U.S. Department of Labor

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

BRB No. 21-0395 BLA

EARL CAUDILL Claimant-Respondent v. SAPPHIRE COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/15/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BUZZARD and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2019-BLA-05540) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on April 5, 2018.[1]

The ALJ found Claimant established twenty-six years of underground 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 condition of entitlement, 20 C.F.R. §725.309, and 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). He further 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 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

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[1] Claimant filed two prior claims. Director's Exhibits 1, 2. The district director denied his first claim in January 2001 because he failed to establish any element of entitlement. Director's Exhibit 1. He filed a second claim, but later withdrew it. Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] 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 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.

ALJs rendered his appointment unconstitutional. Alternatively, it asserts 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 has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument that Claimant's pre-existing, non-respiratory disability due to a back injury precludes entitlement under the Act. In a reply brief, Employer reiterates 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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).[6] Employer's Brief at 8-13; Reply Brief at 1-5. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but maintains the

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[5] 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 Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] *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 of 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)).

ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[7] *Id.*

We agree with the Director's position that Employer forfeited its Appointments Clause argument by failing to raise it when the case was before the ALJ.[8] Director's Response at 3. The Appointments Clause issue is "non-jurisdictional," and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], F.4th , No. 21-1623, 2022 WL 2348053, slip op. at 6-7 (4th Cir. June 30, 2022).

Lucia was decided before the hearing in this case and years before the ALJ issued his Decision and Order. Employer, however, failed to raise its Appointments Clause argument at any time before the ALJ. *See* Hearing transcript at 12-15, 40-42; Employer's January 25, 2021 Post-Hearing at 22-35. Had Employer raised the argument before the ALJ, he could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.,* 53 BRBS 9,

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[7] The Secretary of Labor (Secretary) 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 Merck.

[8] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1, U.S. (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

11 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision.

Employer raises no basis for excusing its forfeiture of the issue beyond stating it was not required to do so, which we have rejected. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna*, 53 BRBS at 11 (Appointments Clause argument is an "as-applied" challenge that the ALJ can address and thus can be waived or forfeited); Employer's Reply at 1-2. Because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its forfeited argument. *See Davis*, 937 F.3d at 591-92; *Powell*, 53 BRBS at 15; *Kiyuna*, 53 BRBS at 11.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 13-17; Employer's Reply to the Director at 5-8. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* 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), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 13-17.

As the Director argues, however, the removal argument is subject to issue preservation requirements and Employer likewise forfeited this issue by not raising it before the ALJ. *Davis*, 987 F.3d at 588 ("[T]he Benefits Review Board's governing regulations require that legal questions be raised before the ALJ to be reviewable by the Board."); *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677.

Even had Employer preserved its argument, we would reject it. The only circuit court to squarely address this precise issue has upheld the statute's constitutionality with respect to DOL ALJs. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021). And, as our concurring colleague notes, the Board has consistently rejected arguments that *Free Enterprise Fund*, *Seila Law*, and *Arthrex* command a different result. *See infra* p. 19.

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. 20 C.F.R. §718.305(b)(1)(iii). 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.[9] 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. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the medical opinion evidence.[10] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13-23. He specifically found Dr. Ajjarapu's opinion that Claimant has a totally disabling respiratory or pulmonary impairment is well-reasoned and documented and entitled to the "most weight." Decision and Order at 20-23; *see* Director's Exhibits 15, 23. He also found the contrary opinions of Drs. Dahhan and Vuskovich entitled to reduced weight because their explanations are unpersuasive and they did not adequately discuss the exertional requirements of the Claimant's usual coal mine employment.[11] Decision and Order at 22-23; Director's Exhibit 26; Employer's Exhibits 2, 3, 7, 11.

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[9] The ALJ found Claimant's usual coal mine employment as a scoop operator required heavy labor as he "was required to lift heavy items such as belt structures" and "other tasks that were inherently physical in nature, such as rock dusting." Decision and Order at 9. We affirm this finding as Employer does not challenge it. *See Skrack*, 6 BLR at 1-711.

[10] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10-13.

[11] We reject Employer's argument that the ALJ shifted the burden of proof to it on the issue of total disability. Employer's Brief at 18. He specifically found Claimant has the burden of establishing total disability and met his burden because Dr. Ajjarapu's opinion outweighs the opinions of Drs. Dahhan and Vuskovich. Decision and Order at 10, 20-23.

Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion. Employer's Brief at 18-20. We disagree.

