX 3; DX 6.

### B. Smoking History

Claimant testified at the hearing that he is a nonsmoker. Tr. at 27. The various medical reports and hospitalization and treatment records also reflect that Claimant is a nonsmoker. DX 9; DX 19; CX 8 EX 3; EX 4; EX 15; EX 16; EX 18. Based on the foregoing, the Tribunal finds that Claimant has no smoking history.

* * *

1994)), cited in *Carter v. Island Creek Coal Co.*, BRB Nos. 16-0423 BLA and 16-0423 BLA-A (May 22, 2017) (unpub.).

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2. As Claimant last worked in coal mine employment in Kentucky, the law of the U.S. Court of Appeals for the Sixth Circuit applies. *Shupe v. Dir., OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

Here, neither Dr. Dahhan nor Dr. Rosenberg 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.

**5. Pneumoconiosis Arising Out of Coal Mine Employment**

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. 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.

## IV. Responsible Operator

Employer argues that Arch Coal, the self-insurance carrier, is not liable for this claim. The gravamen 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").

On Claimant's last day of employment, Apogee was self-insured through Arch. Arch sold Apogee's 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. In 2015, Patriot filed for bankruptcy. Also 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 district court for lack of jurisdiction, and the dismissal was affirmed by the D.C. Circuit. *See Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018).

*Appendix R*

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 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 policy change that eliminates the distinction between commercial insurers and self-insurers. Employer thus argues the Department cannot treat self-insurance as commercial insurance.

Employer asserts Arch is not a responsible operator 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 for treating Arch (the parent company), and not Apogee (the subsidiary), as the responsible operator.

Employer argues that the Department's actions violate Arch's due process rights and the APA. Employer likewise challenges the application of Bulletin 16-01 as a violation of the APA and the BLBA.

*Appendix R*

The Director asserts that Apogee, as self-insured by Arch, is liable in this claim. 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 under § 725.495(c) to prove that it does not possess sufficient assets to pay benefits or that it was not the potentially liable operator who most recently employed Claimant. According to the Director, 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.

*Appendix R*

## 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;[17]
>
> (2) the potentially liable operator operated a coal mine after June 30, 1973;
>
> (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 potentially liable operator is financially capable of paying benefits.

---

17. 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).

§ 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).

*Appendix R*

In this case, the District Director notified Apogee, as self-insured by Arch, that it was a potentially liable operator on May 25, 2017. DX 21. 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 November 9, 2017. 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 Apogee from 1995 to 1998. DX 3; DX 6; Tr. at 22. 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, 1969. *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. 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. Rather, the ability of Apogee (as self-insured by Arch) to assume financial liability is presumed under the regulations.

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 3; DX 6; Tr. at 22-23, 42. 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. Thus, Employer 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 C.F.R. § 725.492(d).[18] Therefore, Employer has not shown that it is not liable under § 725.495(c)(1).

For these reasons, the undersigned concludes 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.

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18. 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. The Tribunal has 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.

**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.

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 21; DX 27; DX 29. 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,[19] 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:

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19. The Tribunal 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.

> 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 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. Rather, 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, Arch was properly notified of its liability in this claim as Apogee's self-insurer 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. 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.

The Tribunal is cognizant 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.

However, the Tribunal sees 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. 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.[20] Rather, it is the Act itself and the substantive requirements of section 725 (particularly subpart G) that impose liability.

The undersigned finds 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 the Tribunal is bound to apply those

20. Likewise, any argument that the Department released Arch from liability also fails because, though an operator choosing to self-insure is required to receive authorization from the Department, it is not the Department's actions that create liability.

regulations. Overall, the Tribunal concludes Employer's arguments do not offer a sufficient legal basis to transfer liability for this claim to the Trust Fund.[21]

* * * *

21. The undersigned declines to address Employer's due process arguments. Employer has preserved its

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**APPENDIX S — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *JOHNSON V. APOGEE COAL*, BRB NO. 22-0022 BLA DATED MAY 26, 2023**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 22-0022 BLA

KENNY R. JOHNSON,

*Claimant-Respondent,*

v.

APOGEE COAL COMPANY, LLC,

*Employer/Carrier-Petitioners,*

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

*Party-in-Interest.*

Date Issued: May 26, 2023

**DECISION AND ORDER**

Appeal of the Decision and Order Awarding Benefits and Decision and Order Awarding Benefits on Reconsideration of Scott R. Morris,

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Administrative Law Judge, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits and Decision and Order Awarding Benefits on Reconsideration (2018-BLA-06169) rendered on a claim filed on January 4, 2017, 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, Incorporated (Arch) is the responsible carrier. He credited Claimant with 20.37 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

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

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.2 It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. It further contends the ALJ erred in finding Arch is the liable carrier. In addition, it asserts the ALJ deprived it of due process by refusing to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case. On the merits, it argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Finally, it argues he erred in finding it did not rebut the presumption.

* * *

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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.

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**Removal Provisions**

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 17-18. It generally argues the removal provisions for ALJs contained in the APA, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* 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), as well as 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). *Id.* For the reasons set forth in *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

**Responsible Insurance Carrier**

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator, and it was self-insured by Arch on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 31-33. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 19-41.

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In 2005, after Claimant ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Employer's Brief at 38; Director's Brief at 2; Director's Exhibit 25 at 12. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Employer's Brief at 12; Director's Brief at 11; Director's Exhibit 33 at 2. In 2015, Patriot went bankrupt. Director's Brief at 11; Director's Exhibit 25 at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned that company and provided self-insurance to it.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 19-41. It maintains the ALJ erred in finding Arch liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[9] (2) its liability evidence was erroneously excluded[10] because

9. Employer first contested the district director's appointment in its brief before the Board. Employer's Brief at 23-24.

10. Employer requested the ALJ issue subpoenas so it could depose Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation Programs employees, and obtain documents related to Arch's liability. *See* June 22, 2018 Subpoena Requests; Apr. 1, 2020 Mot. to Compel. The ALJ denied the discovery request because Employer failed to timely identify the two witnesses or submit liability evidence to the district director

a carrier's liability is not subject to the limitations set forth at 20 C.F.R. §725.456(b)(1);[11] (3) the district director improperly "pierce[d] Arch's corporate veil [to] hold it responsible for" Apogee's employee, Claimant; (4) no evidence establishes Arch's self-insurance covered Apogee for this claim; (5) he evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (6) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (7) the Director changed its policy in naming Arch as the responsible carrier; (8) retroactive application of the policy reflected in Black Lung Benefits

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and did not establish extraordinary circumstances for failing to do so. June 3, 2020 Order; *see* 20 C.F.R. §§725.414(c), 725.456(b)(1).

11. Employer also argues the time limitation for its submission of liability evidence at 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act (Longshore Act) and the Administrative Procedure (APA) because it divests the ALJ of authority under the Longshore Act, 33 U.S.C. §919(d), and the APA, 5 U.S.C. §556(d), to receive evidence and adjudicate issues de novo. Employer's Brief at 19-21. We reject this argument. 30 U.S.C. §932(a) incorporated the provisions of the Longshore Act and the APA into the Black Lung Benefits Act (BLBA) "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulation, the Secretary of Labor has the "authority to adopt regulations that differ from the APA and the Longshore Act." Director's Brief at 15 (citing *Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, 70 (D.D.C. 2001), *rev'd in part on other grounds*, *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F. 3d 849, 869 (D.C. Cir. 2002)).

Act (BLBA) Bulletin No. 16-01[12] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (9) the ALJ abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id.*

The Board has previously considered and rejected these arguments under the same material facts in *Bailey v. E. Assoc. Coal Co.*, ___ BLR ___, BRB No. 20-0094 BLA, slip op. at 10-19 (Oct. 25, 2022) (en banc); *Howard*, 25 BLR at 1-308-19; and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus we affirm the ALJ's determination that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

**Employer's Request for Discovery**

While the case was before the ALJ, Employer sought discovery from the DOL related to the agency's deliberative process underlying the preamble to the 2001 revised regulations. In response, the Director filed a Motion for a Protective Order seeking to bar the requested discovery. Employer responded, urging the ALJ to deny

12. 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" that Patriot's bankruptcy has affected.

the Director's motion. The ALJ granted the Director's motion, finding "Employer has made no showing that the information it seeks" is relevant to whether Claimant is entitled to benefits.[13] Nov. 5, 2019 Order at 5.

* * *

13. The ALJ reasoned:

> The issue of whether a particular miner's condition or disability is due to his or her coal mine employment or smoking habit must be resolved on a claim-by-claim basis. Employer has made no showing that the information it seeks has any bearing on the medical information submitted in connection with this claim or any relation to whether the named Claimant is entitled to benefits. The discovery requests are also not relevant or necessary to aid Employer in developing its own contrary medical evidence in this case, as is permitted by the courts. The preamble already fully sets forth the medical and scientific studies and premises the Department relied upon in promulgating the regulations. Thus, any additional information as to what the statements in the new preamble mean or how [the] medical literature supports those statements is unlikely to further aid the Employer in a practical manner and amounts to no more than a collateral attack on the preamble. Employer's requests relating to the preamble are not reasonably calculated to lead to the discovery of admissible evidence.

Nov. 5, 2019 Order at 5.

caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 28-29.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Decision and Order Awarding Benefits on Reconsideration are affirmed.

SO ORDERED.

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

/s/ Greg J. Buzzard
GREG J. BUZZARD
Administrative Appeals Judge

/s/ Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

**APPENDIX T — DIRECTOR'S ALJ CLOSING BRIEF IN *WOODS V. ARCH OF KY/APOGEE COAL*, CASE NO. 2018-BLA-05610, FILED DEC. 20, 2018**

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE NO. 2018-BLA-05610
CASE NO. XXX-XX-3148

IN THE MATTER OF HAL T. WOODS, SR.,

*Claimant,*

v.

ARCH OF KY/APOGEE COAL COMPANY, LLC,

*Employer,*

and

ARCH COAL, INC.,

*Self-Insurance Carrier,*

and

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

*Party in Interest.*

Filed December 20, 2018

**DIRECTOR'S POST-HEARING BRIEF**

*Appendix T*

The Director, Office of Workers' Compensation Programs, submits the following post-brief, and asks the Administrative Law Judge to issue a decision on the merits of this claim, including a finding that Arch of KY/ Apogee Coal Company, LLC, self-insured through Arch Coal, Inc., c/o Healthsmart CCS, (hereinafter Arch) is the responsible operator.

## I. BACKGROUND

Former miner Hal T. Woods filed an application for benefits under the Black Lung Benefits Act on September 28, 2016 (DX 3). Upon receipt of the miner's Employment History Form CM-911a (DX 4), the district director investigated whether any operator may be held liable for the payment of benefits as required under 20 C.F.R. § 725.407(a). Among other things, the district director collected IRS Form W-2 Wage and Tax Statements, pay statements, and the miner's Social Security Itemized Statement of Earnings (DX 6, DX 7, DX 8, and DX 9).

The district director identified Arch of KY/Apogee Coal Company, LLC, self-insured through Arch Coal, Inc., c/o Healthsmart CCS, (Arch), as a potentially liable operator and notified it of the claim (DX 24). Arch timely responded to the Notice of Claim, disagreeing with its designation as a potentially liable operator and controverting liability (DX 27). On May 15, 2017, the district director issued a Schedule for Submission of Additional Evidence (Schedule) designating Arch as the responsible operator (DX 30). Arch responded, again disagreeing with its designation as responsible operator (DX 31). At the conclusion of the

period permitted for the submission of additional evidence under the Schedule and 20 C.F.R. § 725.410(b), the district director issued a Proposed Decision and Order - Award of Benefits designating Arch as the responsible operator (DX 34). Arch requested a formal hearing (DX 39), and the district director referred the case to the Office of Administrative Law Judges (DX 46). A formal hearing was conducted by telephone on September 17, 2018.

## II. ISSUES

A. Whether Arch is the responsible operator;

B. Whether the district director properly participated in this hearing;

C. Whether the Administrative Law Judge is properly appointed.

## III. ARGUMENT

### A. Arch is the Responsible Operator.

The Department's regulations provide that the responsible operator shall be the "potentially liable operator" that most recently employed the miner. 20 C.F.R. § 725.495(a)(1). The regulations further provide that a potentially liable operator is an operator which meets each of the five conditions set forth in 20 C.F.R. § 725.494.

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The Director bears the burden of proving that the designated responsible operator is a potentially liable operator. 20 C.F.R. § 725.495(b). The designated responsible operator bears the burden of proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). Section 725.495's allocation of burdens of proof is rational and consistent with the Administrative Procedure Act. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002).

Arch meets all the conditions to be a potentially liable operator under 20 C.F.R. § 725.494. First, the miner's alleged disability arose at least in part out of employment in or around a mine operated by Arch. The miner testified his last coal mine employment was for Arch of Kentucky (Tr. at p. 15). Furthermore, at the hearing, Counsel for Arch stated, "Mr. Woods worked for Arch of Kentucky and Apogee after they changed their name." (Tr. at p. 88). Counsel's statement appears to be a stipulation that the miner worked for Arch of Kentucky, and when Arch of Kentucky became Apogee Coal Company, LLC, the miner worked for Apogee Coal Company, LLC. Section 725.494(a) provides a rebuttable presumption that a miner's disability arose out of his employment in or around a coal mine operated by the operator, and further states that a miner's pneumoconiosis or disability shall be considered to have arisen out of that work if that work "caused, contributed to or aggravated the progression or advancement" of the miner's inability to work. The record here contains no evidence that could rebut the presumption. Thus, the miner's alleged disability arose

at least in part out of employment in or around a mine operated by Arch, and Arch meets the condition set forth in § 725.494(a).

Second, the miner was employed by Arch of Kentucky, Inc. from 1984 through 1992, and Apogee Coal Company, LLC for some portion of 1993, according to his Social Security Earnings Record (DX 9). Thus, Arch was an operator after June 30, 1973; Arch employed the miner for a cumulative period of not less than one year; and the miner's Arch employment included at least one working day after December 31, 1969. Consequently, Arch meets the conditions set forth in § 725.494(b), § 725.494(c), and § 725.494(d).

Finally, Arch maintained self-insurance through Arch Coal, Inc. to secure the payment of benefits. Counsel argued at the hearing regarding Arch of Kentucky/Apogee Coal Company, LLC: "Those are not Arch Coal. Those are separate companies with a separate independent corporate structure." (Tr. at p. 88). Counsel did not assert — and more importantly, has never presented any evidence — that Arch Coal, Inc. did not provide self-insurance to Arch of Kentucky/Apogee Coal Company, LLC during the miner's Arch employment. Under the regulations, Arch is presumed to be financially capable of assuming liability for the payment of benefits. 20 C.F.R. § 725.495(b). Arch bears the burden of proving that it is not capable of doing so. *Id. §* 725.495(c). Arch therefore has not carried its burden to show that it is not financially capable of paying this claim. Thus, Arch meets the condition set forth in § 725.494(e). Arch, therefore, is a potentially liable

operator, and it may only escape liability by proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). Arch has submitted no evidence that another coal mine operator more recently employed the miner.[1] Consequently, Arch is the responsible operator.

Yet Arch continues to argue that certain contracts it made with third parties should relieve it from liability. In its response to the district director's Notice of Contest, Arch wrote: "In 2005, Arch Coal sold Arch of Ky/Apogee's assets and liabilities to Magnum Coal. In 2008, Patriot Coal acquired those assets and liabilities when it bought Magnum Coal;" and "Patriot Coal can no longer cover its liabilities. It was an approved self-insurer by DOL. Thus, the Trust Fund must assume responsibility for the claim." (DX 27 at p. 12). Arch's counsel reiterated these arguments during the hearing. (Tr. at pp. 86-90).

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1. Furthermore, it is too late to submit documentary evidence pertaining to liability now. No documentary evidence pertaining to liability shall be admitted in any proceeding with respect to the claim unless it was submitted first to the district director in accordance with 20 C.F.R. § 725.414(b). 20 C.F.R. § 725.414(d); *see also* 20 C.F.R. § 725.456(b)(1). Additionally, all parties are required to notify the district director of the name of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. 20 C.F.R. § 725.414(c); *see also* 20 C.F.R. § 725.457(c)(1). These limitations on evidence are mandatory and may not be waived absent a showing of extraordinary circumstances. *See Smith v. Martin County Coal Corp.,* 23 BLR 1-69, 1-74 (Ben. Rev. Bd. 2004).

Arch is essentially arguing that it should not be held liable for payment of benefits in this claim because Arch transferred its liabilities to Magnum Coal. But any contract between Arch and Magnum Coal bears no relevance on whether Arch is liable as the responsible operator under the Black Lung Benefits Act and its regulations. The miner stopped working for Arch in 1993 — more than a decade before the alleged contract between Arch and Magnum Coal. Any contract between Magnum Coal and Patriot Coal is even farther removed the issue of Arch's liability. The miner never worked for Magnum Coal or Patriot Coal. The miner worked for Arch, and the district director never released Arch from liability. Certainly, if such a release existed, Arch would have produced its documentation long ago. And nothing in the regulations supports Arch's argument that it should now be released from liability now based on a contract it may have entered with a third party long alter the miner's Arch employment.

Arch has submitted no evidence that Magnum Coal or Patriot Coal are successor operators to Arch under the Act, but even if Arch were to make that argument now, the regulation defining a "successor operator" makes clear that prior operators are not relieved of liability if the prior operator meets the conditions of a potentially liable operator. 20 C.F.R. § 725.492. As discussed above, Arch meets those conditions. Arch is therefore not relieved of liability.

Arch cannot carry its Section 725.495(c) burden to show that any other operator meets the conditions

of a potentially liable operator; Arch is the potentially liable operator that most recently employed the miner; and Arch's arguments regarding contracts with other companies long after the miner's Arch employment are irrelevant to this proceeding. Arch is therefore the responsible operator.

