U.S. Department of Labor

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

BRB No. 21-0071 BLA
and 21-0072 BLA

EMIL JEAN DEEL (o/b/o and Widow of CARLIS R. DEEL) Claimant-Respondent v. DOMINION COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 4/08/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

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

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

BOGGS, Chief Administrative Appeals Judge, and GRESH, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Awarding Benefits (2016-BLA-05497 and 2016-BLA-05801) rendered on claims filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on October 11, 2013,[1] and a survivor's claim filed on April 13, 2016.[2]

In her Decision and Order issued on July 14, 2020, the ALJ noted Employer conceded the existence of clinical pneumoconiosis and therefore Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[3] She determined Claimant established the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 41l(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] She further found Employer did not rebut the presumption and

[1] This is the Miner's fourth claim for benefits. Miner's Claim (MC) Director's Exhibits 1, 2, 4. On April 4, 2010, the district director denied the Miner's prior claim because he failed to establish the existence of pneumoconiosis. MC Director's Exhibit 2. The Miner took no further action on his denied claim.

[2] Claimant is the widow of the Miner, who died on July 2, 2015. Survivor's Claim (SC) Director's Exhibits 5, 7. She is pursuing his claim as well as her own survivor's claim. SC Director's Exhibits 3, 8.

[3] 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)(1); *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 in his prior claim, Claimant had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id*. Claimant may establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by invoking the Section 411(c)(4) presumption. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability and death were due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling

awarded benefits in the miner's claim. Considering the survivor's claim, the ALJ found Claimant derivatively entitled to survivor's benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to ALJs violate the separation of powers doctrine and render her appointment unconstitutional. On the merits of entitlement, Employer challenges the validity of the Section 411(c)(4) presumption and the Section 422(*l*) presumption, 30 U.S.C. §932(*l*), as part of the Affordable Care Act (ACA). Further, Employer contends the ALJ erred in finding the Miner had at least fifteen years of qualifying coal mine employment and that Claimant therefore invoked the Section 411(c)(4) presumption. Finally, it contends the ALJ erred in finding it did not rebut the presumption. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the ALJ had the authority to decide the case. Employer replied, reiterating its contentions.

The Benefits Review 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.[6] 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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respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[5] Article II, Section 2, Clause 2, sets forth the appointing powers of the President:

> [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] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See*

Appointments Clause

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).[7] Employer's Brief at 14; Employer's Reply at 2-3. It notes the United States Supreme Court held in *Lucia* that Securities and Exchange Commission ALJs were not properly appointed in accordance with the Appointments Clause of the Constitution. Employer's Brief at 15. Similarly, it argues the ALJ in this case was appointed improperly. *Id.* at 15-16; Employer's Reply at 2-3.

The Director argues the ALJ had the authority to decide this case because the Secretary's September 12, 2018 appointment of her[8] conforms to the Appointments Clause and is presumptively valid, and Employer has failed to demonstrate otherwise. Director's Brief at 4. We agree with the Director's argument.

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Moreover, under the "presumption of

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibits 1, 5, 9; 2019 Hearing Transcript (Hr. Tr.) at 16, 22.

[7] *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 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.

[8] The Secretary of Labor issued a letter to the ALJ on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an Administrative Law Judge in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary's September 12, 2018 Letter to ALJ Applewhite.

regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016) (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Prior to ALJ Applewhite's assignment to this case,[9] the Secretary specifically appointed her as an ALJ in the Department of Labor (DOL) to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105." Secretary's September 12, 2018 Letter to ALJ Applewhite. Under the presumption of regularity, it thus is presumed the Secretary properly discharged his official duty. *Advanced Disposal*, 820 F.3d at 603. Employer does not allege the Secretary's action was either not open or equivocal, or otherwise explain how it was improper. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity. *Butler*, 244 F.3d at 1340. Based on the foregoing, we hold that the Secretary's action constituted a valid appointment of the ALJ.

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 16-17; Employer's Reply at 2-3. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's appointment of the ALJ, which we have held constituted a valid exercise of his authority, bringing her appointment into compliance with the Appointments Clause.

