U.S. Department of Labor

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

BRB Nos. 20-0438 BLA
and 20-0439 BLA

MARY E. GILLIAM (Widow of and o/b/o PAUL GILLIAM) Claimant-Respondent v. REEDY COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/29/2021 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Ann Marie Scarpino (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims (2014-BLA-05277 and 2017-BLA-06277) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

ALJ Berlin (the ALJ or ALJ Berlin) found Claimant[1] established the Miner had at least twenty-one years of underground coal mine employment[2] and was totally disabled at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. The ALJ also found

[1] The Miner died on October 6, 2016. Claimant, his widow, is pursuing his claim, filed on November 21, 2012, on behalf of his estate. She is also pursuing her own survivor's claim, which she filed on December 27, 2016. Director's Exhibits 2, 49, 56.

[2] We affirm, as unchallenged, the ALJ's finding of at least twenty-one years of underground coal mine employment, consistent with the parties' stipulation. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 17.

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

Claimant was entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

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.[5] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, Employer contends the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Additionally, Employer asserts the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting Employer's Appointments Clause challenges should be rejected. The Director also urges the Benefits Review Board to affirm the ALJ's discrediting of Drs. Jarboe's and Rosenberg's opinions on rebuttal.

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.[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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[4] Under Section 422(*l*) of the Act, the 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).

[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] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *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 16-24. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] *Id.* at 17-18. We reject Employer's argument, as the Secretary's ratification was a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification is permissible so long as the agency head: 1) had the authority to take

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 49 at 25.

[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)).

[8] 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 Berlin.

[9] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal,* 820 F.3d at 603 (citing *Butler v. Principi,* 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress 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. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified Judge Berlin and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Berlin. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Berlin "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts," and generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified Judge Berlin's appointment. Employer's Brief at 19. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler,* 244 F.3d at 1340. The Secretary properly ratified the ALJ's appointment.[10] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).

[10] While Employer notes correctly that the Secretary's ratification letter was signed by an "autopen," *see* Employer's Brief at 19 & n.3, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

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 22. The Executive Order does not state 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 ratification of Judge Berlin's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

ALJ Christopher Larsen held a hearing in the miner's claim on August 9, 2016. He subsequently remanded the case to the district director on November 3, 2016, to consolidate the miner's claim with the survivor's claim. Upon the district director's referral of the case to the OALJ, the case was assigned to ALJ Berlin. Prior to the Secretary's ratification of his appointment, he issued a Notice of Hearing on October 25, 2017, and an Amended Notice of Hearing on November 29, 2017. Subsequent to his ratification, ALJ Berlin accepted the parties' agreement to waive the hearing and have the case decided on the record. ALJ Berlin's Order dated May 3, 2018.

Employer's intentional decision to waive the hearing in front of ALJ Berlin after ALJ Berlin's appointment had been ratified prevents it from arguing that having ALJ Larsen preside over the previous hearing before ALJ Larsen's appointment was ratified taints this proceeding with an Appointments Clause violation. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 750-51 (6th Cir. 2019). Because ALJ Berlin's appointment had been properly ratified by that point, he had full authority to hold a hearing and issue a decision, and a new hearing in front of him would have cured any defects arising from ALJ Larsen's previous involvement. *See* discussion above. Based on these facts, Employer waived its Appointments Clause challenge with respect to ALJ Larsen's participation, and considering it now would be to condone sandbagging.[11] *Freytag v. Comm'r*, 501 U.S. 868, 895 (Scalia, J., concurring) (Sandbagging is maintaining "the trial court pursue a certain course, and later -- if the outcome is unfavorable -- claiming that the course followed was reversible error.").

[11] "[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 Housing Services of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Moreover, although Employer filed a Motion to Remand the case in light of *Lucia* on July 17, 2018, ALJ Berlin properly denied it as he took no significant action before his appointment was ratified on December 21, 2017. ALJ Berlin's Order dated October 10, 2018. The ALJ issued his Notice of Hearing on October 25, 2017, and an Amended Notice of Hearing on November 29, 2017. His issuance of the Notices alone involved no consideration of the merits, nor could it color his consideration of the merits of this case. *See Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020). It simply reiterated the statutory and regulatory requirements governing the hearing procedures.[12] *Id*.

Unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, the ALJ's issuance of the Notices of Hearing did not affect his ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S. Ct. at 2055. They therefore did not taint the adjudication with an Appointments Clause violation requiring remand. We thus decline to remand this case to the OALJ for a new hearing before a different ALJ. *Noble*, 25 BLR at 1-272.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 20-24. It 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*. at 23-24. 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 21 & n.5, 22-24.