### B. The District Director is a Proper Party to this Proceeding.

During the hearing, Arch's counsel objected to participation in this case by the Secretary of Labor, through the Office of the Solicitor, on behalf of the district director. But the Secretary clearly has a right to participate. The 1977 BLB Reform Act produced 30 U.S.C. 932(k), which provides: "The Secretary shall be a party in any proceeding relative to a claim for benefits under this part." The legislative history explains the purpose of the provision:

> Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended Longshoremen's and Harbor Workers' Compensation Act confers standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and appeal of claims. In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims

> litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the Act to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts.

S.Rep.No. 95-209, 95th Cong., 1st Sess. 21-22 (1977).

And the Sixth Circuit addressed the question in *Cornett v. Benham Coal*, 227 F.3d 569, 573-74 (6th Cir. 2000):

> The BLBA itself explicitly provides for the Director's involvement in any case, *see* 30 U.S.C. 932(k) ("The Secretary [represented by the Director] shall be a party in any proceeding relative to a claim for benefits" under the BLBA), and the legislative history suggests that Congress intended that the Director be authorized to file pro-petitioner briefs. *See* Senate Comm. on Human Resources, *Black Lung Benefits Reform Act of 1977* S.Rep. No. 95-209, at 22 (1977) ("This [Director's] participation is especially significant in black lung claims when, for example, the claimant

> has been unable to obtain legal representation or where significant issues relating to the interpretation of the Act are to be determined.") More important, this court has held that "[t]he Director is permitted to seek review of Board decisions in the courts to 'ensure proper and consistent administration' of the Act" under the BLBA. *Gibas v. Saginaw Mining Co.,* 748 F.2d 1112, 1114 n. 2 (6th Cir. 1984). And further, we have acknowledged the Director's authority to file a pro-petitioner brief as a respondent, precisely as he has done here. *See id.; Staton v. Norfolk & W. Ry. Co.,* 65 F.3d 55, 58 (6th Cir. 1995); *Bentley v. Peabody Coal Co.,* No. 96-3353, 1997 WL 560057, at * 1, n.1 (6th Cir. Sept. 5) (unpublished opinion). Therefore, despite Benham Coal's arguments to the contrary, we hold that the Director, as a respondent, is authorized to file a pro-petitioner brief in this court in a claimant's appeal from a Board decision under the BLBA.

During the hearing, Arch's counsel argued, "[T]he Department, although it does have the authority to the *[sic]* certain party status, it cannot appear, it seems to me as both a party and program administrator without creating an impermissible conflict of interest, which denies Arch's right to a fair and unbiased conduct of this case." (Tr. at p. 30). Arch's counsel further argued that the Solicitor's Office has "intervened with the Office of the District Directors in some of these cases to impede Arch and Peabody's ability to prove that they are not

liable by ordering the District Directors not to allow adequate development of evidence of liability." *Id* "I can prove this," he asserted. *Id.* Yet Arch's counsel made no specific arguments about how he claims the district director impeded its ability to develop evidence in this claim. Indeed, Arch never requested an extension of time to submit evidence on the issue of liability in this claim. *See, e.g.,* Arch's response to Notice of Claim (DX 27) and Arch's Response to the Department's Schedule for the Submission of Additional Evidence (DX 31). Without any evidence that the district director impeded its ability to develop evidence for this claim, Arch's counsel argued that the involvement of the district director and the Secretary in black lung claims, generally, is inappropriate. This argument is contrary to the legislative history and subsequent interpretation of the Act and should be rejected.

### C. The Administrative Law Judge is properly appointed.

Prior to the hearing, Arch filed several motions to cancel the hearing and reassign the claim to be heard by a "properly appointed" administrative law judge. Arch based its motions on the Supreme Court's decision in *Lucia v. SEC,* 138 S. Ct. 2044 (2018). The ALJ denied Arch's motions and heard this claim on the merits on September 17, 2018. During the hearing, counsel for Arch questioned the ALJ about his appointment. (Hearing Transcript (Tr.) at pp. 11-13). Based on those questions, along with pleadings Arch has filed in other claims, the Secretary anticipates Arch will renew its arguments

for reassignment in its post-hearing brief, including new arguments based on the statute governing removal of ALJs and Executive Order 13843. Arch's expected arguments for reassignment *are* without merit and the ALJ should render a decision on the merits of the claim for benefits.

## IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Administrative Law Judge should issue a decision on the merits of this claim and hold that Arch of KY/Apogee Coal Company, LLC, self-insured by Arch Coal, Inc., c/o Healthsmart CCS, is the responsible operator.

Respectfully submitted,

Kate S. O'Scannlain
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Stanley E. Keen
Regional Solicitor

Theresa Ball
Associate Regional Solicitor

/s/ Emily O. Roberts
Emily O. Roberts
Attorney

U.S. Department of Labor
Attorneys for the Director

**APPENDIX U — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *WOODS V. ARCH OF KY/APOGEE COAL*, CASE NO. 2018-BLA-05610 DATED AUGUST 14, 2020**

**U.S. Department of Labor**
Office of Administrative Law Judges

Case No.: 2018-BLA-05610

In the Matter of

**HAL T. WOODS, SR.,**

*Claimant,*

v.

**ARCH OF KY/APOGEE COAL COMPANY, LLC,**

*Employer,*

and

**ARCH COAL INC.,**

*Carrier,*

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,**

*Party-in-Interest.*

**Issue Date: 14 August 2020**

*Appendix U*

Before: SCOTT R. MORRIS
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This proceeding arises from a subsequent claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901–945 (the "Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title, unless otherwise indicated.

The Act awards benefits to coal miners who are totally disabled due to pneumoconiosis or to the survivors of coal miners whose deaths were due to pneumoconiosis. Pneumoconiosis, commonly known as "black lung," is a disease of the lungs resulting from coal mine dust inhalation.

## I. PROCEDURAL BACKGROUND

Claimant filed his first claim for Black Lung benefits with the U.S. Department of Labor ("the Department") on November 2, 1993, and it was denied (not withdrawn) on October 11, 1994. DX 1.[1] The records relating to the first claim were destroyed and it is not of record. *Id.*

Claimant filed this subsequent claim for benefits with the Department on October 6, 2016. DX 2. On September

1. 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 September 17, 2018 hearing.

1, 2017, the District Director, Office of Workers' Compensation Programs ("the District Director") issued a Proposed Decision and Order awarding benefits based on a finding that Claimant established all of the elements to entitlement to benefits and that Employer was properly named as responsible operator. DX 34. On September 26, 2017, Employer requested revision of the decision or, in the alternative, a formal hearing and the District Director referred this matter to the Office of Administrative Law Judges ("OALJ") on August 10, 2018. DX 39, 46. Following transmittal, on April 3, 2018, a Notice of Docketing: Directions to the Parties was issued. Subsequently, this Tribunal received assignment of this matter and issued a Notice of Hearing and Prehearing Order on May 9, 2018. A teleconference was held on September 7, 2018 and the hearing was subsequently rescheduled to be held telephonically on September 17, 2018.

Prehearing motions and requests filed by the parties were resolved by the following Orders, which are incorporated by reference herein:

(1) An Order of July 26, 2018 denied Employer's request for the issuance of subpoenas and granted the Director's motion for protective order. It preserved Employer's Constitutional arguments for appeal.

(2) An Order of August 29, 2018, denied Employer's renewed motion to cancel hearing and for reassignment. It also preserved Employer's Constitutional arguments for appeal.

(3) An Order of September 11, 2018 rescheduled the hearing and denied Employer's motion for continuance based upon its interlocutory appeal filing.[2]

(4) An Order of November 16, 2018 denied Employer's motion to recuse, which had been informally denied during the telephonic hearing of September 17, 2018. Tr. 35-36.

At the hearing, Director's Exhibits 1 through 46, Claimant's Exhibits 1 through 5, and Employer's Exhibits 1 through 8 were admitted.[3] Claimant and Dr. Rosenberg testified at the hearing. Employer raised certain arguments for appellate purposes. Briefs or written closing arguments were to be submitted on or before December 21, 2018, and the Director's Post-Hearing Brief was mailed on December 20, 2018 and received on December 26. As extended by Order of January 16, 2019, Claimant and Employer submitted their closing briefs by mail on January 23, 2019, and they are accepted as timely based on their mailing date.[4]

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2. On November 5, 2018, in BRB No. 18-0541 BLA the Benefits Review Board issued an Order dismissing Employer's appeal as interlocutory because it failed to satisfy the three-pronged test for accepting an interlocutory appeal and the case did not require the Board to direct the course of the adjudicatory process.

3. EX 8 consisted of a portion of the rulemaking record. It was admitted over the Claimant's and Director's objections based on relevance for appellate purposes, with the caveat that it appeared to be incomplete. Tr. 8-9.

4. Along with its brief, on January 23, 2019, without filing a motion or citing any authority, Employer sought to file an undated

*Appendix U*

## II. ISSUES

At the hearing, Employer withdrew the issues of Timeliness, Miner, and Post-1969 Employment. Tr. 90-91; see also DX 46. On the issue of years of coal mine employment, Employer stated it would be addressed in its brief. Tr. 91. Employer argued in its brief that the claimed 24 years of coal mine employment was unsupported and, although not reaching a formal stipulation, conceded that Claimant was employed for 20 years in underground coal mining (17 years underground plus an additional three years on the surface). *Employer's Brief* at 5-6. That agreement is supported by the undisputed evidence, including the Social Security records (DX 9) and the Claimant's testimony. Tr. 13-27. The Tribunal therefore finds that Claimant has established at least 20 years of employment in underground coal mining, which is sufficient for the operation of any presumptions. Although Employer did not stipulate to dependency, Claimant's marriage certificate is of record (DX 13) and his unrefuted testimony established that his wife was his dependent. Tr. 16, 18. As Employer has offered no evidence or argument to the contrary, the Tribunal finds that Claimant has one dependent for purposes of augmentation of benefits.

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"Revised Response and Controversion" [hereafter "revised controversion"], which essentially seeks to amend the controversion submitted to the district director to add a Constitutional challenge. The controversion was due within 30 days of the November 28, 2016 Notice of Claim, and the initial controversion was timely submitted to the district director on December 19, 2016. The revised controversion cannot be filed before this tribunal and is untimely. It is STRICKEN. SO ORDERED.

*Appendix U*

The following issues are presented for adjudication:

(1) Whether Employer is the responsible operator and the associated issue of insurance;

(2) Whether Claimant has pneumoconiosis;

(3) Whether the pneumoconiosis arose out of coal mine employment;

(4) Whether Claimant is totally disabled;

* * *

smoke after his 1996 heart attack. While Dr. Alam's record of 10.5 pack years is based on recorded starting and ending dates of 1/82 to 6/92, that estimate does not take into account other histories beginning as early as 1954 when Claimant was in the service. Dr. Rosenberg's and Dr. Tuteur's histories amount to as much as 43 pack years, but they recognize that there may have been periods during which Claimant did not smoke. The worker's compensation history of 30 pack years attributed to Dr. Baker is a second hand report and is not therefore entitled to much weight. Based on all of this evidence, the Tribunal finds that Claimant most likely smoked one pack per day from January 1982 through 1996, for a history of approximately 15-pack years, in addition to which he likely smoked starting between 1954 and 1958 and probably ending before 1982, for up to an additional 24 to 28 pack years. Although Claimant's smoking history cannot be reliably estimated, it likely exceeded 20 pack years and

can be described as significant. In view of the uncertainty, a physician's assumptions concerning Claimant's smoking history is not a basis for discrediting an opinion.

### C. Claimant's Usual Coal Mine Work

A claimant bears the burden to establish the exertional requirements of his usual coal mine employment. *See McMath v. Dir., OWCP*, 12 B.L.R. 1-6 (1988). The Board has held that a miner's "'usual coal mine work' is the most recent job he performed regularly and over a substantial period of time." *Shepherd v. Wilder Coal Corp.*, BRB No. 12-0082 BLA, slip op. at 10 (Nov. 28, 2012) (unpub.) (*citing Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982)).

Claimant testified that his last coal mine employment was as an inside laborer, a job that involved some heavy work. In that capacity, Claimant was required to lift and carry timbers weighing 15 to 20 pounds and cement blocks weighing up to 50 pounds. Tr. 15-16. Although in his description of coal mine employment form, Claimant mentioned working from 1969 to 1993 as a repairman (DX 5), he explained that he did not do that job the whole time and his last job was working as an inside laborer, building cribs to hold up the roof of the mine. Tr. 22.

### D. Responsible Operator/Insurance

The responsible operator is the "potentially liable operator" who most recently employed the miner for a year,

or periods of cumulative employment of not less than one year. 20 C.F.R. § 725.495. The Director bears the burden to show that the named employer is a potentially liable operator within the meaning of § 725.494. § 725.495(b). Once the Director shows that employer meets the first four conditions necessary for an employer to be considered a potentially liable operator (see § 725.494(a)-(d)), the burden shifts to the employer to demonstrate either that (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).

The Director asserts that the conditions necessary for Employer to be considered a "potentially liable operator" have been established in this case. *See Director's Brief* at 3-6, citing § 725.494(a)-(d). Upon review of the evidence, the Tribunal finds that the Director has satisfied its burden to show that Employer is a "potentially liable operator" under § 725.494(a)- (d). Employer qualifies as a potentially liable operator because it satisfies the regulatory criteria, and specifically (1) Claimant's disability is alleged to have arisen at least in part from employment in a mine operated by Employer; (2) Employer operated a coal mine after June 30, 1973; (3) Employer employed Claimant for at least one year; (4) that employment included at least one working day after December 31, 1969; and (5) Employer is capable of assuming liability for the payment of benefits. *See* 20 C.F.R. § 725.494. With respect to the final point, under § 725.494(b), there is a presumption "in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits" and under § 725.495(c), the burden is placed on

the designated responsible operator to prove that it either does not possess sufficient assets to secure the payment of benefits or that it was not the potential responsible operator that last employed the miner. Thus, to escape liability, the burden falls to Employer to prove that (1) it does not possess sufficient assets to secure payment of benefits, or (2) it is not the potentially liable operator that more recently employed the miner. § 725.495(c). Employer has not contended that it does not possess sufficient assets to secure payment of benefits, nor does it allege that any other potentially liable operator more recently employed Claimant.

Based on the Social Security earnings records, the Claimant's testimony, and other matters of record (such as the Claimant's worker's compensation claim and pay stubs), Claimant's last employment of at least one year was with Arch of Kentucky, Inc. which employed Claimant at least from 1988 to 1992 according to the Social Security records. No more recent coal mine employment of at least one year appears in the record.[9] Thus, Employer is the

9. The Social Security records reference employment with "APOGEE COAL COMPANY LLC % PATRIOT COAL CO SOLE MBR." in 1993. That employment was for less than one year, as Claimant testified that he stopped working in the coal mines on June 25, 1993. Tr. 13, 18-19. Further, Claimant testified that the employment listed in 1993 for Apogee was for Arch Mineral. Tr. 19, 26. According to the worker's compensation Opinion and Award of July 26, 1994, the defendant employer Arch of Kentucky, Inc. stipulated that Claimant "was exposed to coal and other injurious dusts for approximately 24 years with his last injurious exposure having occurred June 25, 1993, while he was employed by the defendant-employer." DX 11.

most recent potentially liable operator to employ Miner for a period of one year.

Employer does not dispute the above. *Employer's Brief* at 20-21. However, Employer argues the following:

> . . . .The DOL named Arch Coal as the insurance carrier for Arch of KY/Apogee Coal Co. Dx 24, Dx 30, Dx 34. However, DOL has failed to identify or produce a copy of any insurance policy or self-insurance agreement that shows that Arch Coal provides coverage for the black lung liability of Arch of Ky/Apogee Coal Co.
>
> At the same time, it opposed Arch's attempts to obtain this information when the case was before the ALJ. The only inference that can be drawn is that it has not evidence to support its allegation that Arch Coal provides coverage for this claim. . . .

*Employer's Brief* at 21. It is true that, while Arch Coal, Inc. was named as "Carrier," DOL actually found that Employer was self-insured through Arch Coal, Inc. DX 24. Significantly, Employer does not assert that it was not self-insured through Arch Coal, Inc. Rather, it bemoans the lack of evidence produced to support that. Such evidence need not be produced as the regulations specifically provide: "It 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 20 C.F.R. § 725.494(e)." 20 C.F.R. § 725.495(b).

Employer next argues that liability should have been placed on Patriot Coal, based on arguments that it made before the district director and it argues that there was an abuse of discretion by the district director in not addressing the arguments it raised before the district director. This Tribunal cannot accept new evidence on the responsible operator and carrier issue absent a showing of extraordinary circumstances, and no such showing has been made here.[10] 20 C.F.R. § 725.456(b)(1). *See also*

10. Employer's Constitutional challenge to the regulation as applied (*Employer's Brief* at 28-32) is preserved for appeal and will not be addressed here except to note that Employer's assertion that DOL had not taken the position that evidence of insurance coverage must be provided to the district director "[p]rior to the litigation involving Arch Coal and perhaps a few contemporary matters" (*Employer's Brief* at 30) is inaccurate. *See, e.g., Olenick v. Olenick Bros. Coal Co.,* BRB No. 11-0833 BLA, 2012 WL 5267588, at *3 (Ben. Rev. Bd., Sept. 19, 2012) (per curiam) (unpub.) (when carrier did not timely submit evidence concerning coverage to the district director, it could not be considered with carrier's February 2008 modification request.). In enacting the revised regulation in 2000, the Department discussed the basis for this provision as follows: "In both its initial notice of proposed rulemaking and its second notice of proposed rulemaking, however, the Department explained its intention to require potentially liable operators to submit evidence relevant to their employment of the miner and their financial capability to pay benefits at the earliest possible stage. 62 FR 3355– 56 (Jan. 22, 1997); 64 FR 54990–91 (Oct. 8, 1999). In these final regulations, the Department has also required operator development and submission of any evidence relevant to the liability of another party during the district director's claims processing." Preamble, 65 Fed. Reg. 79,920, 79,999 (Dec. 20, 2000).