[9] The consolidated cases were initially assigned to ALJ Morris Davis, who held a formal hearing on November 30, 2017. On December 21, 2017, the Secretary of Labor ratified the appointment of ALJ Davis in order "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." Secretary's December 21, 2017 Letter to ALJ Davis (referencing U.S. Const. art. II, § 2, cl. 2). Pursuant to Employer's timely challenge to ALJ Davis's authority to decide the case, ALJ Davis issued an October 16, 2018 Order returning the case for reassignment to a new ALJ in accordance with *Lucia*. On January 23, 2019, the case was reassigned to ALJ Applewhite (the ALJ).

Thus, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 17-19; Employer's Reply at 4-7. Employer generally argues the removal provisions 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*. Employer's Brief at 18-19. 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). Employer's Brief at 17-19.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1136 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[10] 140 S. Ct. at 2201. It did not address ALJs.

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

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[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. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show 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. *Pehringer*, 8 F.4th at 1136.

Constitutionality of the Section 411(c)(4) and 422(*l*) Presumptions

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) and 422(*l*) presumptions, Pub. L. No. 111-148, §1556 (2010), is unconstitutional and invalid in its entirety. Employer's Brief at 19-20. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Miner's Claim

Invocation of the Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment[11] and that he worked at least fifteen years in "underground coal mines" or in surface mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i), (iii). Pursuant to 20 C.F.R. §718.305(b)(2), "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an

[11] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."

While this case was pending before the ALJ, Employer agreed the first 10.34 years of the Miner's coal mine employment were performed underground, but argued the conditions of the Miner's last eleven years of coal mine employment, when the Miner worked above ground as a mechanic at Employer's Central Shop, were not substantially similar to underground mining conditions. Employer's Closing Brief at 5-6. Thus, Employer argued the Miner did not have the fifteen years of qualifying coal mine employment required to invoke the Section 411(c)(4) presumption. The ALJ found, however, that Claimant was not required to establish substantial similarity because the record and Claimant's testimony established the Miner repaired machinery for underground mining operations and also worked inside the mines. Decision and Order at 6 (citing *Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497, 1-501 (1979); Hr. Tr. at 16-17).

Nonetheless, the ALJ further found Claimant's testimony regarding the Miner's appearance after working in the Central Shop sufficient to establish he was regularly exposed to coal mine dust in his surface coal mine employment. Thus, the ALJ found Claimant established 21.34 years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption. Decision and Order at 6.

Employer asserts the ALJ erred in crediting the Miner's work in the Central Shop as qualifying coal mine employment because it was not at an underground mine, "no evidence was presented as to how often the miner was required to go into the mines due to a breakdown," and Claimant's testimony is insufficient to establish that the Miner's work in the Central Shop regularly exposed him to coal mine dust comparable to conditions in an underground mine. We disagree.

A miner's employment as a mechanic in a repair shop is qualifying coal mine employment so long as his work took place "in or around a coal mine or coal preparation facility."[12] *See Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). In his prior claims, the Miner testified that while he worked at Employer's Central Shop, he also repaired broken equipment in Employer's underground mines and "was in the mines about every day." Miner's Claim (MC) Director's Exhibit 1 at 267 (Aug. 29, 1995 Hr. Tr. at 36); MC Director's Exhibit 1 at 749 (Sep. 19, 1988 Hr. Tr. at 13). He explained that working in the Central shop means "you went to every mine, they just took

[12] Employer raises no argument as to whether Claimant qualified as a miner.

you out of one mine and put you where you could go to every mine." MC Director's Exhibit 1 at 267 (Aug. 29, 1995 Hr. Tr. at 36).

Moreover, even if we were to focus solely on the Miner's work at the Central Shop, the ALJ permissibly relied on Claimant's uncontradicted testimony to establish substantial similarity. Claimant testified that the Miner's work was "just as dusty [as his underground coal mine employment]" and when he came home from work, "it was like he come out of the mines because he worked on all that equipment, had all that dust on it." Hr. Tr. at 23. When she would "wash his clothes, pure coal dust would come out of his clothes," and they had to be washed twice before they would come clean. *Id.* at 23, 26; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting miner's uncorroborated testimony that employer characterized as "hazy and contradictory"); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (an ALJ "may rely on lay testimony regarding a miner's coal mine employment, especially if, as here, the testimony is not contradicted by any documentation of record"); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984).

It was within the ALJ's discretion, as the fact-finder, to assess the credibility of Claimant's testimony, and we have no basis to disturb her findings as they are not inherently unreasonable. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Tackett*, 12 BLR at 1-14. Employer has shown no error in the ALJ's reliance on Claimant's testimony to support a finding that the Miner was regularly exposed to coal mine dust both when he worked in the mines to repair machinery or when he worked at Employer's Central Shop. *See Mays*, 176 F.3d at 756; *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). We therefore affirm the ALJ's finding that the Miner had at least fifteen years of qualifying coal mine employment and her determination Claimant invoked the Section 411(c)(4) presumption.[13] 20 C.F.R. §§718.305(b)(1)(i); *see Muncy*, 25 BLR at 1-21; *Alexander*, 2 BLR at 1-501; Decision and Order at 6.

Rebuttal of the Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[14] or that

[13] Employer does not contest that the Miner had a totally disabling respiratory or pulmonary impairment.

[14] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those

"no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015). The ALJ found Employer failed to establish rebuttal by either method.

The ALJ found that because Employer stipulated at the hearing that the Miner had pneumoconiosis arising out of coal mine employment, it was unable to disprove either clinical or legal pneumoconiosis.[15] Decision and Order at 9; Hr. Tr. at 12. Thus, the ALJ found Employer could not rebut the presumption under the first method by establishing the Miner did not have pneumoconiosis. Regarding the second rebuttal method – disability causation - the ALJ found the opinions of Employer's experts were insufficient to establish that no part of the Miner's respiratory disability was caused by clinical pneumoconiosis *or his coal mine employment.* Decision and Order at 10-11. Thus, the ALJ concluded Employer did not rebut the Section 411(c)(4) presumption.

Employer contends the ALJ failed to consider relevant portions of the physicians' opinions indicating that Miner's respiratory disability was not related to clinical pneumoconiosis or his coal mine dust exposure. Employer's Brief at 20-22, 27-32. Employer's assertions have merit with regard to Drs. Fino's, Caffrey's, and Oesterling's opinions.[16]

The ALJ found Dr. Fino's opinion insufficient to satisfy Employer's burden of proof because Dr. Fino "noted that he could not rule out coal mine dust as contributing to the Miner's disabling emphysema." Decision and Order at 10; quoting MC Director's Exhibit

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diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[15] We affirm the ALJ's finding that Employer did not disprove clinical pneumoconiosis as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[16] Employer contends the ALJ improperly rejected Dr. Tuteur's opinion regarding the etiology of the Miner's respiratory disability. However, Employer designated Dr. Tuteur's opinion as evidence in the survivor's claim but not the miner's claim. MC Employer's Exhibit 7; SC Employer's Exhibits 3, 7; Hr. Tr. at 8-10. Because Dr. Tuteur's opinion was not evidence in the miner's claim, the ALJ erred in weighing it and we need not address Employer's contention of error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

30. However, as Employer correctly asserts the ALJ did not address Dr. Fino's November 6, 2017 supplemental report. After reviewing additional evidence, including the autopsy reports, Dr. Fino concluded in his supplemental report that the Miner's disabling restrictive-obstructive impairment was caused by cancer and emphysema due solely to smoking and that his "clinical pneumoconiosis did not contribute to his [respiratory] impairment and disability." Employer's Brief at 21-22; MC Employer's Exhibit 1 at 12 (supplementing Director's Exhibit 30 at 8). Thus, we agree the ALJ erred in failing to consider Dr. Fino's supplemental report in determining whether Employer established rebuttal. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

The ALJ found Dr. Caffrey's opinion insufficient because the physician did "not address why the Miner's emphysema or chronic obstructive pulmonary disease (COPD) were not related to his pneumoconiosis." Decision and Order at 10. Contrary to the ALJ's finding and as Employer asserts, however, Dr. Caffrey explained that he attributed the Miner's respiratory disability to emphysema caused by smoking because the Miner continued to smoke for over two decades after ceasing coal mine employment and because there was a "paucity" of coal dust in his autopsied lung. Employer's Brief at 29 (citing MC Employer's Exhibit 2 at 5). Dr. Caffrey also explained the Miner's clinical pneumoconiosis, shown on autopsy, was too minimal to "have caused the patient any discernible pulmonary disability." *Id.* Because the ALJ mischaracterized Dr. Caffrey's opinion and failed to consider the opinion in its entirety, we vacate her finding that it is not credible to support rebuttal. *See McCune*, 6 BLR at 1-998.

The ALJ similarly erred in finding Dr. Oesterling did not address whether the Miner's respiratory disability was due to clinical pneumoconiosis. Decision and Order at 10-11. Dr. Oesterling opined the Miner's respiratory disability is due to emphysema caused by smoking and eliminated clinical pneumoconiosis as a cause for his respiratory disability because "the emphysema is disproportionate to the coal dust distribution [seen in the Miner's autopsied lung]." Employer's Exhibit 4 at 5. Dr. Oesterling further stated the "limited dust deposits [in the Miner's autopsied lung] would produce little or no alteration in function since there is no significant alteration in structure." *Id.* at 4. Because the ALJ mischaracterized Dr. Oesterling's opinion and did not consider it in its entirety, we vacate her rejection of it.[17] *See McCune*, 6 BLR at 1-998.

[17] Because Employer has the burden of proof, we need not address Employer's contentions regarding Dr. Perper's opinion as he opined the Miner's respiratory disability is due to pneumoconiosis. *See Larioni*, 6 BLR at 1-1278. Further, although Employer also asserts the ALJ erred in discounting the opinions of Drs. Oesterling and Tuteur as to the

As the ALJ failed weigh all the relevant evidence and explain her findings, her decision does not comply with the APA.[18] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption and thus the award of benefits in the miner's claim. 30 U.S.C. §923(b); 20 C.F.R. §718.305(d)(1) (ii); Decision and Order at 11-12.

Survivor's Claim

Because we have vacated the award of benefits in the miner's claim, we also vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*).

Remand Instructions

The ALJ must reconsider if Employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. In determining whether Employer established rebuttal of the Section 411(c)(4) presumption, the ALJ should first determine whether Employer has disproved legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), despite its concession that the Miner had simple clinical pneumoconiosis.[19] 20 C.F.R. §718.305(d)(1)(i)(A). Performing the rebuttal analysis in the

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Miner's cause of death, death causation is not an element of entitlement in a miner's claim for lifetime benefits. *Id.*

[18] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[19] The definition of legal pneumoconiosis encompasses a broad category of diseases, which includes, but is not limited to, clinical pneumoconiosis; a diagnosis of legal pneumoconiosis may be made independent of the presence of clinical pneumoconiosis and involves a determination of whether any of a miner's chronic lung diseases or impairments is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 210 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821-22 (4th Cir. 1995). Where, as here, the physicians agree the Miner's emphysema/COPD contributes to his disability, the issue before the ALJ at rebuttal encompasses whether Employer disproved the Miner's emphysema/COPD constitutes legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-154-56. Although the issues of legal pneumoconiosis and disability causation may be closely related, proper analysis requires

order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, as well as provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), pursuant to the second rebuttal method. *See Minich*, 25 BLR at 1-159. To establish that the Miner's impairment was not legal pneumoconiosis, Employer must demonstrate it is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

Upon completing the analysis at 20 C.F.R. §718.305(d)(1)(i), the ALJ should then reconsider whether Employer has established that no part of the Miner's disabling impairment was caused by clinal and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Minich*, 25 BLR at 1-159. If Employer fails to rebut the Section 411(c)(4) presumption, Claimant will have established the Miner's entitlement to benefits, and the ALJ may reinstate her award in the miner's claim.

On remand, should the ALJ again award benefits in the miner's claim, Claimant is derivatively entitled to benefits in the survivor's claim. 30 U.S.C. §932(*l*). If the ALJ denies benefits in the miner's claim, however, she must consider whether Claimant can establish entitlement to survivor's benefits pursuant to the Section 411(c)(4) presumption[20] or establishing that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). 20 C.F.R. §§718.1, 718.205. In making her determinations, the ALJ must consider all relevant evidence, set forth her findings in detail, and explain her underlying rationale as the APA requires. 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); *Wojtowicz* 12 BLR at 1-165.[21]

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the ALJ to analyze the legal pneumoconiosis issue under the standard enunciated at 20 C.F.R. §718.305(d)(1)(i)(A), rather than at subsection (ii), as Employer's burden of proof differs under these sections. *Minich*, 25 BLR at 159.

[20] If Claimant is entitled in her survivor's claim to the rebuttable presumption that the Miner's death was due to pneumoconiosis, the ALJ would have to separately address whether Employer's evidence is sufficient to establish that no part of the Miner's death was due to simple or legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

[21] Because the burden of proof shifted to Employer to rebut the presumption of total disability due to pneumoconiosis, we need not reach Employer's assertion that Claimant cannot establish this element of entitlement under 20 C.F.R. §718.204(c). 20 C.F.R. §718.305(d)(1)(i), (ii); *Owens*, 724 F.3d at 555; *Minich*, 25 BLR at 1-154-56; Employer's Brief at 24-27.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues' decision that Claimant invoked the 15-year presumption. I write separately, however, because I disagree with their remand instructions regarding how Employer may rebut it. 30 U.S.C. §921(c)(4) (2018).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut under two prongs: (1) by showing the Miner had neither legal nor clinical pneumoconiosis; or (2) by showing that "no part" of the miner's respiratory or pulmonary total disability was caused by legal or clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-154-56 (2015).

Given the factual development of this case, however, the remaining dispute has narrowed even further. Employer must establish *two* specific things under those criteria to

avoid liability: (1) that the Miner's clinical pneumoconiosis played no part in his disability; and (2) that the Miner's emphysema is not legal pneumoconiosis.

It is not an either/or posture: failure to establish *both* of those things requires an award of benefits. But the ALJ on remand need not on remand resolve anything else.

Clinical pneumoconiosis

Employer stipulated that the Miner suffered from clinical pneumoconiosis. Hearing Transcript at 12. After that stipulation, Employer cannot establish rebuttal through the first prong by showing the Miner does not suffer from clinical pneumoconiosis. Instead, it must establish the clinical pneumoconiosis it conceded was present played no part in the Miner's disability under the second prong.

In this respect, I agree with my colleagues that the ALJ needs to consider Dr. Fino's supplemental report and Dr. Caffrey's opinion in their entirety, which she did not do in her first opinion.

But the two statements my colleagues identify from Dr. Oesterling cannot help Employer in rebutting clinical pneumoconiosis. His statement "the emphysema is disproportionate to the coal dust distribution [seen in the Miner's autopsied lung]" is irrelevant in this context. Employer's Exhibit 4 at 5. Emphysema is not clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1) ("Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses"). Dr. Oesterling's opinion of the severity of the Miner's emphysema relative to the coal dust seen in his lungs -- regardless of its credibility -- therefore cannot establish that clinical pneumoconiosis played no role in his disability. *Id.*

His statement the "limited dust deposits [in the Miner's autopsied lung] would produce little or no alteration in function since there is no significant alteration in structure" similarly does nothing for Employer. Employer's Exhibit 4 at 5. Dust deposits, without more, likewise do not fit under the regulatory definition of clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1). And they are equally relevant to the cause and severity of the Miner's emphysema as they are to the severity of his clinical pneumoconiosis. 65 Fed. Reg. 79,920 79,941 (Dec. 20, 2000). Moreover, as a one-statement, numbered conclusion in Dr. Oesterling's report, there is no context in which to evaluate the statement's meaning. Employer's Exhibit 4 at 5. The conclusion he intended to mean clinical pneumoconiosis plays no part in the disability thus cannot be reasonably inferred. To do so would be pure

speculation, particularly since Dr. Oesterling could have simply said clinical pneumoconiosis played no role in the disability and been done with the matter. He did not.

Counter to my colleagues, I therefore would affirm the ALJ's discrediting of Dr. Oesterling on the role clinical pneumoconiosis played in the Miner's disability.