Dr. Ajjarapu characterized Claimant's usual coal mine employment as "heavily labor intensive," requiring "constant lifting, carrying, and standing." Director's Exhibit 15 at 7. She observed Claimant's April 23, 2018 pulmonary function study, which produced qualifying values,[12] demonstrates a "severe pulmonary impairment." *Id.* Further, she noted Claimant has symptoms of wheezing, dyspnea, and cough. *Id.* at 2. Based on her overall evaluation, she opined Claimant "is totally and completely disabled from [a] pulmonary perspective" and unable to perform his heavy intensive labor consisting of "lifting, carrying, and standing." *Id.*

After reviewing the physical examination findings and objective test results that Dr. Dahhan administered on August 16, 2018, Dr. Ajjarapu acknowledged that even though Dr. Dahhan's exam was more recent, his findings did not necessarily illustrate a "normal pulmonary picture." Director's Exhibit 23 at 2. She explained the pulmonary function testing associated with his examination illustrates "declining pulmonary parameters" even if it is non-qualifying. *Id.* Because Claimant continues to exhibit severe pulmonary impairment, she reiterated her original opinion that he does not have the pulmonary capacity to perform his usual coal mine employment. *Id.*

We reject Employer's argument that the ALJ erred in crediting Dr. Ajjarapu's opinion despite finding the pulmonary function studies do not establish total disability. Employer's Brief at 19. Total disability can be established with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

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[12] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values 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).

The ALJ permissibly found Dr. Ajjarapu's opinion credible because it is "based on her consideration of both qualifying and non-qualifying[13] pulmonary function test data" and her assessment of Claimant's usual coal mine employment requiring "heavy" manual labor.[14] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 21.

Employer argues Dr. Ajjarapu did not adequately set forth her reasons for diagnosing a severe pulmonary impairment based on the pulmonary function testing and thus the ALJ should have rejected her opinion. Employer's Brief at 18-20. This argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

We also reject Employer's argument that the ALJ erred in discrediting the contrary opinions of Drs. Dahhan and Vuskovich. Employer's Brief at 20-22. The ALJ noted "Dr. Dahhan listed the types of work that the Claimant performed (operating shuttle car and scoop, etc.)" and Dr. Vuskovich "understood that the Claimant had worked as a miner underground." Decision and Order at 20-21. Neither physician indicated if they were aware that this work required heavy manual labor; therefore, the ALJ determined they did not adequately "address the specific exertional requirements of the Claimant's coal mine work," *id.*, and permissibly found their opinions entitled to diminished weight. *See Cornett*, 227 F.3d at 587; *Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991).

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[13] The ALJ noted the non-qualifying pulmonary function studies were "generally quite close to the qualifying value[s]." Decision and Order at 13 n. 20.

[14] We reject Employer's argument that the ALJ "simply excused" Dr. Ajjarapu's mistaken identification of Claimant's usual coal mine employment as a miner's helper in her supplemental report. Employer's Brief at 19, *citing* Decision and Order at 21 n.28. The ALJ acknowledged this mistaken reference contained in her supplemental report. Decision and Order at 21 n. 28. However, he noted she was aware that "Claimant had a heavy level of exertion in his coal mine work," which is consistent with the ALJ's finding that Claimant's usual coal mine employment required heavy manual labor. Decision and Order at 9, 21, 23. Thus the ALJ permissibly concluded this mistake did not diminish the probative value of Dr. Ajjarapu's overall disability assessment. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 21.

Further, although Dr. Dahhan initially opined Claimant is not totally disabled, the ALJ assigned diminished weight to his findings because he did not indicate if that was still his opinion after he reviewed the March 16, 2018 pulmonary function study along with Dr. Ajjarapu's supplemental report. Decision and Order at 21-22. The ALJ found Dr. Dahhan focused on the etiology of Claimant's impairment, but not whether he is totally disabled. Decision and Order at 21-22. Employer does not challenge this finding. Thus we affirm it. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Finally, Dr. Vuskovich testified that Claimant's pulmonary function studies are qualifying or non-qualifying depending on his measured height for the respective study. Employer's Exhibit 7 at 15-20. He acknowledged pulmonary function testing in this case evidences a respiratory impairment, but opined Claimant is not totally disabled because his most recent pulmonary function study produced non-qualifying results. *Id.*

As the ALJ noted, total disability can be established under the regulations with reasoned medical opinions even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see* Decision and Order at 22-23. The ALJ permissibly found Dr. Vuskovich's opinion unpersuasive because he merely stated his conclusion and noted Claimant's pulmonary function study results did not meet DOL disability standards without otherwise addressing whether Claimant is totally disabled from his usual coal mine employment notwithstanding whether his objective testing is non-qualifying. *See Napier*, 301 F.3d at 713-14; *Cornett*, 227 F.3d at 577; Decision and Order at 22-23.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability[15] based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his determinations that Claimant established a change in an applicable condition of entitlement and invoked the

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[15] Employer argues Claimant's pre-existing, non-respiratory disability due to his musculoskeletal conditions precludes his entitlement to benefits because his disability must be entirely respiratory in nature. Employer's Brief at 22-23. But in claims filed after January 19, 2001, a non-pulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see Gulley v. Director, OWCP*, 397 F.3d 535, 538-39, 549 (7th Cir. 2005).

Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309; Decision and Order at 23-24.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[16] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[17]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015). The Sixth Circuit holds this standard requires Employer to show Claimant's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ considered Dr. Dahhan's opinion that Claimant does not have legal pneumoconiosis. Decision and Order at 31-32. He found the doctor's opinion unpersuasive and inconsistent with the medical studies that the DOL cites in the preamble

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

[17] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25-29.

to the 2001 revised regulations. *Id.* We reject Employer's argument that the ALJ erred in discrediting Dr. Dahhan's opinion. Employer's Brief at 23-26.

Dr. Dahhan diagnosed an obstructive ventilatory impairment due to cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibit 26; Employer's Exhibit 2. He explained "the literature indicates that a susceptible smoker will lose 50-90cc of his FEV1 [on pulmonary function testing] per pack year of smoking" and this "amount is sufficient to cause significant pulmonary impairment and loss in lung function … comparable to the one that [Claimant] demonstrates." Employer's Exhibit 2 at 3. But he indicated a miner will only "lose 5-9cc of his FEV1 per year of coal dust exposure," which is "trivial" considering the degree of Claimant's obstruction. Director's Exhibit 26. Thus, he opined cigarette smoking, rather than coal mine dust exposure, accounts for the degree of Claimant's obstructive impairment. *Id.*

The ALJ correctly noted the preamble to the 2001 revised regulations cites medical studies, which the DOL found credible, concluding the risks of smoking and coal mine dust exposure may be additive.[18] 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 31. In light of these medical studies, the ALJ permissibly found Dr. Dahhan focused "principally on his conclusion that smoking results in a greater effect on pulmonary capacity" but did not adequately explain why Claimant's coal mine dust exposure was not a contributing or additive factor, along with cigarette smoking, to his diagnosed lung diseases or impairments.[19] 20 C.F.R. §718.201(a)(2), (b); *see Young*, 947 F.3d at 403-07;

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[18] Contrary to Employer's argument, an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Employer's Brief at 23-27.

[19] We reject Employer's argument that the ALJ applied an improper legal standard with respect to rebuttal of legal pneumoconiosis. Employer's Brief at 28. The ALJ correctly noted Employer must rebut the presumption of legal pneumoconiosis, which he recognized is a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 25, 29, *citing* 20 C.F.R. §718.201(a)(2), (b). The ALJ did not reject Dr. Dahhan's opinion based on his failure to meet a heightened legal standard; he found his opinion inadequately reasoned. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 31.

Westmoreland Coal Co. v. Stallard, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); Decision and Order at 31.

Because the ALJ permissibly discredited Dr. Dahhan's opinion,[20] the only opinion supportive of Employer's burden on rebuttal,[21] we affirm his finding Employer did not disprove legal pneumoconiosis.[22] Decision and Order at 29-32. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing "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); *see* Decision and Order at 32-34. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to prove that no part of

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[20] Because the ALJ provided a valid reason for discrediting Dr. Dahhan's opinion, we need not address Employer's additional arguments regarding the weight the ALJ assigned his opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 23-27.

[21] We reject Employer's argument that the ALJ erred in considering Claimant's treatment records. Employer's Brief at 27. The ALJ acknowledged his treatment records include diagnoses of chronic obstructive pulmonary disease (COPD), but permissibly found this evidence insufficient to rebut the presumption of legal pneumoconiosis because they "do not specifically indicate the etiology of the Claimant's COPD." Decision and Order at 32; *see Young*, 947 F.3d at 405; *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment").

[22] The ALJ found Drs. Ajjarapu and Vuskovich diagnosed legal pneumoconiosis, and thus, their opinions do not support Employer's burden to disprove the disease. Decision and Order at 31-32.

Claimant's total disability was caused by pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32-34.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Administrative Appeals Judge, concurring:

I concur with my colleagues' decision to affirm the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim. However, I write separately to express my opinion that as the Board has previously rejected Employer's argument that the removal provisions are unconstitutional on the merits, *see Shepherd v. Nat'l Mines Corp.*, BRB Nos. 20-0495 BLA and 20-0498 BLA (Dec. 29, 2021) (unpub.), there is no need to determine whether Employer forfeited those same arguments.

As my colleagues note, Employer's arguments are without merit as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Pehringer*, 8 F.4th at 1137.

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 [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. 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."[23] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an *inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

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

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[23] 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).

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) (a 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 1137-38.

In all other respects, I also concur with my colleagues' decision to affirm the ALJ's Awarding Benefits in a Subsequent Claim.

DANIEL T. GRESH
Administrative Appeals Judge