Order of July 26, 2018. That restriction also applies to the carrier issue. *See, e.g., Olenick v. Olenick Bros. Coal Co.,* BRB No. 11-0833 BLA, 2012 WL 5267588, at *3 (Ben. Rev. Bd., Sept. 19, 2012) (per curiam) (unpub.). However, as this Tribunal is not bound by determinations made by the district director, the issue of whether the district director abused his discretion is not relevant to the responsible operator issue at hand. Thus, Employer's failure to make the arguments in its brief based on the record before the district director is puzzling, although its counsel did touch upon it at the September 17, 2018 hearing (Tr. 87-90).

In its brief, the Director addressed the arguments made by Employer before the district director on the coverage issue:

> Yet Arch continues to argue that certain contracts it made with third parties should relieve it from liability. In its response to the district director's Notice of Contest, Arch wrote: "In 2005, Arch Coal sold Arch of Ky/ Apogee's assets and liabilities to Magnum Coal. In 2008, Patriot Coal acquired those assets and liabilities when it bought Magnum Coal;" and "Patriot Coal can no longer cover its liabilities. It was an approved self-insurer by DOL. Thus, the Trust Fund must assume responsibility for the claim." (DX 27 at p. 12). Arch's counsel reiterated these arguments during the hearing. (Tr. at pp 86-90).
>
> Arch is essentially arguing that it should not be held liable for payment of benefits in this claim because Arch transferred its liabilities

> to Magnum Coal. But any contract between Arch and Magnum Coal bears no relevance on whether Arch is liable as the responsible operator under the Black Lung Benefits Act and its regulations. The miner stopped working for Arch in 1993 – more than a decade before the alleged contract between Arch and Magnum Coal. Any contract between Magnum Coal and Patriot Coal is even farther removed [from] the issue of Arch's liability. The miner never worked for Magnum Coal. The miner worked for Arch, and the district director never released Arch from liability. Certainly, if such a release existed, Arch would have produced its documentation long ago. And nothing in the regulations supports Arch's argument that it should now be released from liability now based on a contract it may have entered with a third party long after the miner's Arch employment.

*Director's Brief* at 5-6. The Director also noted that, even if Magnum Coal or Patriot Coal were successor operators, that would not relieve Employer, as the original operator, of liability.[11] *Id.* at 6. *See* 20 C.F.R. §§ 725.492(a), 725.493 (b)(1).

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11. A successor operator is "any individual who, on or after January 1, 1970, acquired a mine(s) or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof." 20 C.F.R. § 725.492(a). "In a case in which the miner was not independently employed by the successor operator, the prior operator shall remain primarily liable for the payment of any benefits based on the miner's employment with the prior operator." 20 C.F.R. § 725.493(b)(1).

*Appendix U*

The Director's analysis is sound. Inasmuch as Employer here was Claimant's last coal mine employer and satisfied the other criteria, Employer was properly named as responsible operator. As Magnum Coal and Patriot Coal never employed Claimant, they cannot be responsible operators unless they qualify as successor operators. However, even if the successor operator issue is reached, Employer would still remain primarily liable for the payment of any benefits. 20 C.F.R. § 725.493(b)(1). Employer therefore remains liable for payment of benefits.

Administrative law judges, including the undersigned, have rejected arguments made by other operators similar to those made by Employer here. *See Torain v. Heritage Coal Co.*,2018- BLA-05014 (June 8, 2020) (Judge DeMaio); *Osborne v. Sterling Smokeless Coal Co., Inc.,* 2019-BLA-05064 (May 15, 2020) (Judge Markley); *Phelps v. Heritage Coal Company,* 2018- BLA-05987 (Sept. 24, 2019) (Judge Price); *Griffith v. Eastern Associated Coal,* Case No. 2018- BLA-05046 (June 19, 2019) (Judge Morris); *Webb v. Peabody Coal Company*, Case No. 2017- BLA-05196 (Nov. 2, 2018) (Judge McGrath). In those cases, as here, the employers were self-insured, they met the criteria for being potentially liable responsible operators, they failed to establish their inability to pay benefits, and the transfer of assets and obligations to Patriot did not affect their liability. Inasmuch as Employer here was Claimant's last coal mine employer and satisfied the other criteria, Employer was properly named as responsible operator. For these reasons, the Tribunal finds that the Director correctly designated the self-insured Employer as the responsible operator in this claim.

## E. Entitlement

In order to establish entitlement to benefits, Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. § 718.204(a); *see also Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from complicated pneumoconiosis.[12] 20 C.F.R. § 718.304.

To succeed in a subsequent claim, a claimant must demonstrate a change in conditions, *i.e.*, the claimant must establish an element of entitlement previously adjudicated against him in the prior claim. § 725.309(c). "To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application." *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (en banc) (explaining that § 725.309 gives res judicata effect to a prior decision, and that a claimant's "theory of recovery on the new claim must be consistent

12. Complicated pneumoconiosis is a chronic dust disease of the lung which when diagnosed by x-ray yields one or more opacities greater than 1 cm in diameter; when diagnosed by biopsy or autopsy yields "massive lesions in the lung"; or when diagnosed by other acceptable medical procedures would be a condition which could reasonably be expected to yield the results of x-ray, biopsy or autopsy described in the rule. 20 C.F.R. § 718.304. There is no evidence of complicated pneumoconiosis in the instant case.

with the assumption that the original denial was correct"). A claimant may establish a change in condition by disproving the continuing validity of a single element adjudicated against him. *Lisa Lee Mines v. Dir., OWCP [Rutter],* 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc) (noting that § 725.309 "simply interposes a rebuttable presumption that nothing has changed" since the last adjudication); 65 Fed. Reg. 79,920, 79,973–74 (Dec. 20, 2000) (codifying the *Spese* and *Rutter* holdings in the revised regulations). Accordingly, only medical data generated after the denial of the prior claim may be considered in meeting this threshold standard. § 725.309(c)(3)–(4); *see also Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997) (holding that evidence "in existence at the time the [prior] claim was denied . . . is not applicable in determining whether there has been a change in condition since the denial" (quotations omitted)). If the claimant satisfies this threshold standard with newly generated evidence, the administrative law judge must conduct a *de novo* weighing of the evidence relevant to the remaining elements of entitlement. *See* 65 Fed. Reg. 79,920, 79,973 (Dec. 20, 2000) (explaining the application of revised § 725.309(c)).

Here, although this claim is a subsequent claim, the prior claim was destroyed by the district director and it is unclear upon what basis it was denied. In its brief, Employer argues that the destruction of the claim precluded it from having a fair hearing (Employer's Brief at 22-24), but there has been no showing of prejudice.[13]

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13. Employer's argument that the Trust Fund should assume responsibility as punishment for failing to safeguard the records is based on the Sixth's Circuit's decision in *Island Creek Coal Co. v. Holdman,* 201 F.3d 873, 883-84 (6th Cir. 2000).

*Appendix U*

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**APPENDIX V — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *WOODS V. ARCH OF KY/APOGEE COAL*, BRB NO. 21-0120 BLA DATED JAN. 20, 2023**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 21-0120 BLA

HAL T. WOODS, SR.,

*Claimant-Respondent,*

v.

ARCH OF KENTUCKY/APOGEE
COAL COMPANY, LLC,

and

ARCH RESOURCES, INCORPORATED
(FORMERLY ARCH COAL, INCORPORATED),

*Employer/Carrier-Petitioners,*

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

*Party-in-Interest.*

Date Issued: January 20, 2023

*Appendix V*

## DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2018-BLA-05610) rendered on a subsequent claim[1] filed on September 28, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Apogee Coal Company, doing business as Arch of Kentucky (Apogee), is the responsible operator and Arch Coal, Incorporated (Arch Coal) is the responsible carrier. On the merits, he found Claimant established twenty years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He

1. Claimant previously filed a claim in 1993 that was denied in 1994. Director's Exhibit 1. The basis for the denial is unclear, as the prior claim file was destroyed. *Id.*

therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Further, he found Employer did not rebut the presumption and thus found Claimant established a change in applicable condition of entitlement by establishing all the elements of his claim. 20 C.F.R. §725.309. Accordingly, he awarded benefits. After considering Employer's Motion for Reconsideration, he affirmed his prior findings.

On appeal, Employer argues the ALJ lacked authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[3] and the

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2. Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

3. 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.

removal provisions applicable to the ALJ rendered his appointment unconstitutional. Employer also contends the Department of Labor (DOL)'s destruction of Claimant's prior claim file and the ALJ's denial of certain discovery requests violated Employer's due process rights. It further argues the All erred in finding Arch Coal is the liable insurance carrier. On the merits, Employer argues the ALJ erred in finding Claimant established total disability, and thus erred in invoking the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.[4]

Claimant responds in support of the award of benefits.[5] The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging the Benefits Review Board to reject Employer's constitutional and due process challenges and its arguments with respect to the responsible carrier. In a reply brief, Employer reiterates its contentions on the merits.

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

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

5. The Board granted Claimant's Unopposed Motion to Accept Claimant's Response to Employer's Petition for Review and Brief Out of Time and accepted his brief as part of the record. *Woods v. Arch of Ky.*, BRB No. 21-0120 BLA (Oct. 28, 2021) (Order) (unpub.).

Regarding the Preamble. In response, the Director moved for a Protective Order barring the requested discovery. *See* Director's Motion for Protective Order. Employer objected to the Director's motion. *See* Employer's Opposition to Motion for Protective Order. The ALJ granted the motion, finding Employer's discovery request would not lead to relevant information regarding the DOL' s deliberative process or the science underlying the revised regulations that was not already set forth in the preamble. Order Denying Employer's Request to Issue Subpoenas and Granting the Solicitor's Motion for Protective Order at 10-14. Furthermore, the ALJ found Employer is "free to present other scientific evidence or research studies challenging the scientific data and conclusions by use of its own experts." *Id.* at 12.

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians' opinions as inconsistent with the science relied on in the preamble. Employer's Brief at 39-42. We disagree.

As the ALJ accurately observed, Employer had the opportunity to submit evidence invalidating the science set forth in the preamble but failed to do so. *See Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491 (6th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the

science underlying the preamble). Therefore, Employer has not shown a due process violation. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm the ALJ's ruling. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

**Responsible Insurance Carrier**

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and it was self-insured by Arch Coal on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack*, 6 BLR at 711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 10-11; Order on Reconsideration at 4-5 (unpaginated); Employer's Brief at 24. Rather it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Employer's Brief at 5; Director's Brief at 5-6; Director's Exhibits 4, 9; Hearing Transcript at 19. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Brief at 19. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide

for those benefits. *Id.* at 15-18. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company. Director's Brief at 18-19; Decision and Order at 8-10; Order on Reconsideration at 4-7 (unpaginated).

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 23-38. It argues the ALJ erred in finding Arch Coal liable for benefits because: (1) the ALJ evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (2) the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (3) the Director did not prove that Arch Coal's self-insurance covered Apogee for this claim; (4) the DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[12] reflects a change in policy under which the DOL began to retroactively impose new liability on self-insured mine operators and bypassed traditional rulemaking in violation of the APA; (5) the district director improperly "pierce[d] Arch [Coal]'s

12. The 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 Coal Corporation's bankruptcy.

corporate veil [to] hold it responsible" for the benefits of Apogee's employee, Claimant; and (6) the ALJ abused his discretion and deprived Employer of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01. Employer's Brief at 21-30.

The Board has previously addressed these arguments and rejected them in *Bailey v. E. Assoc. Coal Co.*, __BLR __, BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; and *Graham v. E. Assoc. Coal Co.*, __BLR __, BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey, Howard*, and *Graham*, we reject Employer's arguments.

In light of the foregoing, we affirm the ALJ's finding that Apogee, as insured by Arch Coal, is liable for the payment of benefits. 20 C.F.R. §§725.494, 725.495; Decision and Order at 10-11; Order on Motion for Reconsideration at 7 (unpaginated).

**Disability Causation**

The ALJ next addressed 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." 20 C.F.R. §718.305(d)(1)(ii). Contrary to Employer's assertion, the ALJ identified the correct rebuttal standard and permissibly discredited the opinions of Drs. Rosenberg and Tuteur on disability causation because they did not diagnose legal pneumoconiosis, contrary to the ALJ's findings. *See Big Branch Res., Inc*

*v. Ogle*, 737 F.3d 1063, 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 32-34; Employer's Brief at 43-44. Thus, we affirm the ALF's finding that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34.

Accordingly, we affirm the All's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration.

SO ORDERED.

/s/ Greg J. Buzzard
GREG J. BUZZARD
Administrative Appeals Judge

/s/ Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

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

**APPENDIX W — DIRECTOR'S ALJ CLOSING BRIEF IN *HOLBROOK V. ARCH OF KENTUCKY/APOGEE COAL*, CASE NO. 2017-BLA-05857, FILED FEB. 18, 2020**

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 2017-BLA-05857

STEVEN HOLBROOK O/B/O DONALD HOLBROOK,

*Claimant,*

v.

ARCH OF KY/APOGEE COAL,

*Employer,*

and

SELF-INSURED THROUGH ARCH COAL INC.,

*Carrier,*

and

DIRECTOR, OWCP,

*Party in Interest.*

**DIRECTOR'S RESPONSE TO ARCH COAL'S MOTION TO DISMISS AND TO TRANSFER LIABILITY TO TRUST FUND**

*Appendix W*

Chief Judge Paul Johnson

The Director, Office of Workers' Compensation Programs, United States Department of Labor, responds in opposition to Arch Coal's Motion to Dismiss and to Transfer Liability to Trust Fund. Arch Coal's assertion that liability must transfer to the Black Lung Disability Trust Fund because the Department of Labor has violated Arch Coal's due process right to meaningfully defend itself should be rejected.

**A. Applicable regulations.**

Section 725.418(d) provides, in pertinent part, 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." 20 C.F.R. § 718.418(d). Section 725.407, in turn, provides, in pertinent part:

> The district director shall notify each such [identified potentially liable] operator oldie existence of the claim. Where the records maintained by the Office pursuant to part 726 of this subchapter indicate that the operator had obtained a policy of insurance, and the claim falls within such policy, the notice provided pursuant to this section shall also be sent to the operator's carrier. Any operator or carrier notified of the claim shall thereafter be considered a party to the claim in accordance

> with § 725.360 of this part unless it is dismissed by an adjudication officer and is not thereafter notified again of its potential liability.

20 C.F.R. § 725.407(b). Section 725.407 does not prescribe how notice shall be effected.

After completing the initial development of evidence, the district director will issue and serve a schedule providing the parties with an opportunity to submit additional evidence. In particular, documentary evidence pertaining to liability, and the identity of witnesses whose testimony pertains to the liability of a potentially liable operator, must be provided to the district director in accordance with the deadlines set forth in the schedule. See 20 C.F.R. § 725.414(c), (d). Documentary liability evidence not submitted, and liability witnesses not identified, to the district director in accordance with the schedule shall not be admitted in any further proceeding in the absence of extraordinary circumstances. See 20 C.F.R. § 725.456(b)(1), .457(c)(1).

**B. Arch Coal had prompt notice of the claim and had, and continues to have, a meaningful opportunity to defend itself.**

1. Arch Coal was promptly notified of the claim. Arch Coal correctly points out that the district director issued a notice of claim on April 21, 2015 (DX 37) that identified Arch of KY/Apogee Coal Company as the responsible operator and Patriot Coal Company LLC as the self-insurer for this claim, and was served on Arch

Coal's third-party administrator (Mot. to Dismiss, p. 1). Although that notice identified Patriot rather than Arch Coal as the self-insurer, on April 27, 2015, Arch Coal timely responded to the notice denying Arch Coal's liability (DX 38). Then on June 29, 2016, the district director issued an amended notice of claim properly identifying Arch Coal as the self-insurer (DX 50). The amended notice was served on Arch Coal's third-party administrator (DX 50, p. 4). Thus, § 725.407(10 requirement that the district director notify each potentially liable operator and carrier was satisfied.

2. Arch Coal was provided with an opportunity to submit additional evidence. The district director issued a schedule for the submission of additional evidence on October 14, 2016, that identified Arch of KY/Apogee Coal as the responsible operator and Arch Coal as the self-insurer (DX 58). The schedule was served on Arch Coal's third-party administrator and its attorney (DX 58, p. 4). Arch Coal, by counsel, timely responded to the schedule on October 28, 2016, once again denying its liability for this claim (DX 59). Although the schedule provided Arch Coal with a 60-day period within which to submit liability evidence or identify liability witnesses in support of its denial of liability, Arch Coal submitted no documents pertaining to liability and identified no one as a liability witness. Arch had the opportunity to develop both medical and liability evidence in this case. To the extent that it didn't, it's because it chose not to, it was not prevented from doing so.

3. Arch Coal was provided with notice of the district director's Proposed Decision and Order ("PDO")(DX 65). Arch Coal, by counsel, timely responded to the PDO and requested a formal hearing (DX 66).

4. Arch Coal's suggestion that the course of proceedings here violate both due process of law and the APA, verges on ridiculous given that, all the documents identified Arch Coal as responsible, all the documents were served on Arch Coal's third-party administrator and Arch Coal's attorney, Arch Coal timely responded to all of the documents, and Arch Coal lost no opportunities to defend itself. Arch coat's Motion does not even attempt to make a showing that it has been prejudiced by the district director's actions. That is not surprising since, as evidenced by its timely actual notice of all three administrative actions, Arch could not have suffered any conceivable prejudice.