And I would instruct her that if she finds Employer -- through the opinions of Drs. Fino and Caffrey -- did not establish that clinical pneumoconiosis played no part in the Miner's disability, or they simply did not adequately explain their reasons for that conclusion, she must reinstate benefits. 20 C.F.R. §718.305(d)(1)(ii).

Legal pneumoconiosis in this case, on the other hand, must be rebutted through evaluating the credibility of the physicians' opinions under the first prong of rebuttal.

Legal pneumoconiosis

Unlike clinical pneumoconiosis, the ALJ mistakenly held Employer stipulated to the existence of legal pneumoconiosis, when it did not. Hearing Transcript at 12. So, Employer remains free to establish the Miner's emphysema was not legal pneumoconiosis to avoid liability. Indeed, it must make that showing.

That is because all the doctors agree his emphysema contributes to the Miner's respiratory disability. MC Claimant's Exhibit 7 at 31; MC Employer's Exhibits 1 at 12, 2 at 4, 4 at 5. Given that universal agreement, Employer cannot show that the emphysema played no part in the disability under the second prong. 20 C.F.R. §718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-154-56 (Where the physicians agree the miner's emphysema/COPD contributes to his disability, the issue before the ALJ at rebuttal encompasses whether Employer disproved the miner's emphysema/COPD constitutes legal pneumoconiosis.). It therefore must show that the Miner's emphysema is not legal pneumoconiosis under the first prong to avoid liability. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019).[22]

As the majority correctly points out, an employer's burden in rebutting the existence of legal pneumoconiosis under the first prong normally is to show it is more likely than not that the miner did not suffer from a "chronic pulmonary disease or respiratory or pulmonary

[22] Technically, rebutting under the first prong is rebutting under the second as well. That is because if the Miner did not suffer from legal pneumoconiosis, it categorically could not have played any role in his disability -- because it did not exist. *See* 20 C.F.R. §718.305(d)(1)(i). But it is the legal requirements of the first prong that apply.

impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718 201(a)(2), 718.305(d)(1)(i)(A).

Here, however, Drs. Fino, Caffrey, and Oesterling all definitively concluded that smoking *alone* caused the Miner's emphysema, ruling out any contribution whatsoever from the Miner's over 21-years of dust exposure in coal mine employment in causing or aggravating it. Vitally, none of Employer's experts opined that coal dust played a role in causing or aggravating the emphysema, but not a significant enough one under the legal standard for the emphysema to qualify as legal pneumoconiosis. They ruled it out entirely.

The remaining issue regarding legal pneumoconiosis thus is not the ability to meet the usual "significantly related to or substantially aggravated by" standard, but rather the credibility of Employer's doctors in ruling coal dust out entirely as a cause or aggravating factor. If the ALJ finds they were not credible in completely ruling out coal dust as contributing to the Miner's emphysema as they attempted to do, or if the ALJ finds they simply did not adequately explain why the Miner's over twenty-years of dust exposure -- or the dust found in his lungs on autopsy -- could not have aggravated the emphysema/COPD, she must reinstate benefits. *See Owens*, 724 F.3d at 558.

Therefore, I would instruct the ALJ on remand specifically to evaluate the credibility of their conclusions -- including whether Dr. Fino's changing position that he could not rule out coal dust as a factor in the emphysema in his original report to excluding it entirely in his supplemental report affects his credibility. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991). Each physicians' acknowledgment of coal dust being present in the Miner's lung as shown on autopsy is further relevant to this inquiry. 65 Fed. Reg. 79,920 79,941 (Dec. 20, 2000).

If the ALJ finds the Employer's experts not to be credible in opining that coal dust played no role in causing or aggravating the Miner's emphysema, she must find the Miner's emphysema/COPD is legal pneumoconiosis, and she must reinstate the award of benefits.

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In short, if the ALJ decides Employer failed to establish through the opinions of Drs. Fino and Caffrey that clinical pneumoconiosis played no part in the Miner's disability, she must reinstate benefits. And if she finds Employer's doctors not to be credible in ruling

out coal dust from causing or aggravating the Miner's emphysema, she likewise must reinstate benefits.

In all other aspects, I agree with the majority.

JONATHAN ROLFE
Administrative Appeals Judge