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)

[12] The Amended Notice of Hearing informed the parties of the date for the hearing, set time limits for the completion of discovery and submission of evidence, provided general advice to parties proceeding without counsel, and addressed other routine hearing matters. *See* November 29, 2017 Amended Notice of Hearing and Pre-hearing Order.

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."[13] 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. 1970. 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*. (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 [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.

[13] 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).

Miner's Claim

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *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. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions at 20 C.F.R. §718.204(b)(2)(i), (iv), and the evidence overall at 20 C.F.R. §718.204(b)(2).[14] Decision and Order at 18-20.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies. The January 16, 2013, March 26, 2015, and July 13, 2016 pulmonary function studies yielded qualifying[15] values before and after the administration of a bronchodilator. Director's Exhibit 14; Employer's Exhibit 6; Claimant's Exhibit 5. The August 1, 2013 and July 12, 2016 studies had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Employer's Exhibit 5; Claimant's Exhibit 4. All the qualifying pulmonary function studies met the standards for total disability based on the FEV1 and MVV values, but not the FVC or FEV1/FVC values. The ALJ found Claimant established total disability based on the preponderance of the pulmonary function studies. Decision and Oder at 5-6, 17-18.

Employer argues the ALJ erred in relying "on the MVV values to find [the Miner's] pulmonary function studies were qualifying when the FVC values were not." Employer's Brief at 25. It asserts the DOL has recognized the limited import of MVV values by making

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[14] The ALJ found the blood gas studies do not establish total disability, there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure, and Claimant did not establish the Miner had complicated pneumoconiosis. Decision and Order at 17, 18, 28-31; *see* at 20 C.F.R. §§718.204(b)(2)(ii), (iii), 718.304.

[15] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

them optional. *Id*. (citing 20 C.F.R. §718.103). We disagree. The ALJ found all of the pulmonary function studies valid.[16] Decision and Order at 5-6, 17-18; Director's Exhibit 14; Employer's Exhibits 5, 6; Claimant's Exhibits 4, 5. Moreover, the regulations specifically provide that a pulmonary function study with a qualifying FEV1 value and a qualifying MVV value will support a finding of total disability.[17] 20 C.F.R. §718.204(b)(2)(i)(B). As Employer raises no other allegation of error, we affirm the ALJ's determination that the pulmonary function study evidence supports a findings of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 5-6, 17-18, 20; Director's Exhibit 14; Employer's Exhibits 5, 6; Claimant's Exhibits 4, 5.

Medical Opinions

The ALJ considered five medical opinions. He credited the opinions of Drs. Wolfe, Raj, and Silman that the Miner was totally disabled over Drs. Rosenberg's and Jarboe's contrary opinions.[18] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19.

Employer asserts the ALJ improperly credited the opinions of Drs. Raj and Silman because "both doctors relied on a discredited diagnosis of complicated pneumoconiosis to find [the Miner] disabled." Employer's Brief at 25. We disagree.

Dr. Raj specifically opined the Miner was totally disabled based on the qualifying pulmonary function study obtained during his examination which showed a moderate to severe obstructive defect. He also noted the Miner had pulmonary symptoms of severe shortness of breath, cough, and wheezing. Claimant's Exhibit 4 at 4. Dr. Silman similarly diagnosed significant obstructive lung disease based on the qualifying pulmonary function

[16] Dr. Gaziano validated the January 16, 2013 pulmonary function study. Director's Exhibit 14 at 16.

[17] For a pulmonary function study to constitute evidence of total disability, it must produce *both* a qualifying FEV1 value *and* either an FVC value or MVV value equal to or less than the values appearing in the tables set forth in Appendix B, or an FEV1 to FVC ratio equal to or less than 55 percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C).

[18] The ALJ found Dr. Rosenberg's opinion equivocal as to whether the Miner was totally disabled and that Dr. Jarboe's opinion was unpersuasive because he did not adequately address the qualifying pulmonary function studies. As Employer does not challenge the ALJ's credibility determinations regarding Drs. Rosenberg's and Jarboe's opinions, they are affirmed. *See Skrack,* 6 BLR at 1-711; Decision and Order at 18-20.

studies, and the Miner's severe exertional dyspnea and significant chronic productive cough. Claimant's Exhibit 5 at 3.

Because we find Employer's argument as to error in the ALJ's crediting of Drs. Raj's and Silman's opinions lacks merit, we affirm his findings.[19] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Thus, we affirm his determination that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27; Claimant's Exhibits 4, 5.