5. Employer argues that if the Director insists that the adjudication of this matter proceed, liability should be transferred to the Black Lung Disability Trust Fund because to go forward would be a violation of the Employer's right to a fair and unprejudiced adjudication. To support this position, Employer references matters where courts have dismissed employers and transferred liability to the Trust Fund, but none of those scenarios are present here. Employer refers to *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999), and *Lane Hollow Coal Co. v. Director, OWCP,* 137 F.3d 799 (4th Cir. 1998), but in those cases, the employers were dismissed because they had not received timely notice of the claims and the

delay compromised their defense; there is no evidence that Employer's defense has been compromised here. Next, Employer cites to *Island Creek Coal Co. v. Holdman,* 202 F.3d 873 (6th Cir. 2000) wherein an incomplete record precluded a fair hearing and the matter required an employer's dismissal. Again, such a situation is not present in this matter and is thus not applicable. The Employer has failed to demonstrate any prejudice and/or provide this court with a valid reason as to why it should be dismissed.

6. Employer's chief contention is that it sold away Arch/Apogee's federal black lung liabilities to Magnum, which in turn sold them to Patriot. *See* DX 25. While an operator can arrange for other companies to pay the operator's federal black lung liabilities on the operator's behalf, such private contracts do not release the operator from liability imposed by the BLBA. *See U.S. Dep't of Labor v. Triplett,* 494 U.S. 715, 718 (1990) (provisions of a contract between private parties are invalid if they conflict with black lung regulations); *see also Connolly v. Pension Ben. Guar. Corp.,* 475 U.S. 211, 223-24 (1986) ("Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.") (quoting *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240, 307-308 (1935)); *Lovilia Coal Co. v. Williams,* 143 F.3d 317 (7th Cir. 1998) (holding that insurance contract could not be construed to limit an insurer's liability under the Black Lung Benefits Act); *Curry v. Eagle Energy, Inc.,* Case No. 2013-BLA-05263, slip op. at 7 (July 28, 2016) (where regulations clearly impose liability on an employer, contractual provisions to the contrary do not control). This Tribunal should reject

Employer's argument as it and other ALJs have done in similar cases.[1]

7. Further, even assuming Employer's factual allegations are true, OWCP never released Arch from liability for this claim. Patriot obtained authorization to

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1. *See, e.g., Halcomb v. Arch of Kentucky/Apogee Coal Co.,* Case Nos. 2017-BLA-5938, 2017-BLA-5537, Order (1) Denying Motion for Abeyance or to Cancel the Hearing and Provide a Schedule for Discovery on Liability; (2) Granting Director's Motion for Partial Summary Decision; and (3) Awarding Benefits (Nov. 30, 2017), p. 8 ("The Director's motion for partial summary decision is GRANTED, and Arch of Kentucky/Apogee Coal Company is the responsible operator liable for payment of benefits in this matter."); *Pletcher v. Hobet Mining LLC,* Case No. 2017-BLA-05230, Order Denying Bifurcation and Denying Extension of Deadline to Develop Liability Evidence (Nov. 15, 2017), p. 9 ("Arch is properly named as a prior operator in this case as a self-insurer for its former subsidiary, Hobet Mining, and the self-insurer at the time the miner was most recently employed as a coal miner."). Similar arguments by Peabody Energy have also been rejected. *See Halstead v. Pine Ridge Coal Co.,* Case No. 2017-BLA-05009, Decision and Order Awarding Benefits (May 22, 2018) (finding Pine Ridge/Peabody liable); *Duncan v. Martinka Coal. Co., Peabody. Energy Corp., and Director, OWCP,* Case No. 2017-BLA-5074, Decision and Order awarding Benefits (May 1, 2018) (ALJ Appetta) (finding Martinka Coal/Peabody liable); *Floyd v. E. Associated Coal Co.,* All No. 2017-BLA-05519, Order Denying Motion to Dismiss Peabody energy Corp. as Insurer (Aug. 21, 2018) (ALJ Appetta); *Burns v. Pine Ridge Coal Co.,* AU No. 2017-BLA-5319, Order Denying Employer's Motion to Bifurcate (Nov. 3, 2017); *Adkins v. Eastern Associated Coal. Corp.,* ALJ No. 2017-BLA-05130, Order Denying Employer's Motion to Dismiss Peabody Energy (Oct. 6, 2017).

self-insure its federal black lung liabilities in 2011. This authorization was retroactive, meaning that Patriot was liable for black lung claims based on employment with Patriot subsidiaries both before and after Patriot owned those subsidiaries. However, Patriot's authorization was not exclusive; it did not provide that if Patriot's self-insurance failed, no other operator could be responsible for the claims of miners who worked for subsidiary companies before Patriot owned them. In other words, Arch was never released from liability liar the claims of miners who worked for it in the event Patriot's self-insurance failed. After filing for bankruptcy in 2015, Patriot's self-insurance did fail. Arch remains liable for the claims of miners who worked for it but never for Patriot or one of its subsidiaries, as in this case. For that reason, the district director properly named Arch as Apogee's self-insurer.

8. Employer argues that the Department of Labor "changed its self-insurer regulations to impose liability based on the miner's last day of work" rather that the date the claim was filed (Mot. to dismiss, pg. 5). This argument also fails. The Department hasn't changed its regulations for imposing liability on self-insurers. Under the black lung regulations, parent companies can be held responsible for their subsidiaries' liabilities in multiple ways, including after they have sold those subsidiaries. *See, e.g.,* 20 C.F.R. §§ 725.491(e) ("any parent entity or other controlling business entity may be considered an operator for purposes of this part"); 725.492(a), (d) (providing liability for successor operators, which are entities that "acquired a mine or mines, or substantially all of the assets thereof, from a prior operator," and providing

that this regulation "shall not be construed to relieve a prior operator of any liability"); 725.493(b)(2) (providing that a parent entity may be considered the "employer"). In this case, Arch Coal is liable for this claim under a straightforward reading of the regulations: the miner last worked for at least one year in coal mine employment for Apogee/Magnum, when it was self-insured through Arch Coal (DX 10). 20 C.F.R. §§ 725.493-725.495.

9. Arch continues to argue that Bulletin No. 16-01 (the "Bulletin") is a rule under the Administrative Procedure Act and that the Department violated the APA by issuing it. More specifically, these topics pertain to Arch's argument that when the Department issued the Bulletin (which provided guidance to district directors on how to handle claims after the Patriot bankruptcy), the Department attempted to amend the regulations without going through notice and comment rule-making. Arch has further argued that the guidance in the Bulletin was a change in DOI's interpretation of its regulations regarding al location of liability. However, this argument simply isn't valid. The D.C. Circuit rejected Arch's argument that the Bulletin is "a substantive 'rule.'" *Arch Coal, Inc. v. Acosta,* 888 F.3d 493, 501 (D.C. Cir. Apr. 27, 2018) *("Acosta")* (citing 5 U.S.C. § 551(4)). The court recognized that the Bulletin is, instead, "an enforcement policy," which "only requires District Directors to initiate proceedings concerning Arch's potential responsibility for (certain] claims" under the BLBA. *Id.* The court further noted: "It is well understood that the notice-and-comment provisions . . . of the APA do not apply to [such] agency bulletins . . . ." *Id.* In light of the D.C. Circuit's decision

in *Acosta,* there is no longer a reason to keep presenting this argument since Arch has already litigated the APA issue and lost in federal court.[2]

10. Employer further argues that DOL is trying to apply commercial insurance principles to a black lung case. This argument also fails. Arch is liable under the regulations because the miner last worked for Arch of Ky/Apogee/Magnum when it was self-insured through Arch. Employer satisfies the criteria for a potentially liable operator as set forth in 20 C.F.R. § 725.494(a)-(e). A coal mine operator is potentially liable for a black lung claim if it meets five criteria: (a) the miner's disability or death arose out of employment with that operator; (b) the entity was an operator after June 30, 1973; (c) the miner worked for the operator for at least one year; (d) the miner's employment included at least one working day after December 31, 1969; and (e) the operator is financially capable of assuming liability for the claim. 20 C.F.R. § 725.494. Absent contradictory evidence, the designated responsible operator is presumed to be financially capable of paying benefits. *Id. §* 725.495(b). If a miner was employed by more than one coal mine operator during his career, the responsible operator is the most recent operator to employ the miner, provided

2. *See Muscar v. Director, OWCP,* 18 BLR 1-7, 1-8 (DOL Ben. Rev. Bd. Sept. 23, 1993) ("An inferior court has no power or authority to deviate from the mandate issued by an appellate court.") (citing *Briggs v. Pa. R. Co.,* 334 U.S. 304 (1948)); *see also Collins v. Pond Creek Mining Co.,* 468 F.3d 213, 218-21 (4th Cir. 2006) (applying the doctrine of collateral estoppel to bar a coal company's relitigation of whether a miner had pneumoconiosis).

that employer qualifies as a "potentially liable operator" under 20 § 725.494. *Id, §* 725.495(a)(1). The Director is not required to prove that the designated responsible operator is financially capable of assuming liability. Rather, that fact is presumed and it is the designated responsible operator's burden to prove that it lacks sufficient assets to secure the payment of benefits. *See* 20 C.F.R. § 725.495(b), (c)(1). Here, Employer contends that its liabilities were transferred to Magnum and then to Patriot and that Patriot cannot pay, but Employer has not contended that Arch/Apogee is presently unable to pay through its self-insurance under Arch. Neither has Employer submitted any evidence to meet its burden of showing that Arch/Apogee is unable to pay. Therefore, the ALJ should find that Employer is the responsible operator liable for this claim. 20 C.F.R. § 725.495(a)(1).

11. Employer further argues that 20 C.F.R. § 725,495(a)(4) precludes it from being held liable in this claim. Employer misconstrues the regulation. Section 725.495(a)(4) provides that if the miner's "most recent employment by an operator ended while the operator was authorized to self-insure" and that operator no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be named as the responsible operator and liability falls to the Trust Fund. Employer argues that Patriot is no longer capable of paying benefits and therefore Arch cannot be named. However, Claimant's most recent employer was with Arch/Apgoee, not Patriot. In fact, he was never employed by Patriot. Therefore, Patriot's inability to pay benefits does not trigger § 725.495(a)(4). Nor does § 725,495(a)(4) bar Arch/Apogee's

designation as the responsible operator, as Employer has not shown that Arch/Apogee is unable to pay benefits.

**C. Arch's documentary evidence is not properly before the ALJ and should be stricken from the record.**

12. Under the Black bung regulations, "[d]ocumentary evidence pertaining to liability of a potentially liable operator and/or identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. § 725.456(b)(1) *see also id §* 725.414(d). Similarly, no witness testimony pertaining to liability is allowed at the hearing or through deposition or interrogatory unless the witness was identified as a potential witness while the claim was pending before the district director or extraordinary circumstances excuse Employer's failure to do so. *Id.* §§ 725.414(c), 725.457(c).

Here, Employer presented no liability evidence to the district director. Employer also identified no liability witnesses to the district director. Employer has not suggested any extraordinary circumstances prevented it from doing so. In the absence of extraordinary circumstances, the exhibits attached to Employer's motion are improperly before the AU and should be stricken from the record. *See id.* §§ 725.414(c)-(d), 725.456(b)(1), 725.457(c).

13. In addition, the deposition of Robert Brisco from *Jerry Lee Burns v. Hobet Mining, Inc.* is irrelevant to this

claim and should be excluded on that basis. The Briscoe deposition focused on Arch Coal's actuary's general understanding of OWCP's self-insurance authorization procedures and barely touched on Arch Coal's specific situation. Even to the extent the deposition addressed Arch Coal, the testimony did not address Arch Coal's liability for this claim. Arch Coal is liable for this claim because it self-insured Arch/Apogee when Arch/Apogee employed the claimant. Mr. Briscoe's testimony does not dispute this fact, or allege that Arch Coal is financially incapable of paying any benefits awarded in this claim. 20 C.F.R. § 725.495(c)(1). The testimony is irrelevant to Arch Coal's liability. *Cf. DeHart v. Hohet Mining, Inc.,* Case No. 2018-BLA-05512, Order Denying Employer's Subpoena Request and Requests for Production of Documents at 12 (Aug. 10, 2018) (finding Arch Coal failed to establish BLBA Bulletin 16-01 is relevant to the adjudication of a claim because its liability is based upon the BLBA and applicable regulations, not Bulletin 16-01) (ALJ Swank).

14. Finally, Arch continues to argue that Dr. Forehand's pilot program report should not be admitted because it also violates its due process. Arch's motion to exclude this report was denied by an AU on September 20, 2018 wherein the ALJ found that the Director complied with the regulations in relying on that report. The Director incorporates her positions, arguments and brief filed earlier on this issue and submits that Dr. Forehand's report was properly and rightfully relied upon by the Department and that reliance in no way violated the due process rights of Employer.

*Appendix W*

**CONCLUSION**

Arch Coal's motion to dismiss and to transfer liability to the trust fund should be denied.

Respectfully submitted,

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**APPENDIX X — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *HOLBROOK V. ARCH OF KENTUCKY/APOGEE COAL*, CASE NO. 2017-BLA-05857 DATED DECEMBER 21, 2021**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE NO.: 2017-BLA-05857

*In the Matter of:*

STEVEN HOLBROOK

ON BEHALF OF DONALD HOLBROOK,

*Claimant,*

*v.*

ARCH OF KY/APOGEE COAL COMPANY,

*Self-Insured Employer,*

*and*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

**Issue Date: 21 December 2021**

*Appendix X*

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §901 et seq. (hereinafter "the Act"). In accordance with the Act and the Regulations issued thereunder, the case was referred by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of miners who were totally disabled at the time of their deaths (for claims filed prior to January 1, 1982), or to the survivors of miners whose deaths were caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as "black lung."

A hearing was scheduled for February 10, 2020, but on December 19, 2019, I issued an Order granting the parties' consent motion for a decision on the record, and provided time for the submission of evidence, objections to the other parties' evidence, and the submission of written closing briefs. The Employer submitted a written brief on September 4, 2020; neither the Claimant nor the Director submitted a written brief.[1]

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1. The Employer's myriad objections to issues other than the merits of this claim, raised again in its brief, have previously

*Appendix X*

## JURISDICTION AND PROCEDURAL HISTORY

Mr. Holbrook filed this claim on March 18, 2015. (DX 5). On February 15, 2017, the Director issued a Proposed Decision and Order awarding benefits. (DX 65). The Employer requested a hearing, and on May 18, 2017, the file was transmitted to the Office of Administrative Law Judges. (DX 66, 74).

Mr. Holbrook filed three previous claims. His first claim was filed on November 3, 1997, and denied by the Director on June 10, 1998. Mr. Holbrook did not further pursue this claim. (DX 1).

Mr. Holbrook filed his second claim on December 14, 2001, which was denied by Administrative Law Judge Thomas F. Phalen Jr. on November 18, 2005. Mr. Holbrook appealed, and on September 18, 2006, the Benefits Review Board (Board) issued a Decision and Order affirming Judge Phalen's denial of benefits. (DX 2).

Mr. Holbrook filed a third claim, which was withdrawn, and thus is considered never to have been filed. (DX 3).

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been addressed in my March 13, 2020 Order Granting Motion to Extend Deadlines and Denying Motion to Dismiss, my June 9, 2020 Order Granting in Part Employer's Motion to Compel, my August 18, 2020 Order Sustaining Director's Evidentiary Objections, my September 15, 2020 Order Denying Employer's Motion to Suspend Briefing and to Leave Record Open, and my October 28, 2020 Order Denying Employer's Motion to Reconsider Order Denying Motion to Suspend Briefing and to Leave Record Open.

In connection with this claim the record includes Director's Exhibits (DX) 1 through 74; and Employer's Exhibits (EX) 1 through 8, 10 and 11, 22, 25, and 26. In an Order issued on August 18, 2020, I sustained the Director's objections to EX 9, 12-21, 23-24, and 27.

## ISSUES PRESENTED

As reflected on the CM-1025, the following issues are contested by the Employer.

1. The timeliness of Mr. Holbrook's claim.[2]

2. The length of Mr. Holbrook's coal mine employment.

3. Whether Mr. Holbrook had pneumoconiosis that arose from his coal mine employment.

4. Whether Mr. Holbrook was totally disabled due to pneumoconiosis.

5. The number of dependents for purposes of augmentation of benefits.[3]

6. Whether the Employer is properly designated as the responsible operator.

(DX 74).

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2. The Employer has proffered no evidence or argument to rebut the presumption that Mr. Holbrook's claim was timely filed. 20 C.F.R. Section 725.308(b).

3. Mr. Holbrook did not claim any dependents.

*Appendix X*

## APPLICABLE STANDARD

The Claimant's claim is a subsequent claim because there was a previous claim which was finally denied. As an initial matter, evidence admitted in a subsequent claim must demonstrate an element of entitlement adjudicated against the miner in the prior claim. 20 C.F.R. § 725.309(d). Only medical data generated after denial of the previous claim may be considered in meeting this threshold standard. 20 C.F.R. § 725.309(d)(3); *see also Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997) (it was proper for the Administrative Law Judge to refuse to consider evidence "in existence at the time the (prior) claim was denied on grounds that such evidence 'is not applicable in determining whether there has been a change in condition since the denial'"). If the Claimant satisfies this threshold standard with newly generated evidence, then the entire record is reviewed *de novo* to determine entitlement to benefits. 20 C.F.R. § 725.309(d)(4).

Because this claim was filed after the enactment of the Part 718 regulations, the Claimant's entitlement to benefits will be evaluated under Part 718 standards. Under these regulations, the Claimant bears the burden of demonstrating each of the following elements by a preponderance of the evidence: (1) that Mr. Holbrook suffered from pneumoconiosis; (2) the pneumoconiosis arose from coal mine employment; (3) that he had a totally disabling respiratory impairment; and (4) the impairment is caused by pneumoconiosis. 20 C.F.R. § § 718.202-718.204. Failure to establish any one of these elements precludes entitlement to benefits.

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Claimant will be entitled to a rebuttable presumption that Mr. Holbrook was totally disabled due to pneumoconiosis if he establishes that Mr. Holbrook had fifteen years of underground coal mine employment and that he had a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). The burden would then shift to the Employer to demonstrate, by a preponderance of the evidence, either that Mr. Holbrook did not suffer from pneumoconiosis or that his history of coal mine dust exposure was not a factor in his totally disabling respiratory impairment. 30 U.S.C. § 921(c)(4)(A)-(B); 20 C.F.R. § 718.305(d).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

*Background*

The miner, Donald Holbrook, was born in March 1939; he completed the third grade in school. Mr. Holbrook was married to his wife, Janice, on June 10, 1962; they resided together. Mr. Holbrook did not have any dependent children. (DX 5).

Mr. Holbrook died on April 26, 2016. His death certificate reflects that his death was due to a shotgun wound to the head. (DX 15). A letter from Mr. Holbrook's son, Steve Holbrook, reflects that Mr. Holbrook woke up very short of breath the morning of April 26, 2016, and refused to go to the hospital to treat his breathing difficulties. He took his own life that morning. (DX 14).

On his application, Mr. Holbrook stated that he worked for 19 years as a coal miner, ending in 1997 because of his breathing, and because the mines shut down. (DX 5).

*Appendix X*

On his Employment History form, Mr. Holbrook listed his work in underground coal mines for Arch of Kentucky from 1978 to 1997. He operated a shuttle car and worked on the belt line. (DX 6).

An Employee Service Record for Mr. Holbrook reflects that he worked for Arch of Kentucky at the Lynch 37 mine from May 19, 1978 to October 1, 1996, when he retired. He worked as a shuttle car operator and inside laborer. (DX 8).

*Length of Coal Mine Employment/*
*Responsible Operator*

The Employer contests the length of Mr. Holbrook's coal mine employment.[4] The Claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1 34 (1984); *Schmidt v. Amax Coal Co.* 7 B.L.R. 1-489; *see, e.g., Niccoli v. Director, OWCP*, 6 B.L.R. 1 910 (1984); *Hartley v. C.J. Langenfelder & Son, Inc.*, BRB No. 00-0823 BLA (15 May 2001)(unpub.).

Calculating the length of coal mine employment may be based on any reasonable method so long as it is supported by substantial evidence in the record considered as a whole. *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1 551 (1984); *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1 489 (1984); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). In determining length of employment in the coal mines, it

4. I note that when this claim was before Judge Phalen, the Employer stipulated that Mr. Holbrook worked at least 18 years in or around one or more coal mines. (DX 2).

is proper to consider evidence from a variety of sources, including affidavits of co-workers, Social Security records, sworn testimony, written statements of the miner (including the Form CM-911a), records of the employer, and pension records. § 725.101(a)(32)(ii); *Muncy, supra* (finding that the formula set forth at § 725.101(a)(32)(iii) may be used, but it is not mandatory; it was proper to use the miner's Social Security records, employment history form, and records from former employers).

As noted above, Mr. Holbrook's Employee Service Record from U.S. Steel reflects that he worked for Arch of Kentucky at the Lynch 37 mine from May 19, 1978 to October 1, 1996 when he retired. (DX 8). He worked 5 to 6 days a week. (DX 7). Yet despite this detailed record of Mr. Holbrook's employment with the Employer, the Employer has calculated that he had only 11 years of coal mine employment. (Employer's Brief at 14).

Although the Employer disputes the Court's finding in *Shepherd v. Incoal, Inc.*, 915 F.3d 932 (6th Cir. 2019), that 125 days of coal mine employment is equivalent to one year of coal mine employment, the Employer pointed to the Court's instruction that before any "definitive determination" can be made, an ALJ is required to "consider and weigh, in the first instance, *all evidence* related to the beginning and ending dates of each of the miner's stints of coal mine employment." (Employer's Brief at 13-14, citing *Shepherd*, 915 F.3d at 407).

But despite the fact that the record includes the Employer's records setting out the precise dates of Mr. Holbrook's employment, the Employer elected to calculate

the length of his coal mine employment using his testimony that he worked 10 hours a day at $18 an hour, dividing his annual reported earnings by a daily rate of $180, and comparing it to 251 working days, the average number of working days in a calendar year.

As there is information in the record that provides for a precise calculation of the length of Mr. Holbrook's coal mine employment, such calculations are not necessary. Mr. Holbrook's Service Record reflects the following continuous periods of employment with the Employer.

| | |
|---|---|
| 5-19-78 to 6-25-84: | Lynch 37 Mine (6 years, 1 month, 6 days) |
| 6-26-84 to 8-29-84: | Idle |
| 8-30-84 to 5-31-86: | Lynch 37 Mine (1 year, 9 months) |
| 6-1-86 to 3-12-87: | Idle |
| 3-13-87 to 11-3-95: | Lynch 37 Mine (8 years, 7 months, 10 days) |

Retired 10-1-96

Based on this detailed record, with starting and ending dates for each period of Mr. Holbrook's employment with the Employer, he clearly had at least 16.4 years of coal mine employment. But even if such records were not available, the appropriate method to determine the length of Mr. Holbrook's coal mine employment would be to compare his coal mine earnings to the Average Earnings of Employees in Coal Mining at OWCP Exhibit 610. As shown below, using this method, and accounting for the fact that Mr. Holbrook last worked in November 1995, he clearly had more than 16 years of coal mine employment.

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| YEAR | EMPLOYER(S) | EARNINGS | INDUSTRY AVERAGE | TOTAL CME (YEARS) |
|---|---|---|---|---|
| 1978 | Marathon Oil Corp. | $10,292.87 | $10,038.75 | 1 |
| 1979 | Marathon Oil Corp. | $20,006.81 | $10,878.75 | 1 |
| 1980 | Marathon Oil Corp. | $17,771.24 | $10,927.50 | 1 |
| 1981 | Marathon Oil Corp., U.S. Steel Mining Co. Inc. | $12,926.46<br>5,822.66 | $12,100.00 | 1 |
| 1982 | U.S. Steel Mining Co. Inc. | $17,366.41 | $12,698.75 | 1 |
| 1983 | U.S. Steel Mining Co. Inc. | $17,841.45 | $13,720.00 | 1 |
| 1984 | U.S. Steel Mining Co. Inc., Arch of Kentucky Inc. | $3,678.08<br>20,630.08 | $14,800.00 | 1 |
| 1985 | Arch of Kentucky Inc. | $29,288.45 | $15,250.00 | 1 |

*Appendix X*

| | | | | |
|---|---|---|---|---|
| 1986 | Arch of Kentucky Inc. | $16,329.33 | $15,390.00 | 1 |
| 1987 | Arch of Kentucky Inc. | $27,103.42 | $15,750.00 | 1 |
| 1989 | Arch of Kentucky Inc. | $35,066.43 | $16,250.00 | 1 |
| 1990 | Arch of Kentucky Inc. | $51,300.00 | $16,710.00 | 1 |
| 1991 | Arch of Kentucky Inc. | $43,188.73 | $17,080.00 | 1 |
| 1992 | Arch of Kentucky Inc. | $34,075.79 | $17,200.00 | 1 |
| 1993 | Apogee Coal Co. | $24,318.62 | $17,260.00 | 1 |
| 1994 | Apogee Coal Co. | $37,506.95 | $17,660.00 | 1 |
| 1995 | Apogee Coal Co. | $39,999.07 | $18,440.00 | 1 |
| 1996 | Apogee Coal Co. | $4,980.54 | $18,740.00 | |
| | | | TOTAL: | 17 |

*Appendix X*

I do not credit the Employer's convoluted calculation of the length of Mr. Holbrook's coal mine employment, which ignores the Court's instructions in *Shepherd*, as well as the information in its own records. I find that Mr. Holbrook had at least 16.4 years of underground coal mine employment. Finally, the record clearly reflects that the Employer, for whom Mr. Holbrook worked from 1978 to 1996, is properly designated as the responsible operator.

* * * *

**APPENDIX Y — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *HOLBROOK V. ARCH OF KENTUCKY/APOGEE COAL*, BRB NO. 22-0229 BLA DATED JULY 13, 2023**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 22-0229 BLA

STEVEN HOLBROOK (ON
BEHALF OF DONALD HOLBROOK)

*Claimant-Respondent,*

v.

ARCH OF KENTUCKY/APOGEE COAL COMPANY,

and

ARCH RESOURCES, FORMERLY
ARCH COAL, INCORPORATED,

*Employer/Carrier-Petitioners,*

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

*Party-in-Interest.*

Date Issued: 07/13/2023

**DECISION AND ORDER**

*Appendix Y*

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2017-BLA-05857) rendered on a miner's subsequent claim filed on March 18, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Apogee Coal Company, doing business as Arch of Kentucky (Apogee), is the responsible operator. On the merits, he found the Miner had 16.4 years of underground coal mine employment and

1. The Miner filed three prior claims Director's Exhibits 1, 2. The district director denied his first claim on June 10, 1998, as he failed to establish any element of entitlement. The Miner did not further pursue this claim. Director's Exhibit 1. He filed a second claim on December 14, 2001, which was denied in a decision issued by ALJ Thomas F. Phalen, Jr. that the Benefits Review Board affirmed on September 18, 2006, for the Miner's failure to establish pneumoconiosis and total disability due to pneumoconiosis. *Holbrook v. Apogee Coal Co./Arch of Ky., Inc.,* BRB No. 06-0220 BLA (Sept. 18, 2006) (unpub.); Director's Exhibit 2. The Miner took no further action on that claim. He subsequently filed a third claim, but later withdrew it. Director's Exhibit 3. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant[2] invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[3] and established a change in an applicable condition of entitlement.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. Further, he found 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 he was not

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2. Claimant, the son of the Miner, is pursuing the Miner's claim due to the Miner's death on April 26, 2016. Director's Exhibits 15, 16.

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

4. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner did not establish pneumoconiosis or total disability due to pneumoconiosis in his prior claim, evidence establishing one of these elements was required to obtain review of the merits of his current claim. *Id.*

appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to the ALJ rendered his appointment unconstitutional. Further, Employer argues the ALJ erred in finding it is the properly designated responsible operator and in denying its request for discovery regarding Black Lung Benefits Act (BLBA) Bulletin No. 16-01. On the merits, Employer argues the ALJ erred in finding the Miner worked at least fifteen years in underground coal mine employment, and thus improperly invoked the Section 411(c)(4) presumption. Finally, it argues he erred in determining it did not rebut the presumption.[6]

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5. 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.

6. We affirm, as unchallenged on appeal, the All's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-24.

Claimant has not filed a response in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and removal protections. The Director also urges the Board to reject Employer's arguments regarding its request for discovery on BLBA Bulletin No. 16-01, and to affirm the ALJ's determination that Arch is the properly designated responsible operator. Employer has filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.,* 380 U.S. 359 (1965).

**Appointments Clause/Removal Protections**

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC,* 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 36-

7. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

8. *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United

41; Employer's Reply Brief at 19-20. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 41-46. 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. Id.* In addition, it relies on the United States

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States Supreme Court held that, 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)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler,* 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

9. The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Johnson; *see* Employer's Brief at 38-39.

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), as well as 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). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.,* BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), and *Howard v. Apogee Coal Co.,* 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

**Responsible Insurance Carrier**

Employer does not challenge the ALJ's findings that it is the correct responsible operator, self-insured on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 6. In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 3-4. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 21; Employer's Brief at 4. In 2015, Patriot went bankrupt. *Id.; see* Director's Exhibit 52 at 5-6. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company, as the Director states. Director's Brief at 21-22.

Employer raises one argument on appeal to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 15-22; Employer's Reply Brief at 7-15. It argues the ALJ erred in finding it liable for benefits because he abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01.[10] *Id.*

The Board has previously considered and rejected this argument under the same material facts in *Howard,* 25 BLR at 1-308-19. For the reasons set forth in *Howard* we reject Employer's argument. Thus we affirm the ALJ's determination that Employer is the self-insured responsible operator liable for this claim.

**Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment**

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP,* 348 F.3d 133, 136 (6th Cir. 2003);

10. The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Department of Labor issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" effected by Patriot›s bankruptcy.

*Kephart v. Director, OWCP,* 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP,* 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.,* 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.,* 11 BLR 1-58 (1988) (en banc).

The ALJ credited the Miner's Employee Service Record indicating the beginning and ending dates of his coal mine employment as May 19, 1978 to October 1, 1996, and establishing 16.04 years of coal mine employment. Decision and Order at 5-6; Director's Exhibit 8. Even though the ALJ was able to ascertain the specific beginning and ending dates of the Miner's employment, he also referenced the formula at 20 C.F.R. §725.101(a)(32)(iii),[11] and calculated the Miner's length of coal mine employment using

* * *

11. Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

* * *

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

**APPENDIX Z — DIRECTOR'S ALJ CLOSING BRIEF IN *HALL V. ARCH OF KY/APOGEE COAL*, CASE NO. 2017-BLA-06125, FILED FEB. 26, 2021**

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 2017-BLA-06125

IN THE MATTER OF JERRY HALL,

*Claimant,*

v.

ARCH OF KY/APOGEE COAL CO.,
SELF-INSURED THROUGH ARCH COAL, INC.,

*Employer,*

and

DIRECTOR, OWCP,

*Party in Interest.*

Filed February 26, 2021

**DIRECTOR'S CLOSING BRIEF**

Former coal miner Jerry Hall filed a claim for benefits under the Black Lung Benefits Act ("BLBA") on June 2, 2015 (DX 2). The district director issued a Proposed Decision and Order awarding benefits (DX

38) and, upon Employer's request (DX 39), referred the case to the Office of Administrative Law Judges (DX 44). Administrative Law Judge Johnson conducted a formal hearing on February 10, 2020. This brief will address the question whether Employer—Arch of KY/Apogee Coal, self-insured through Arch Coal, Inc.—is the properly designated responsible operator in this matter.

## STATEMENT OF THE FACTS

Mr. Hall's Social Security Itemized Statement of Earnings documents earnings from Employer from 1984 through 1990 (DX 5). The order approving settlement of Mr. Hall's state occupational disease claim against Employer indicates that his date of last exposure was June 18, 1990 (DX 7). Mr. Hall worked for Employer as an underground coal miner (DX 4).

Employer was the most recent employer for which Mr. Hall worked as a coal miner (DX 5, 7). Arch of KY/Apogee Coal was self-insured through Arch Coal at the time Mr. Hall last worked (DX 31, 33).[1]

## ARGUMENT

### 1. Applicable legal standards.

The Department's regulations provide that the operator responsible for the payment of benefits in a

1. Judge Johnson properly denied Employer's motion to admit additional liability evidence in an order issued on January 26, 2021.

claim shall be the "potentially liable operator" that most recently employed the miner. 20 C.F.R. § 725.495(a)(1). Those regulations further provide that a "potentially liable operator" is an operator which meets each of the five conditions set forth in 20 C.F.R. § 725.494. The five conditions that must be met are: (a) the miner's disability or death arose at least in part out of employment in a mine when it was operated by the operator; (b) the operator was an operator for any period after June 30, 1973; (c) the miner was employed by the operator for a cumulative period of not less than one year; (d) the miner's employment with the operator included at least one working day after December 31, 1969; and (e) the operator is capable of assuming its liability for the payment of continuing benefits because, for example, it has insurance coverage for the claim.

To avoid liability, a potentially liable operator designated as the responsible operator in the district director's proposed decision and order bears the burden of proving that it: (1) does not possess sufficient assets to secure the payment of benefits, or (2) is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2). *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 281-82 (4th Cir. 2016). It is presumed under § 725.495(b) that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e). 20 C.F.R. § 725.495(b).

**2. Employer is a potentially liable operator.**

Employer meets all the conditions to be a potentially liable operator under § 725.494. First, Mr. Hall's disability arose at least in part out of employment in or around a mine operated by Employer. Section 725.494(a) provides a rebuttable presumption that a miner's disability arose out of his employment in or around a mine operated by the operator, and further states that a miner's disability shall be considered to have arisen out of that work if that work "caused, contributed to or aggravated the progression or advancement" of the miner's inability to work. The record here contains no evidence that could rebut the presumption. Moreover, the record demonstrates that Mr. Hall was exposed to dust while working for Employer as underground miner (DX 3; DX 13, p. 4). Thus, Mr. Hall's disability arose at least in part out of employment in or around a mine operated by Employer, and Employer meets the condition set forth in § 725.494(a).

Second, Mr. Hall worked at a mine operated by Employer from 1984 to 1990 (DX 5, 7). Thus, Employer was an operator after June 30, 1973; Employer employed Mr. Hall for a cumulative period of not less than one year; and Mr. Hall's employment with Employer included at least one day after December 31, 1969. Consequently, Employer meets the conditions set forth in § 725.494(b) through (d).

Finally, Employer meets the condition set forth in § 725.494(e) because Arch Coal provided self-insurance coverage to Arch of KY/Apogee Coal on Mr. Hall's last date of employment. (DX 31, 33). No evidence contradicts that fact, and Employer has not disputed it.

**3. Employer has failed to prove that it is not the potentially liable operator that most recently employed claimant.**

Employer has presented no evidence, and has not argued, that it does not possess sufficient assets to secure the payment of benefits here. *See* 20 C.F.R. § 725.495(b) ("It 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)"); and § 725.495(c)(1) ("The designated responsible operator shall bear the burden of proving . . . [t]hat it does not possess sufficient assets to secure the payment of benefits in accordance with § 725.606").

The record contains no evidence that Mr. Hall engaged in coal mine employment after his employment with Employer. Thus, Employer has failed to prove that it is not the potentially liable operator that most recently employed Mr. Hall. *See* 20 C.F.R. § 725.495(c)(2).

In sum, the Director has established that Employer is a potentially liable operator, and Employer has failed to prove that it is not the responsible operator. 20 C.F.R. § 725.495(a)(1), (c).

**4. Previous arguments made by Arch Coal to avoid liability are unpersuasive.**

We anticipate that Arch Coal may argue that it is not responsible as Arch of KY/Apogee Coal's self-insurance

provider because it sold Arch of KY/Apogee Coal's federal black lung liabilities to Magnum Coal in 2005, which in turn sold those liabilities to Patriot Coal in 2008. But while an operator can arrange for other companies to pay the operator's federal black lung liabilities on the operator's behalf, such private contracts do not release the operator from liability imposed by the BLBA. *See U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 718 (1990) (provisions of a contract between private parties are invalid if they conflict with black lung regulations); *see also Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223-24 (1986) ("Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.") (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935)); *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998) (holding that insurance contract could not be construed to limit an insurer's liability under the Black Lung Benefits Act); *Curry v. Eagle Energy, Inc.*, Case No. 2013-BLA-05263, slip op. at 7 (July 28, 2016) (where regulations clearly impose liability on an employer, contractual provisions to the contrary do not control).

Significantly, Patriot Coal never employed the miner and did not even exist until years after the miner stopped working. In 2011, Patriot was authorized to self-insure, and that authorization made it retroactively liable for the claims of miners who had worked for Arch of KY/Apogee Coal. But Patriot later went bankrupt and can no longer provide for those benefits. Further, Patriot's self-insurance authorization did not make Patriot exclusively liable for Arch of KY/Apogee Coal's claims. On the contrary, neither

that authorization nor any other arrangement relieved Arch Coal of liability for paying benefits to miners last employed by Arch of KY/Apogee Coal when Arch Coal owned and provided self-insurance to that company.[2]

Employer has complained in other cases that the Director wrongly pierced Arch Coal's "corporate veil" to hold it liable for Apogee's claims, thereby treating Arch Coal as the responsible operator. Although 20 C.F.R. § 725.493(b)(2) provides that if the company that employed the miner is no longer operating, its parent company may be considered the employer, the district director did not hold Arch Coal liable by piercing the corporate veil or finding that Arch Coal should be considered Mr. Hall's employer. Instead, the district director held Arch Coal liable because it provided Arch of KY/Apogee Coal's self-insurance coverage at the time the miner last worked there.

Employer has suggested previously that designating Arch of KY/Apogee Coal, as self-insured through Arch Coal, was prompted by a questionable policy change implemented by BLBA Bulletin 16-01. Employer is wrong on at least two counts. First, Bulletin 16-01 is an internal guidance document, and is not relevant here, where Arch

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2. Employer has claimed previously that the Department approved Arch's agreement not to insure Apogee's liabilities after December 31, 2005. But the Department never formed an agreement with Arch Coal or otherwise released it from liability for claims of miners who last worked for its subsidiaries when Arch Coal owned and self-insured them. No evidence of such an agreement exists.

Coal's liability is based upon a straightforward application of the black lung regulations. As explained above, Arch Coal is liable because Arch of KY/Apogee Coal, self-insured through Arch Coal, was the last potentially liable operator that employed the miner. Employer meets all the requirements of a potentially liable operator, and Employer did not submit any evidence establishing it is not the operator that most recently employed the miner or that it is unable to assume liability for the payment of benefits.

Second, Bulletin 16-01 did not mark a departure from the black lung regulations or a change in Department policy. Employer previously has cited three cases in which the Department designated Patriot or Magnum Coal as the responsible self-insurer in claims by miners who worked for Arch Coal subsidiaries before Patriot or Magnum owned those subsidiaries: *Massey v. Apogee Coal*, 2019-BLA-05144; *Creech v. Apogee Coal*, xxx-xx-6408; and *Allen v. Hobet Mining*, 2019-BLA-06231. But those cases do not evidence a change in policy; rather, they evidence a change in the facts. In those cases, Patriot and Magnum were held liable when they owned the subsidiaries and were capable of assuming liability. Patriot had been authorized to self-insure Arch Coal's former subsidiaries for claims by miners who worked for them before Patriot owned them. But following its bankruptcy, Patriot was no longer capable of assuming liability. As Arch Coal was never released from liability for claims by miners who worked for its subsidiaries while Arch Coal owned and self-insured them, Arch Coal is the responsible self-insurer. Thus, the change from the three

cited cases was not a change in policy; instead, the change was that post-bankruptcy, Patriot became incapable of assuming liability. The responsible operator, Arch of KY/Apogee Coal, is presumed capable of paying benefits, and can do so through Arch Coal's self-insurance. 20 C.F.R. § 725.495(b). Employer has not argued otherwise.

Employer has alleged that the Department tried – and failed – to change the law to require a parental guaranty of liability, through the Department's Proposed Collection of Information; Comment Request, 82 Fed. Reg. 50,166 (Oct. 30, 2017) (seeking comments on proposed Application for Self-Insurance Under the Black Lung Benefits Act, 1240-0NEW (CM-2017; CM-2017a; CM-2017b)). Rather than propose a change to the regulations, however, the Department merely requested comments on new forms that would be used to collect information from companies seeking self-insurance authorization. In the proposed collection of information, the Department indicated it was considering requiring an explicit parental guaranty as part of the self-insurance application process. That language was later withdrawn. *See* Self-Insurance Supporting Statement at 6, ICR Ref. No. 201901-1240-008 (Jan. 2019).[3] Employer insinuates that the Department proposed the parental guaranty language because the regulations did not otherwise hold self-insuring parent companies liable. To the contrary, the proposed (although withdrawn) guaranty language would have been consistent with the way in which the black lung regulations

3. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201901-1240-008.

allocate liability. Under the black lung regulations, parent companies can be held responsible for their subsidiaries' liabilities in multiple ways, including after they have sold those subsidiaries. *See*, *e.g.*, 20 C.F.R. §§ 725.491(e) ("any parent entity or other controlling business entity may be considered an operator for purposes of this part"); 725.492(a), (d) (providing liability for successor operators, which are entities that "acquired a mine or mines, or substantially all of the assets thereof, from a prior operator," and providing that this regulation "shall not be construed to relieve a prior operator of any liability"); 725.493(b)(2) (providing that a parent entity may be considered the "employer"). In this case, however, all this is beside the point. Employer is liable for this claim under a straightforward reading of the regulations: the miner last worked for at least one year in coal mine employment for Arch of KY/Apogee Coal when it was self-insured through Arch Coal. 20 C.F.R. §§ 725.493-725.495.

Because there has been no change in the regulations or policy, any suggestion by Employer that Arch Coal's liability has been imposed retroactively in contravention of the Constitution, BLBA, and APA, does not even leave the starting gate.

## CONCLUSION

For the foregoing reasons, the Director respectfully requests that the ALJ find and conclude that Arch of KY/ Apogee Coal Company, self-insured through Arch Coal,

Inc., is the properly designated responsible operator liable for any benefits that may be awarded in this case.

Respectfully submitted,

ELENA S. GOLDSTEIN
Deputy Solicitor

TREMELLE HOWARD
Regional Solicitor

THERESA BALL
Associate Regional Solicitor

/s/ *Christian P. Barber*
CHRISTIAN P. BARBER

U.S. Department of Labor
Attorneys for the Director

**APPENDIX AA — EXCERPTS FROM THE ALJ'S DECISION AND ORDER IN *HALL V. ARCH OF KENTUCKY/APOGEE COAL*, CASE NO. 2017-BLA-06125, DATED DECEMBER 21, 2021 .**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE NO.: 2017-BLA-06125

IN THE MATTER OF: JERRY HALL,

*Claimant,*

*v.*

ARCH OF KENTUCKY/APOGEE COAL,
SELF-INSURED THROUGH ARCH COAL, INC.,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

Issue Date: 21 December 2021

**DECISION AND ORDER AWARDING BENEFITS**

*Appendix AA*

This proceeding arises from a claim for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. §901 et seq. (hereinafter "the Act"). In accordance with the Act and the Regulations issued thereunder, the case was referred by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of miners who were totally disabled at the time of their deaths (for claims filed prior to January 1, 1982), or to the survivors of miners whose deaths were caused by pneumoconiosis.

Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as "black lung."

I presided over a formal hearing on February 10, 2020, in Knoxville, Tennessee. At that time, Director's Exhibits (DX) 1 through 45; Claimant's Exhibits (CX) 1 through 5; and Employer's Exhibits (EX) 1 through 30 were admitted. However, on January 26, 2021, I issued an Order denying the Employer's motion to admit EX 14-21[1] and 31-40. The Employer and the Director submitted written briefs on February 26, 2021; the Claimant did not submit a written brief.

1. EX 14-21 were among the exhibits that were provisionally admitted at the hearing, subject to a motion by the Director to exclude them. The Order of January 26, 2021 excluded them.

*Appendix AA*

## JURISDICTION AND PROCEDURAL HISTORY

The Claimant filed his claim for benefits on June 2, 2015. (DX 2). On May 31, 2017, the Director issued a Proposed Decision and Order awarding benefits. (DX 38). The Employer requested a hearing, and on August 15, 2017, the file was transferred to the Office of Administrative Law Judges. (DX 39, 44).

## ISSUES PRESENTED

The following issues are contested by the Employer.

1. The length of the Claimant's coal mine employment.

2. Whether the Claimant has pneumoconiosis that arose from his coal mine employment.

3. Whether the Claimant is totally disabled due to pneumoconiosis.

4. Whether the Employer is correctly designated as the responsible operator.

(Tr. 8-9). The Employer does not contest the timeliness of the Claimant's claim, the Claimant's status as a miner, that he worked as a miner after 1969, or that he has one dependent for purposes of augmentation of benefits. (Tr. 57).

*Appendix AA*

## APPLICABLE STANDARD

Because this claim was filed after the enactment of the Part 718 regulations, the Claimant's entitlement to benefits will be evaluated under Part 718 standards. Under these regulations, the Claimant bears the burden of demonstrating each of the following elements by a preponderance of the evidence: (1) that he suffers from pneumoconiosis; (2) the pneumoconiosis arose from coal mine employment; (3) that he has a totally disabling respiratory impairment; and (4) the impairment is caused by pneumoconiosis. 20 C.F.R. §§ 718.202-718.204. Failure to establish any one of these elements precludes entitlement to benefits.

Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes that he had fifteen years of underground coal mine employment and that he has a totally disabling respiratory impairment.

* * *

under it. He was constantly hanging miner cables; the continuous mining cable was very heavy, and it took two or three men to hang it. He was on his hands and knees hanging it above his head. (Tr. 49-50).

The Claimant did a lot of curtain hanging to direct the airflow through the mines. When they were muddy, which was most of the time, they were heavy. (Tr. 50).

To move the rock dust bags, they used small trailers pulled with battery equipment. They hand loaded the bags on the trailers and unloaded them in a different location. They rock dusted by hand. (Tr. 51).

The Claimant did not think there was anything harder than coal mining. He did not think they were recognized for what they do. (Tr. 52).

*Length of Coal Mine Employment/Responsible Operator*

The Employer contests the length of the Claimant's coal mine employment, but has presented no evidence or argument on the issue. The Claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1 34 (1984); *Schmidt v. Amax Coal Co.* 7 B.L.R. 1-489; *see, e.g., Niccoli v. Director, OWCP*, 6 B.L.R. 1 910 (1984); *Hartley v. C.J. Langenfelder & Son, Inc.*, BRB No. 00-0823 BLA (15 May 2001)(unpub.).

Calculating the length of coal mine employment may be based on any reasonable method so long as it is supported by substantial evidence in the record considered as a whole. *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1 551 (1984); *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1 489 (1984*); Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). In determining length of employment in the coal mines, it is proper to consider evidence from a variety of sources, including affidavits of co-workers, Social Security records, sworn testimony, written statements of the miner (including the Form CM-911a), records of the employer,

and pension records. § 725.101(a)(32)(ii); *Muncy, supra*. (finding that the formula set forth at § 725.101(a)(32)(iii) may be used, but it is not mandatory; it was proper to use the miner's Social Security records, employment history form, and records from former employers).

The Claimant's Social Security earnings report reflects 20 quarters of earnings from Marathon Oil Corporation from 1972 to 1977. (DX 5). He also had yearly earnings from Marathon Oil Corporation from 1978 to 1981, from U.S. Steel Mining Co. Inc. from 1981 to 1984, and from Arch of Kentucky Inc. from 1984 to 1990. (DX 5). The Claimant's earnings in each of those years exceeded the average earnings for coal miners in Exhibit 610.[2]

I find that the Claimant has established at least 17.5 years of underground coal mine employment.

*Responsible Operator*

The Employer has raised numerous arguments in an attempt to shift liability for payment of benefits in this claim from Arch Coal to the Trust Fund. For the following reasons, these arguments must fail.

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

2. I note that the Settlement Agreement in connection with the Claimant's occupational disease claim against Arch of Kentucky indicates that the Claimant had 18 years of exposure, ending on June 18, 1990. (DX 7).

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;[3]
>
> (2) the potentially liable operator operated a coal mine after June 30, 1973;
>
> (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 finically capable of paying benefits.

§ 725.494(a)-(e). A potentially liable operator is deemed financially capable of paying benefits if: the operator had insurance for the time period covering the miner's

3. 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).

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).

In adjudicating the identity of the responsible operator, the district director bears the burden to establish the five requirements set forth at §725.494. However, "[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 Arch of Ky/Apogee Coal Company, as self-insured by Patriot Coal Company LLC, that it was a potentially liable operator on March 11, 2016. (DX 29). On December 19, 2016, the Director issued an Amended Notice of Claim, designating Arch of Ky/Apogee Coal Company, as self-insured through Arch Coal Inc. (DX 31). The district director issued the SSAE and designated Arch of Ky/Apogee Coal Company, as self-insured by Arch Coal Inc., as the potentially liable operator responsible for payment of benefits on December 19, 2016. (DX 33). On May 31, 2017, the Director issued the Proposed Decision and Order awarding benefits, naming Arch of Ky/Apogee Coal Company as the responsible operator. The Summary of Medical and Employment Evidence reflects that Arch of Ky/Apogee Coal Company was self-insured through Arch Coal Inc. (DX 38).

The evidence in the record reflects that Arch of Ky/Apogee Coal Company, self-insured by Arch Coal Inc., meets the five regulatory requirements of a potentially liable operator. First, the Employer has not rebutted the presumption that the Claimant's disability, at least in part, arose out of his work for Arch of Ky/Apogee Coal Company. *See* § 725.494(a). Next, based on the Claimant's Social Security Records it is clear that the Claimant worked for Arch of Ky/Apogee Coal Company as a coal miner from 1984 through 1990. (DX 5). Thus, the evidence shows that Arch of Ky/Apogee Coal Company operated a coal mine after June 30, 1973; the Claimant worked for Arch of Ky/Apogee Coal Company for at least one cumulative year; and the Claimant worked for Arch of Ky/Apogee Coal Company for at least one day after December 31, 1969. *See* § 725.494(b)-(d).

Finally, absent evidence to the contrary, Arch of Ky/Apogee Coal Company is presumed to be financially capable of paying benefits in accordance with §725.494(e). § 725.495(b). The Employer claims that the district director has failed to establish an insurance relationship existed between Arch of Ky/Apogee Coal Company and Arch Coal Inc. (Employer's Brief at 30-31.) The Employer is correct that the record does not contain any evidence of an insurance agreement between Arch Coal Inc. and Arch of Ky/Apogee Coal Company. However, the district director need not establish as much. The regulations presume that Arch of Ky/Apogee Coal Company is financially capable of paying benefits. § 725.495(b). The Employer has presented no evidence that Arch of Ky/Apogee Coal Company is incapable of paying benefits, particularly through its self-

insurance with Arch Coal Inc. There appears to be no dispute, as a factual matter, that Arch of Ky/Apogee Coal Company itself is no longer in operation, and its assets and liabilities have been transferred elsewhere. Nonetheless, the Employer failed to rebut the presumption that Arch of Ky/Apogee Coal Company, as self-insured by Arch Coal Inc., is financially capable of assuming liability. There is no evidence in the record indicating Arch Coal Inc., as Arch of Ky/Apogee Coal Company's self-insurer, would be incapable of paying benefits.

Therefore, to defeat liability, the Employer must establish either that (1) Arch of Ky/Apogee Coal Company was not the last potentially liable operator to employ the Claimant, or (2) Arch of Ky/Apogee Coal Company, as self-insured by Arch Coal Inc. is not financially capable of paying benefits. § 725.495(c)(1)-(2); *see also Gilbert v. Williamson Coal Co.*, 7 B.L.R. 1-289, 1-294 (1984); *Borders v. A.G.P. Coal Co.*, 9 B.L.R. 1-32, 1-34 (1986). The Employer does not dispute that Arch of Ky/Apogee Coal Company was the Claimant's last coal mine employer, and as stated above, the record shows that the Claimant did not work for any coal mine operator subsequent to his employment with Arch of Ky/Apogee Coal Company. (DX 4, DX 5). Therefore, the Employer has not established that it is not liable under § 725.495(c)(2).

The only remaining avenue by which the Employer can avoid liability is to prove that Arch of Ky/Apogee Coal Company, as self-insured by Arch Coal Inc., is financially incapable of paying benefits. The Employer has not even made such an argument. Though Arch of Ky/Apogee

Coal Company's assets were sold to Patriot, there is no evidence that Arch Coal Inc. is now unable to assume liability. The Employer, thus, has not established that Arch of Ky/Apogee Coal Company, through its self-insurance with Arch Coal Inc., is not financially capable of paying benefits. The fact that Arch of Ky/Apogee Coal Company is no longer in operation does not affect this analysis –an entity that is no longer actively operating a coal mine is not relieved of its potential liability based on the potential liability of a successor operator. *See* 30 U.S.C. § 932(i); 20 C.F.R. § 725.492(d). Instead, an operator may still be liable for payment of benefits as long as the operator meets the conditions set forth in 20 C.F.R. § 725.494. *See* 20 C.F.R. § 725.492(d). Therefore, the Employer has not shown that it is not liable under § 725.495(c)(1).

For these reasons, I find that Arch of Ky/Apogee Coal Company, as self-insured by Arch Coal Inc., was properly identified as a potentially liable operator and was properly designated as the responsible operator in this claim.

The Employer's remaining arguments for transferring liability to the Trust Fund are unpersuasive.

Arch of Ky sold Apogee Coal to Magnum on December 31, 2005, and it was subsequently acquired by Patriot in 2008. Patriot was dissolved in bankruptcy in October 2015, and the Department of Labor issued Bulletin 16-01, imposing liability on Arch Coal in cases involving its former subsidiaries where the last day of the miner's work was before December 31, 2005. The Employer argues that while its (ultimately unsuccessful) challenge

to Bulletin 16-01 was underway, in December 2016, the Director "switched course" and named Arch Coal as the liable self-insurer, but not the responsible operator for this claim. (Employer's Brief at 26). The Employer argues that although this Court on September 18, 2019 granted the Employer's motion to compel discovery, and ordered the Director to produce documents relating to Arch Coal's liability for this claim, the Court did not require the Director to respond to discovery regarding the development and implementation of Bulletin 16-01, based on the conclusion that this information was not relevant to Arch Coal's liability as the responsible operator.

The Employer argues that the Director's "change in policy" in imposing liability on Arch Coal was arbitrary and capricious, and the Director's actions and my rulings prohibiting Arch Coal from challenging the "changed policy" violate due process the APA, and *Arch Coal v. Acosta,* 888 F.3d 493 (D.C. Cir. 2018). (Employer's Brief at 33-34).

The Employer noted that I denied its request to admit evidence it received from the DOL in response to the Order compelling discovery, because it was not submitted to the Director, and there were no extraordinary circumstances for its admission. (December 7, 2020 Order). The Employer argued that the Director has refused to provide any evidence to support its allegation that Arch Coal is liable, and, according to the Employer, the DOL, with my support, has effectively denied Arch Coal any ability to defend itself, violating both due process and the APA. (Employer's Brief at 27-28).

The Director argues that there has been no change in regulations or policy. The change is that after its bankruptcy, Patriot became incapable of assuming liability for payment of benefits. The responsible operator, Arch of Ky/Apogee Coal, is presumed capable of paying benefits, and is able to do so through Arch Coal's self-insurance. The Employer has not argued otherwise. (Director's Brief at 6-7).

I find that Bulletin 16-01 does not represent a policy change. There has been no change in regulations or policy, and thus the argument that Arch's liability has been imposed retroactively in violation of constitution, BLBA, and APA fails.

The Employer argues that liability must be transferred to the Trust Fund because Arch Coal was not properly named as a party; the PDO did not name Arch Coal as the responsible operator or self-insurer. (DX 38). This argument is specious. While the title page of the PDO lists Arch of Ky/Apogee Coal as the responsible operator, the Summary of Medical and Employment Evidence reflects that the Coal Mine Company is Arch of Ky/Apogee Coal Company, and the Insurance Carrier is "Self-insured thru Arch Coal Inc." Arch Coal has been a party since the Notice of Claim was issued on December 19, 2016; the Director is not "now adding" Arch Coal as a party. (Employer's Brief at 29).

The Employer argues that there is nothing to justify the Director's attempt to pierce Arch Coal's corporate veil to hold it responsible for its former subsidiary. (Employer's

Brief at 31-32). However, the Director argues that Arch Coal was not held liable by piercing the corporate veil, or a finding that Arch Coal should be considered the Claimant's employer. The Director held Arch Coal liable because it provided Arch of Ky/Apogee Coal's self-insurance coverage at the time the Claimant last worked there. (Director's Brief at 6).

The Employer argues that the DOL's failure to enforce its self-insurance regulations requires that liability fall on the Trust Fund. (Employer's Brief at 37-39). The Employer has pointed to no statute or regulation that requires such a result. Nor has the Employer alleged that the Department engaged in "affirmative misconduct," or that its actions constituted a misrepresentation. Although it appears, at worst, that the Department may have erred when calculating Patriot's potential liabilities or that it may have ineffectively managed the self-insurance program, this does not amount to affirmative misconduct and there is no evidence in the record whatsoever regarding the intent of the Department or those acting on its behalf. The failure of the Department to monitor Patriot's ability to meet current and legacy liability does not shift liability to the Trust Fund.

The Employer argues that Arch Coal's self-insurance obligation ended on December 31, 2005, and with it Arch Coal's responsibility to cover this claim. The Employer states that the DOL approved Arch Coal's agreement not to insure Apogee's liabilities after December 31, 2005 multiple times. The self-insurance agreement in effect at the time the claim was filed, *i.e.* Patriot's, is liable, and

the DOL's attempt to impose retroactive liability on Arch Coal is an abuse of agency authority. (Employer's Brief at 40-41).

The Director argues that while an operator can arrange for other companies to pay its federal black lung liabilities, such private contracts do not release the operator from liability imposed by the Act. The Director noted that Patriot never employed the Claimant, and did not even exist until years after the Claimant stopped working. The Director stated that in 2011, Patriot was authorized to self-insure, and the authorization made it retroactively liable for the claims of miners who worked for Arch of Ky/Apogee Coal. Patriot went bankrupt and can no longer provide for those benefits. Patriot's self-insurance authorization did not make it exclusively liable for Arch of Ky/Apogee Coal's claims; neither the authorization nor any other arrangement relieved Arch of liability for paying benefits to miners last employed by Arch of Ky/Apogee Coal when Arch Coal owned and provided self-insurance. (Director's Brief at 4-5).

The relevant question here is whether Arch of Ky/Apogee Coal, as self-insured by Arch Coal, qualifies as a potentially liable operator. Arch Coal is liable here because, as outlined above, it provided Arch of Ky/Apogee Coal's self-insurance while the Claimant was employed by Arch of Ky/Apogee Coal, and Arch of Ky/Apogee Coal, as self-insured by Arch Coal, meets the requirements of a potentially liable operator. Accordingly, the Employer's argument fails. Pursuant to the regulations, it is Arch of Ky/Apogee Coal, as self-insured by Arch Coal, which remains primarily liable for the Claimant's claim.

*Appendix AA*

In conclusion, none of the Employer's arguments or the evidence in this proceeding relieve Arch Coal, as Arch of Ky/Apogee Coal's self-insurer, from liability. I find that Arch of Ky/Apogee Coal is the responsible operator in this case under the applicable regulations, and Arch Coal, as Arch of Ky/Apogee's self-insurer, is responsible for any benefits awarded in this proceeding.

*Smoking History*

The accounts of the Claimant's smoking history are generally consistent. At the hearing, the Claimant stated that he thought he smoked for about 15 years, about a pack a day. He tried to quit many times, and finally stopped smoking more than 20 years ago. (Tr. 26-27).

Dr. Alam reported that the Claimant smoked a pack of cigarettes a day from January 1980 to June 1995. (DX 13). Dr. Rosenberg reported that the Claimant smoked maybe a pack a day for about 15 years, ending when he was about 45 years old. (DX 19, EX 4). Dr. Tuteur reported that the Claimant smoked a pack a day from 1980 to 1995. (EX 5).

I find that the evidence establishes that the Claimant smoked a pack of cigarettes a day for 15 years, ending in 1995.

* * * *

**APPENDIX BB — EXCERPTS FROM THE BENEFITS REVIEW BOARD'S DECISION AND ORDER IN *HALL V. ARCH OF KENTUCKY/APOGEE COAL*, BRB NO. 22-0228 BLA DATED AUG. 4, 2023**

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 22-0228 BLA

JERRY HALL,

*Claimant-Respondent,*

v.

ARCH OF KENTUCKY/APOGEE COAL COMPANY,

and

ARCH COAL, INCORPORATED,[1]

*Self-Insured Employer-Petitioner,*

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

*Party-in-Interest.*

Date Issued: 08/04/2023

1. In its brief, Employer indicates that Arch Coal, Incorporated, is now known as Arch Resources. Employer's Brief at 4.

*Appendix BB*

**DECISION AND ORDER**
NOT PUBLISHED

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2017-BLA-06125) rendered on a claim filed on June 2, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Arch of Kentucky/Apogee Coal Company (Apogee) is the responsible operator and Arch Coal, Inc. (Arch) is the responsible carrier. He credited Claimant with at least 17.5 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus the ALJ 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).[2]

2. 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

Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs

* * *

[7] Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble).

Employer generally asserts its experts "cit[ed] literature post-dating the preamble" but fails to explain how such literature invalidates the DOL's position set

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

3. 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
>
> * * *

forth in the preamble. Employer's Brief at 52. Given that Employer was afforded the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process.[9] *See Hatfield,* 556 F.3d at 478; *Holdman,* 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm the ALJ's ruling. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 711 (1983); ALJ's April 4, 2019 Order at 2-5, 12.

**Responsible Insurance Carrier**

Employer does not directly challenge the ALJ's findings that Apogee is the correct responsible operator, and it was self-insured by Arch[10] on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack,* 6 BLR at 1-711; 20 C.F.R. §§725.494(e), 725.495,

9. To the extent Employer argues the ALJ was biased because of a training program, it has not supported its claim with evidence in the record that ALJs were instructed to reject certain evidence, or that the ALJ attended the training or rendered an improper decision based on such training. *See Cochran v. Consolidation Coal Co.,* 16 BLR 1-101, 1-107 (1992) ("Charges of bias or prejudice are not to be made lightly and must be supported by concrete evidence."). Therefore, Employer's claim of bias is rejected, and we affirm the ALJ's granting of the Director's motion for a protective order regarding the DOL training discovery request as it is not "reasonably calculated to lead to the discovery of admissible evidence." All's April 4, 2019 Order at 2-3, 5, 12; Employer's Brief at 48 n.21; Employer's Reply Brief at 28 n.8.

10. Employer argues the ALJ improperly named Arch as the responsible operator. Employer's Brief at 18. Contrary to Employer's argument, the ALJ clearly found that Apogee is the

726.203(a); Decision and Order at 7-11. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus [8] liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 18-33; Employer's Reply Brief at 5-24.

In 2005, after Claimant ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Director's Brief at 2; Employer's Brief at 22; Director's Exhibit 32 at 1. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 17. In 2015, Patriot went bankrupt. Employer's Brief at 5. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned that company and provided self-insurance to it. Director's Brief at 2-3.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 18-33; Employer's Reply Brief at 5-24. It maintains the ALJ erred

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responsible operator and it is "self-insured by Arch Coal, Inc." Decision and Order at 9. Thus he did not find "Arch Coal Inc." employed Claimant, but rather is liable as the responsible carrier. *Harman Mining Co. v. Director, OWCP [Looney],* 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

in finding Arch liable for benefits because: (1) the district director improperly "pierce[d] Arch's corporate veil to hold it responsible" for Apogee's employee, Claimant; (2) he evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (3) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (4) no evidence establishes Arch's self-insurance covered Apogee for this claim; (5) the Director changed its policy in naming Arch as the responsible carrier; (6) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01" imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (7) the ALJ abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01.[12] *Id.*

[9] The Board has previously considered and rejected these arguments under the same material facts in *Bailey*

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11. 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.

12. The ALJ denied discovery regarding BLBA Bulletin No. 16-01 because Employer failed to establish the relevance of the material it sought. ALJ's September 18, 2019 Order at 6-7. Employer has not adequately set forth how the ALJ has abused his discretion. *V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

*v. E. Assoc. Coal Co.,* BLR —, BRB No. 20-0094 BLA, slip op. at 10-19 (Oct. 25, 2022) (en banc); *Howard,* 25 BLR at 1-308-18; and *Graham v. E. Assoc. Coal Co.,* 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey, Howard,* and *Graham,* we reject Employer's arguments. Thus, we affirm the ALJ's determination that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. 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.[13] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial

13. The ALJ observed Claimant testified at the hearing that his last job was as a general mine foreman in charge of the entire operation of the mines, and on a typical day he carried a tool belt weighing at least 25 pounds and handled a couple hundred bags of rock dust weighing 50 pounds apiece. Decision and Order at 5 (citing Hearing Transcript at 39-41).

blood gas studies,[14] 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 all relevant supporting evidence against all relevant 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer alleges the ALJ erred in finding total disability established by the pulmonary function studies and medical opinion evidence at 20 C.F.R §718.204(b)(2)(i),

* * *

4. A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

## APPENDIX CC — BULLETIN 16-01, ISSUED BY OWCP, DATED NOVEMBER 12, 2015

### U.S. DEPARTMENT OF LABOR

**BLBA BULLETIN NO. 16-01**

Issue Date: 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.

*Appendix CC*

**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 Hable. 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

*Appendix CC*

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 PDO has been issued, but the PDO is not yet final, wherein Patriot Coal's attorneys have formally withdrawn their appearances from the claims, follow steps 3 (a) through (t) 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 PDO 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
Michael A. Chance
Director, Division of Coal Mine Workers' Compensation

Distribution: All DCMWC staff

**APPENDIX DD — DIRECTOR'S PETITION FOR EN BANC REVIEW IN *HOBET MIN., INC. V. DIR., OWCP & HORACE K. MEREDITH, JR.*, NO. 23-2157, FILED JAN. 28, 2026**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2157

HOBERT MINING, INC., ARCH RESOURCES,

*Petitioners,*

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND HORACE K. MEREDITH, JR.

*Respondents.*

Filed January 28, 2026

**PETITION FOR EN BANC REVIEW**

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

[TABLES INTENTIONALLY OMITTED]

*Appendix DD*

## INTRODUCTION & RULE 40(B) CERTIFICATION

Although this case's issue may appear mundane (i.e., who pays an individual miner's black-lung health benefits: a mine operator or the taxpayers?), it raises profoundly important questions related to separation of powers, stewardship of the public fisc, and the long-term health of the American miner. The question presented involves a company called Arch Resources, which was the parent corporation of several mine operators functioning throughout Appalachia. Years ago, Arch was the conceded self-insurer for the black-lung claims of its subsidiaries' miners. And despite Congress's intent that mine operators remain liable for black-lung benefits to the greatest extent possible, the panel here shifted responsibility to the American taxpayer and the Black Lung Disability Trust Fund.

In so doing, it self-admittedly split from the Sixth Circuit on materially identical facts, which means that scores of miners will be treated differently based solely on which state housed the mine in which they last worked. The fractured opinion also broke ways with an earlier, non-published opinion of this Court. Along the way, it evaded the deference afforded to the Department of Labor's interpretation of its own regulations and then interpreted those regulations in a way that renders them intractably inconsistent with other regulations. Most importantly, the panel's opinion eviscerates Congress's stated intent to hold liable mine operators for black-lung benefits whenever possible, and neglects the monetary wound it inflicts on an already financially stressed fund that draws directly from the American taxpayer's pocket.

In short, this case is uniquely apt for en banc review. The panel expressly deepened an inter-circuit conflict. It reversed course from an earlier, non-published opinion from this Court without acknowledging that it had done so. And it raises several questions of the most exceptional importance, particularly because this Circuit is a black-lung-claim epicenter.

For these reasons and those that follow, the undersigned certifies that:

1. "[T]he panel decision conflicts with a decision of this Court *(Hobet Mining Co. v. Workman,* No. 23-1126, 2024 WL 3633574 (4th Cir. Aug. 2, 2024)) "and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions";

2. "[T]he panel decision conflicts with an authoritative decision of another United States court of appeals *(Apogee Coal Co. v. Dir., Off of Workers' Comp. Programs, US. Dep't of Lab.,* 112 F.4th 343 (6th Cir. 2024), *cert denied sub nom. Arch Res., Inc. v. Pennington,* 145 S. Ct. 2732 (2025))"; and

3. "[T]he proceeding involves" the aforementioned "questions of exceptional importance."

*/s/ Edward M Wenger*
EDWARD M. WENGER

*Appendix DD*

## BACKGROUND, PROCEEDINGS, & DISPOSITION

**A.** The Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.*, was enacted to ensure that coal miners rendered entirely disabled by pneumoconiosis would receive disability and health benefits. *Id.* §§ 901(a), 922(a)(1), 932(c). In passing the Act, Congress articulated its preference that the mine operator for whom a miner worked when he was last exposed to coal dust would bear primary liability for the miner›s benefits. *Id. §* 932(c); 20 C.F.R. § 725.495(a)(1). If no mine operator can be held liable (because, e.g., the mine operator does not have the financial resources to cover those benefits), the miner's benefits are covered by the Black Lung Disability Trust Fund. *See* 26 U.S.C. § 9501(d)(1)(B).

Because Congress intended the Trust Fund to serve as a backstop, the Act includes a requirement that mine operators either purchase commercial insurance or self-insure. Self-insurance requires permission from the Department of Labor and agreements to (1) pay benefits to entitled miners and their survivors, and (2) post security in an amount determined by the Department's Office of Workers' Compensation Programs (OWCP). 20 C.F.R. § 726.110(a)(1), (3). Applications for self-insurance may be filed by, among other entities, "any parent or subsidiary corporation" that "may be determined liable for the payment of black lung benefits[.]" *Id.* § 726.102(c).

**B.** This case (and those like it) stem from a series of corporate sales, mergers, and—most relevantly—a bankruptcy in the coal-mining industry. Specifically,

Arch Resources was the parent of several subsidiaries that operated coal mines, including Hobet Mining. *Hobet Mining, Inc. v. Dir., Off of Workers' Comp. Programs, US. Dep 't of Lab. (Meredith),* 156 F.4th 385, 387 (4th Cir. 2025). While Arch served as Hobet's parent, Arch self-insured. *Id.*

In 2005, Arch sold Hobet to Magnum Coal Company, which Patriot Coal later acquired (along with Hobet). *Id.* at 392. After Patriot acquired Hobet, the Department granted Patriot's application to self-insure, both prospectively and retroactively, itself and its subsidiaries. *Id.* Not long after, Patriot and most of its subsidiaries (including Hobet) went bankrupt. *Id.* at 393.

Patriot's bankruptcy muddied the Act's application for hundreds of miners. Horace Meredith, who mined coal for Hobet Mining from 1990 to 1995, is one such individual. *Id.* at 392. Given that Arch self-insured itself and its subsidiary Hobet when Mr. Meredith concluded his mining career, OWCP took the position that Arch was potentially liable when Mr. Meredith, filed a request for black-lung benefits in 2019. *Id.* at 393. Based on Arch's self-insuring Hobet, an administrative law judge and then the Benefits Review Board found Arch liable. *Id.* at 394.

**C.** Arch petitioned for review to this Court, which, over the dissent of Judge King, granted the petition. *Id.* at 402. In the panel's view, Hobet could not be liable under the self-insurance regulations because, first, *Arch* (the parent company, not the operator) was the self-insurer, while *Hobet* (the subsidiary that *was* the operator) was not.

*Id.* It concluded, second, that the regulations anchoring coverage on the entity for whom a miner worked on his last day of employment applied only to operators with commercial insurance, and not to those self-insuring. *Id.* Judge King dissented; in his view, (1) the Act grants the Department broad discretion to determine liability for black-lung benefits, (2) Congress intended operators to bear that liability when possible, and (3) Arch should be liable as Hobet's self-insurer under DOL's regulations. *Id.* at 402-04 (King, J., dissenting).

## ARGUMENT

### I. THE PANEL MAJORITY ERRED BADLY.

#### A. The Panel misinterpreted the Act's regulations.

**1.** Because Congress intended to, where possible, hold operators responsible for their former employees' benefits, Congress gave DOL broad authority to establish regulations providing "for the payment of benefits by such operator[s]," 30 U.S.C. § 932(a), "for apportioning liability," *id. §* 932(h), and, in certain circumstances, for setting requirements for self-insurers, *see id. §* 933(a). The Department's interpretation of any ambiguous provision of those regulations is "deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation." *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 159 (1988) (citation and quotation omitted).[1] The panel's failure to afford that deference

1. *See also Kisor v. Wilkie,* 588 U.S. 558, 574-75 (2019); *Auer v. Robbins,* 519 U.S. 452, 461-62 (1997).

was plain interpretive error, and that interpretive error badly distorted the substantive regulatory scheme the Department created to implement Congress's express intent.

The animating premise behind the Department's regulatory regime is straightforward—when possible, responsibility for black-lung benefits will rest with a miner's last coal-mine employer (or its insurer). Specifically, the regulations provide that the operator who "most recently employed the miner" is responsible, 20 C.F.R. § 725.495, so long as the "potentially liable operator" can pay benefits either though commercial insurance, self-insurance, or its assets, *id.* § 725.494(e)(1)–(3). Taken together, the regulations establish a strong presumption that an operator will pay for the disease developed by a miner who served it.

The panel's crabbed interpretation of these regulations obliterated Congress's goal in passing the Act and ran roughshod over the deference afforded to the Department. And in so doing, it created a profound loophole for any moderately savvy operator to circumvent black-lung liability. Having held that the liability regulations do not apply to Hobet because it did not provide its own self-insurance (Arch did), or to Arch because it is not a coal-mine operator (Hobet is), it perversely incentivized corporate-form gamesmanship that shifts operator liability to the American taxpayer. And under the panel's interpretation, the liability regulations quickly become unworkable and inconsistent with the rest of the regulations implementing the Act.

Although 20 C.F.R. § 725.494(e)(2) uses the phrase "self-insurer," it does not follow that an operator must provide its own self-insurance rather than receive self-insurance coverage through its parent company. No regulation does that. To the contrary, the self-insurance regulations explicitly state that parent companies can provide self-insurance coverage for their subsidiaries. *See* 20 C.F.R. § 726.102(c) ("An application for authorization to self-insure . . . may be filed by any parent or subsidiary corporation, . . . , regardless of whether such applicant is directly engaged in the business of mining coal."). This is a common practice and one that Arch concededly employed.[2] Read commonsensically, a "self-insurer" is given that moniker to distinguish it from an operator that purchased commercial insurance (in other words, a "non-self-insurer").

The panel's mistake becomes even more manifest by virtue of the irreconcilable conflict it creates not only with the self-insurance regulation at 20 C.F.R. § 726.102(c), but also with the undisputed practice of companies like Arch.[3] This Court has consistently recognized that it "must read [a] regulation's words—just like a statute's—'in their context and with a view to their place in the overall

2. *See* Arch Br. at 3-4 (acknowledging that Arch used to be responsible for Hobet's liabilities as its self-insurer); *see also Hobet Mining, Inc. v. Dir., Off of Workers' Comp. Programs, US. Dep 't of Lab. (Meredith),* 156 F.4th 385, 387, 392 (4th Cir. 2025) (acknowledging that Arch provided Hobet's self-insurance coverage when Meredith last worked there).

3. *See generally* 20 C.F.R. § 726.3(b) (Act regulations "should be read harmoniously to the fullest extent possible.").

[regulatory] scheme,'" and "[t]here is only one way to read these regulations as part of a harmonious scheme." *Lovo v. Miller,* 107 F.4th 199, 213 (4th Cir. 2024) (quoting *Mohamed v. Bank of Am. NA.,* 93 F.4th 205, 211 (4th Cir. 2024)). The panel's failure to do so distorts the entire regulatory scheme.

Similarly, the liability regulations apply to Arch even though Arch, as the parent, did not operate any mine. On their face, the liability regulations apply equally to operators *and* an entity that actually pays for the benefits owed by operators, irrespective of whether those entities provide commercial or self-insurance coverage. Simply put, the regulations place liability on the entity that, among other things, can pay the benefits. *See., e.g.,* 20 C.F.R. § 725.494(e)(3). Indeed, the Department's regulations expressly provide that "[a]ll . . . rules affecting the responsibilities of coal mine operators prescribed in [the liability regulations] are hereby made applicable, as appropriate, to [these insurance regulations]." 20 C.F.R. § 726.3(a).[4] Under these circumstances, that entity is Arch,

4. *See also* 20 C.F.R. § 726.103 ("each of the regulations, interpretations, and requirements contained in this part . . . are binding upon each [self-insurance] applicant"); *id. §* 726.207 ("[e]very obligation and duty in respect of payment of benefits . . . imposed by the Act or the regulations . . . upon an operator shall be discharged and carried out by the [commercial] carrier as appropriate."); *id.* § 725.407(b) (the notice of claim must provide notice to an operator›s carrier as well as the operator, and "[a]ny operator or carrier notified of the claim shall thereafter be considered a party").

and the panel was wrong to conclude that Arch could avoid black-lung liability by pointing to Hobet as the operator.

In arriving at this mistake, the panel failed to recognize this Court's previous holding that the liability regulations plainly apply to insurance carriers. Specifically, in *Tazco, Inc. v. Director,* the Court explained that an insurance carrier "takes on all the employer's responsibilities in connection with insured claims," and "is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." 895 F.2d 949, 951 (4th Cir. 1990) (citing 33 U.S.C. § 935; 20 C.F.R. § 726.207). The majority panel diverged from this view, erroneously overlooking that it does not matter that Arch was a self-insurer instead of an operator. Instead, Arch is liable just the same.

**2.** The panel's interpretive mistakes did not end there. In finding "the Act and related regulations treat self-insurance and commercial insurance differently," *Meredith,* 156 F.4th at 391, 396-99, the panel wrongly focused on the processes of procuring self-insurance and commercial insurance and failed to recognize that both forms of insurance function the same way and under the same rules for providing liability coverage to operators.[5] Indeed, in an explicit link between the two forms, the self-

5. *See, e.g.,* 30 U.S.C. § 933(a) (both forms secure benefits); 20 C.F.R. § 725.494(e) (both forms mean an operator will be deemed capable of paying benefits); *compare id. §* 726.110(a)(1) (requiring self-insurers to pay miners' benefits when due) *with id.* § 726.203(a) (requiring commercial insurers to pay miners' benefits).

insurance rules provide that the commercial insurance regulations will bind all self-insurance applicants. 20 C.F.R. § 726.103 ("each of the regulations . . . including those [regarding commercial insurance], are binding upon each [self-insurance] applicant").

The majority panel wrongly decided that it would not be "appropriate" to apply the explicit liability provision in commercial insurance to self-insurance, reasoning that (1) "the self-insurance regulations do not even address that topic," and (2) importing this requirement to self-insurance "would seem to eliminate the differences between commercial insurance and self-insurance found in the regulations." *Meredith,* 156 F.4th at 397. That is incorrect. While the self-insurance regulations do not explicitly address the self-insured's liability coverage, the coverage is clear and necessarily interpreted in harmony with direct liability and commercial insurers' liability. As the name suggests, self-insurance allows an employer to guarantee its own liabilities—i.e., *without* commercial insurance. Because, as discussed above, the liability regulations plainly place responsibility on the most recent coal-mine employer, 20 C.F.R. §§ 725.494, 725.495, the panel erred.

Although variances exist between the two insurance forms insofar as they may be procured differently, the two forms operate in lockstep and it would be nonsensical to conclude that they do not. This is especially true where, as here, companies frequently alternate between the two forms of coverage over time. *See* J.A. 2407. If, as Arch insists, the two forms of coverage trigger by different

events, an employer could not shift from one form of coverage to the other without creating significant coverage gaps.

The entire black-lung regulatory regime presumes that—for operators and their carriers—liability falls to the last company for whom a black-lung claimant worked. In accordance with this presumption, the Department deemed Arch liable for claims of miners (like Mr. Meredith) who ended their careers working for Hobet while Arch owned and self-insured Hobet. Because the panel's interpretation distorts the way in which the black-lung regulatory scheme is supposed to operate, it cannot stand.[6]

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6. The panel also criticized the Department for "seek[ing] to impose liability on Arch under a new and different theory," *Meredith,* 156 F.4th at 396, which it found to be barred under *Securities and Exchange Commission v. Chenery Corporation,* 318 U.S. 80 (1943), *id.* at 397. This was further error; the Department has maintained this argument through every stage of this litigation, *see* J.A. 540-41, 637; Director's Response Brief to the Court, 11-13 (arguing to the AU, Board, and this Court that Hobet and Arch were liable because Mr. Meredith's most recent coal-mine employment was with Hobet while Arch self-insured it, citing 20 C.F.R. §§ 725.494 and 725.495), and the Department maintains that the *Chenery* doctrine does not apply to Board decisions, *see Crockett Colleries, Inc. v. Barrett,* 478 F.3d 350, 358 (6th Cir. 2007) (Rogers, J., concurring) (the *Chenery* doctrine does not apply to the Board because it exercises the same kind of appellate review that used to be exercised by district courts); 33 U.S.C. § 921(b)(3) ("findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.").

## II. THE PANEL'S ERROR DEEPENS INTRACTABLE INTER- AND INTRA-CIRCUIT CONFLICTS.

The panel's decision marks the fourth time in roughly the last year that this precise issue—i.e., how to handle the interplay between Arch's role as a self-insurer and the Patriot bankruptcy—has been decided at the circuit court level. The Sixth Circuit and a different panel of this Court (albeit in an unpublished opinion) got the answer right. The panel here and the Seventh Circuit got it wrong. Because Congress "desired uniformity [in] application of the Black Lung Benefits Act," *Glen Coal Co. v. Seals,* 147 F.3d 502, 513 (6th Cir. 1998), en Banc review is desperately needed to bring the panel's wayward holding in line with the Sixth's correct resolution.[7] If the court does not, the resolution of hundreds of black-lung cases may turn on the happenstance of where the miner last worked.

And to be certain, this issue has resulted in a difference of opinion among judges of this Circuit. Judge King, of course, dissented from the panel majority here. And before issuing its decision in *Meredith,* a different panel of this Court already found Arch liable in a case with materially identical facts. *See Workman,* 2024 WL 3633574. In *Workman,* as here, a miner last worked for Hobet while Arch owned and self-insured that company. *Id.* at *2. But in *Workman,* the panel unanimously upheld

7. Given that the majority of Arch-related black-lung claims arise in the Fourth and the Sixth Circuits, the fact that the Seventh's incorrect holding will remain (for the moment) intact does not dilute the salutary effect and necessity of correcting course in this Circuit.

the lower decisions holding Arch liable. *Id.* Specifically, *Workman* found that, on the evidentiary record before it, Hobet and Arch "satisfie[d] all the criteria for a responsible operator, including the financial capability requirement." *Id.* (citing 20 C.F.R. §§ 725.494, 725.495(a)(1)). As a result, the panel deemed Arch's "substantive challenges to the Board's liability decision . . . meritless" and denied Arch's petition for review. *Id.* at *3.

While an unpublished decision is not binding precedent in this circuit, it reveals that at least three judges of this Court would appear to believe that the two on the *Meredith* majority panel erred in resolving this case. It also means that two different miners with materially identical circumstances are being treated differently, even though both of their black-lung claims arose in this Circuit. This intra-circuit conflict adds additional imperative to the inter-circuit conflict that cries out for this Court's en Banc resolution.

## III. THE ISSUE THE PANEL RESOLVED IS ONE OF EXCEPTIONAL IMPORTANCE.

### A. The Panel's decision flouts Congress's decision to hold coal-mine operators liable to the maximum extent possible.

As the Agency tasked with ensuring the health, safety, and flourishing of all American workers, the Department is of the opinion that fewer questions are more exceptional than the welfare of America's coal miners. Congress agrees. The Act's purpose is to make sure that those

men and women exposed to coal dust while working for decades to literally keep America's lights on are taken care of (along with their survivors) during their golden years. Indeed, the panel recognized that Congress created the Black Lung Disability Trust Fund to make sure that miners were always taken care of even if "no operator is found liable." *Meredith,* 156 F.4th at 390 (citing 30 U.S.C. § 932(c); 26 U.S.C. § 9501).

The panel's mistake, however, was failing to recognize Congress's intent to "ensure that individual coal operators rather than the trust fund bear the liability for claims arising out of such operators' mines to the maximum extent feasible." *Old Ben Coal Co. v. Luker,* 826 F.2d 688, 693 (7th Cir. 1987) (quoting S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977)). The trust fund was never intended to function interchangeably with the responsibility of mine operators to pay black-lung benefits. It was always intended to serve as a necessary safety net, but one that should function as the exception to the general rule that operators must care for the miners who became sick under their employ.

For this reason, Congress took steps to ensure that liable operators would be able to pay for benefits when awarded. It mandated that coal-mine operators secure the payment of benefits either by obtaining permission from OWCP to self-insure, or by purchasing commercial insurance. 30 U.S.C. § 933(a); 20 C.F.R. § 726.1. Both forms of coverage—self-insurance and commercial insurance—are designed to guarantee that each operator will be able to carry out its responsibility for "the payment of benefits

for which [it] is liable," 30 U.S.C. § 933(a), regardless of the operator's financial condition when payment is due.

This congressional calibration matters—tremendously. But the panel ignored it, almost entirely. Judge King not only recognized it, but found that it counseled strongly in favor of affirming Arch's liability for Mr. Meredith's black-lung claim. Given the scores of formerly Arch-employed black-lung claimants who have made and will continue to make benefits requests in the near future, the question is not only one of exceptionally important substantive depth but also exceptionally important breadth. En banc review, then, is critically warranted.

### B. The Panel's decision imperils the public fisc.

This case's core does not touches only on foundational (and crucially important) separation-of-powers issues (i.e., the panel's willingness *vel non* to animate Congress's express purpose in creating the Act). It also raises another profoundly important consideration—who should pay for black lung benefits, the mine operators, or the American taxpayer? The panel here glossed over this question, reasoning only that that it would cause no harm to Mr. Meredith if the Trust Fund, rather than Arch, paid his black lung benefits. *Meredith,* 156 F.4th at 401.

In so doing, the panel failed to see that the harm extends far beyond Mr. Meredith if Arch is permitted to avoid its statutorily imposed responsibility in the Appalachian states throughout the Fourth Circuit. If the panel's decision stands and Arch escapes liability for this

and hundreds of other claims arising in the Fourth Circuit, the liability thrust on the Trust Fund will be tremendous.

This matters. The Trust Fund borrows money from the Treasury Department to satisfy its obligations, meaning that any time an operator avoids liability, the American taxpayer foots the bill. *See U.S.* Gov't Accountability Off., GAO-18-351, Black Lung Benefits Program: Options for Improving Trust Fund Finances, at 7 (2018) ("When necessary for the Trust Fund to make relevant expenditures under federal law, the Trust Fund borrows from the Treasury's general fund. When this occurs, the federal government is essentially borrowing from itself—and hence from the general taxpayer—to fund its benefit payments and other expenditures."). This result is not only contrary to Congress's intent in placing liability for black lung benefits squarely on the shoulders of the mine operators that profit from miners' employment; it is also contrary to Congress's responsibility to protect public funds. *See, e.g., Off of Pers. Mgmt. v. Richmond,* 496 U.S. 414, 428 (1990) ("public funds [should] be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.").

## CONCLUSION

For the forgoing reasons, the Department respectfully requests that the Court grant its petition for rehearing en banc.

*Appendix DD*

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/s/ Edward M. Wenger

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[CERTIFICATES INTENTIONALLY OMITTED]