We consequently affirm, as supported by substantial evidence, the ALJ's finding that Claimant established total disability based on his consideration of the evidence overall. Decision and Order at 17-18, 20. Therefore, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 20.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[20] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

[19] Employer also contends the ALJ improperly credited Dr. Wolfe's opinion because he "did not know the functional demands of [the Miner's] work." *Id*. (citing Director's Exhibit 49 at 441). We need not address Employer's contention as substantial evidence supports the ALJ's finding that Claimant establish total disability based on the medical opinions of Drs. Raj and Silman. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[20] "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).

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.[21]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, whose law applies to this claim, requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Jarboe and Rosenberg to disprove legal pneumoconiosis. Both physicians concluded the Miner's respiratory impairment was related to either tuberculosis or a combination of smoking and tuberculosis, but unrelated to coal mine dust exposure. Employer's Exhibits 5 at 3; 6 at 11; 7 at 4; 8 at 10. Employer asserts the ALJ did not give proper reasons for discrediting their opinions. Employer's Brief at 25-32. We disagree.

As the ALJ noted, Dr. Jarboe excluded legal pneumoconiosis because the Miner had "a significant element of reversible airways disease." Employer's Exhibit 8 at 10. He explained that "the inhalation of coal mine dust causes a fixed impairment" while "cigarette smoking is associated with an element of reversible airway disease in up to 20% of patients." *Id*. The ALJ permissibly found Dr. Jarboe's rationale unpersuasive because the Miner's "most recent pulmonary function studies were qualifying before and after the administration of bronchodilators," and he did not explain why coal mine dust exposure did not contribute to the "residual, fixed, and disabling impairment."[22] Decision and Order

[21] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 20-23.

[22] Additionally, the ALJ observed correctly that Dr. Jarboe excluded coal mine dust exposure as a causative factor for the Miner's impairment because it was not detected until ten years after he stopped working in coal mine employment. Decision and Order at 26; Employer's Exhibit 8 at 10. Contrary to Employer's contention, the ALJ permissibly found Dr. Jarboe's rationale unpersuasive because it fails to account for the DOL's recognition

at 26; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

Dr. Rosenberg similarly opined Claimant's coal mine dust exposure did not contribute to his impairment because it is partially reversible. Employer's Exhibit 5 at 3. Dr. Rosenberg concluded that the Miner had moderate obstruction but that his marked air trapping and bronchodilator response were not consistent with legal coal workers' pneumoconiosis. *Id*. He described that Miner's symmetrical reduction of the FEV1 and FVC values is a pattern that can be seen with legal pneumoconiosis but also considered it "confounding" that the Miner had residual parenchymal scarring from tuberculosis that could also explain the preserved FEV1/FVC ratio. *Id*. He stated that to determine whether the Miner had legal coal workers' pneumoconiosis, it would be necessary to review serial pulmonary function studies predating the onset of his infection. *Id*.

Contrary to Employer's contentions, the ALJ permissibly found that Dr. Rosenberg did not adequately explain "why it couldn't be the case that both coal mine dust exposure and tuberculosis had a causal role in these functional findings." *See Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 25. The ALJ rationally found Dr. Rosenberg's explanation "[t]hat tuberculosis 'could' account for the functional findings does not imply that exposure to coal mine dust could not." *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 25.

Employer's arguments on legal pneumoconiosis are 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). Because the ALJ acted within his discretion in rejecting the opinions of Drs. Jarboe and Rosenberg, we affirm his finding that Employer did not disprove legal pneumoconiosis.[23] *See Young*, 947 F.3d at 407; Decision and Order at 25-

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that pneumoconiosis is a latent and progressive disease which "may first become detectable only after the cessation of coal mine dust exposure." Decision and Order at 26 (quoting 20 C.F.R. §718.201(c)); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Employer's Exhibit 8 at 10.

[23] Because the ALJ gave permissible reasons for rejecting the opinions of Drs. Jarboe and Rosenberg, we need not address Employer's additional challenges to the ALJ's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 26; Employer's Brief at 28.

26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. The ALJ permissibly discredited Drs. Jarboe's and Rosenberg's opinions on the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, and none of their reasons for denying causation were independent of their views that the Miner did not suffer from the disease or was not disabled by a respiratory impairment, which the ALJ rejected. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 27-28; Employer's Exhibits 5-8.

We therefore affirm the ALJ's determination that Employer failed to establish no part of the Miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. Thus, we affirm the ALJ's award of benefits in the Miner's claim.

Survivor's Claim

The ALJ found Claimant derivatively entitled to survivor's benefits based on the award of benefits in the miner's claim. Decision and Order at 32. Employer raises no arguments regarding the survivor's claim other than its assertion the miner's claim should be denied, which we have rejected. We therefore affirm the ALJ's finding that Claimant is entitled to benefits pursuant to Section 422(*l*) of the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the ALJ's Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge