U.S. Department of Labor

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

BRB No. 21-0386 BLA

RONALD A. FOSSAT (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNNYSIDE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/11/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri and Mark E. Solomons (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD, and GRESH, Administrative Appeals Judges.

BUZZARD and GRESH, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits (2015-BLA-05546) rendered on a claim filed[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with at least fifteen years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] 20 C.F.R. §718.305. He further found Employer failed to 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 further asserts the removal provisions applicable to the ALJ render his appointment unconstitutional. On the merits, it argues the ALJ erred in finding at least fifteen years of qualifying coal mine employment and total disability established, and thus that Claimant invoked the Section 411(c)(4) presumption. It further

[1] The Miner filed this claim on June 13, 2013. Director's Exhibit 2. He died on February 15, 2021. Director's Brief at 5 n.7. His widow is pursuing the claim on behalf of his estate. *Id.*

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

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging rejection of Employer's constitutional challenges and its arguments with respect to invocation of the Section 411(c)(4) presumption. Employer has filed reply briefs in response to both Claimant and the Director, reiterating its arguments.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 16-21; Employer's First Reply Brief at 1-3 (unpaginated); Employer's Second Reply Brief at 1-3 (unpaginated). It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6] but maintains the

[4] The Miner performed his last coal mine employment in Utah. Director's Exhibit 3. Therefore the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

[6] 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.

ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 16-21.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 5-8. We agree with the Director's argument.

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 "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had the authority to take 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.*, 857 F.3d at 372; *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). Moreover, 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 ALJ Nordby and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Nordby. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Nordby "as an Administrative Law Judge." *Id.*

Employer generally asserts that the Secretary's ratification lacked aspects of ceremony and formality, but it does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Nordby's appointment. Employer's Brief at 17-19. 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 thus properly

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Secretary's December 21, 2017 Letter to Administrative Law Judge Evan H. Nordby.

ratified the ALJ's appointment. *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).[7]

Employer further asserts that the Secretary's ratification of the ALJ's appointment was issued without notice and comment and violates the Administrative Procedure Act (APA). Employer's Brief at 19-20. Employer cites no authority to support its argument.[8] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Consequently, we reject Employer's assertion that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 21-26; Employer's First Reply Brief at 3-4 (unpaginated). It generally argues the removal provisions for ALJs contained in the APA, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Employer's Brief at 21-26. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at

[7] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 26, the Executive Order does not indicate the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Nordby's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

[8] The Director also notes that 5 U.S.C. §553(a)(2) provides an exception from the Administrative Procedure Act's rulemaking requirements for matters "relating to agency management or personnel[.]" Director's Brief at 7-8.

21-26. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Invocation of the Section 411(c)(4) Presumption - Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer does not challenge the ALJ's finding of at least fifteen years of coal mine employment "underground or on the surface of an underground mine." Decision and Order at 8; Hearing Tr. at 52. Thus we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer argues the ALJ erred in failing to consider whether the Miner's aboveground coal mine work at an underground mine site occurred in conditions substantially similar to those underground. Employer's Brief at 33-36; Employer's Second Reply Brief at 9-10. Contrary to Employer's argument, the ALJ correctly held that the type of mine (underground or surface), rather than the location of the particular worker (whether working below ground or aboveground), determines whether a miner is required to show comparability of conditions. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy*, 25 BLR at 1-20; 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 8. Thus, a miner who worked aboveground at an underground mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29. We therefore affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment.[9]

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

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work or comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

[9] We reject Employer's argument that the substantial similarity regulation at 20 C.F.R. §718.305(b)(2) is invalid as arbitrary, capricious, and an abuse of agency discretion. Employer's Brief at 35-36; Employer's Second Reply Brief at 10. The United States Courts of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has rejected similar arguments and upheld the validity of 20 C.F.R. §718.305(b)(2). *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014).

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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the arterial blood gas studies and medical opinions.[10] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 31-34. As it is unchallenged, we affirm the ALJ's finding that the arterial blood gas studies establish total disability. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 32.

Employer argues the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 26-33. The ALJ considered the opinions of Drs. Farney, Gagon, and Rosenberg. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 32-34; Director's Exhibits 10, 11, 15, 16, 18, 19, 21; Employer's Exhibit 26. Drs. Farney and Gagon opined the Miner was totally disabled by a respiratory or pulmonary impairment. The ALJ found their opinions credible. Decision and Order at 32, 34. Dr. Rosenberg opined the Miner did not have a respiratory or pulmonary impairment because his pulmonary function testing is invalid and arterial blood gas test results are not due to "an oxygenation abnormality" of the lung but rather "hypoventilation (increased CO2) which has developed consequent to his obesity." Director's Exhibit 18 at 8. The ALJ discredited Dr. Rosenberg's opinion as he determined the doctor conflated the issues of total disability and total disability causation. *Id*. In addition, the ALJ noted Dr. Rosenberg excluded a diagnosis of total disability by stating that if the Miner's "March 7, 2016 arterial blood gas study had been performed at sea level" rather than an elevated altitude, "his pO2 would be much higher based on the pressure difference between the geographic sites." Decision and Order at 32-34. The ALJ found this rationale to be speculative. *Id*. He further discredited the doctor's total disability opinion because he did not address the results of the Miner's most recent January 13, 2017 blood gas study. *Id*.

Employer initially argues the ALJ erred in finding the opinions of Drs. Farney and Gagon support total disability because they attributed the Miner's disabling blood gas exchange impairment to what Employer alleges are non-respiratory causes and, thus, they

[10] The ALJ found the pulmonary function studies do not establish total disability and there is no evidence that the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 32.

did not diagnose an intrinsic disabling respiratory or pulmonary impairment. Employer's Brief at 28-32; Employer's First Reply Brief at 5. It similarly argues he erred in discrediting Dr. Rosenberg's opinion as conflating total disability and total disability causation insofar as the doctor opined the Miner's arterial blood gas testing results reflect "hypoventilation syndrome, a result of his morbid obesity," which is not an intrinsic lung condition. *Id.* We disagree.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305.[11] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Thus we reject Employer's argument that the ALJ erred in finding Drs. Gagon and Farney[12] diagnosed total disability and in

[11] We reject Employer's argument that the Board held otherwise in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). In that case, the Board concluded a physician's testimony, that a miner's "severe degenerative neuromuscular problem" affected his objective testing results, may be "relevant to the issue of the *reliability* of pulmonary function studies as indicators of a chronic respiratory or pulmonary disease" for purposes of invoking an interim presumption that is no longer in effect. *Id.* at 1-134 (emphasis added). The Board did not hold, however, that a doctor's opinion on the *cause* of a respiratory or pulmonary impairment reflected on an otherwise reliable objective test is relevant to whether the miner is disabled. Unlike *Casella*, Employer does not challenge the reliability of the Miner's objective testing and the relevant regulation applicable to this claim specifically states that if "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled *due to pneumoconiosis*." 20 C.F.R. §718.204(a) (emphasis added).

[12] Further, contrary to Employer's argument, substantial evidence supports the ALJ's finding Dr. Farney diagnosed the Miner with a totally disabling respiratory impairment. Employer's Brief at 28-32. Considering the Miner's blood gas study results, Dr. Farney opined they indicate he had compensated chronic hypoventilation, which the doctor attributed to obesity hypoventilation syndrome. Employer's Exhibit 5 at 20-22, 27. When asked at his deposition if the Miner had a disabling respiratory impairment, Dr. Farney stated that he "would say so. Mainly because [he did] have chronic obstructive pulmonary disease. . . And he . . . clearly [was] hypoxic and retain[ed] CO2. . . . I don't think there's any question that he [had] a respiratory impairment. . . . [H]e clearly [was] disabled from work due to his respiratory status." Employer's Exhibit 5 at 25-26. When asked if the Miner's impairment would have prevented him from returning to his usual coal mine employment, Dr. Farney responded "Yes." *Id.* at 41. After reviewing the March 7, 2016 arterial blood gas study results, Dr. Farney stated the Miner's "baseline arterial blood

discrediting Dr. Rosenberg's opinion for conflating total disability and total disability causation. *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 32-34; Employer's Brief at 28-32; Employer's First Reply Brief at 5.

The ALJ's additional bases for discrediting Dr. Rosenberg's opinion are also supported by substantial evidence. Although Dr. Rosenberg opined the March 7, 2016 arterial blood gas study would be normal if he had performed it at sea level, Employer's Exhibit 6, the ALJ rationally discredited his opinion as speculative and undermined by the fact that the regulatory criteria for establishing total disability based on blood gas studies already account for altitude. *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; Decision and Order at 32-34 (citing Appendix C to 20 C.F.R. Part 718). The ALJ also permissibly rejected Dr. Rosenberg's opinion because he did not discuss the Miner's most recent January 13, 2017 blood gas study. *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; Decision and Order at 32-34

Employer also argues the ALJ erred in crediting Dr. Farney's opinion because it is not supported by the objective testing. Employer's Brief at 31. Employer's 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). Moreover, its argument is factually incorrect given that the ALJ found the Miner's arterial blood gas study evidence qualifying for total disability and Dr. Farney relied on blood gas testing in rendering his diagnosis. *See* Employer's Exhibits 4, 5.

We therefore affirm the ALJ's finding Dr. Farney's opinion credible and therefore establishes total disability.[13] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14. Further, we affirm the ALJ's finding Claimant established total disability in consideration

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gas studies meet [the regulations'] criterion for disability." Employers Exhibit 4 at 2. He also opined that the results indicate severe hypoxemia connected with obesity hypoventilation and smoking. Employer's Exhibit 4 at 3.

[13] Because Claimant established total disability through Dr. Farney's opinion, we need not address Employer's arguments that the ALJ erred in crediting Dr. Gagon's opinion or relying on his opinion that was obtained through the DOL pilot program. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 29-31, 36-39; Employer's First Reply Brief at 7; Employer's Second Reply Brief at 6-7.

of the evidence as a whole,[14] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and invoked the Section 411(c)(4) presumption.[15] 20 C.F.R. §718.305(b)(1).

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,[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 that Employer failed to establish rebuttal by either method.

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),

[14] Employer asserts the ALJ erred by failing to consider evidence that the Miner was totally disabled by back, knee, and shoulder injuries prior to any disability by respiratory impairments, and therefore cannot be awarded benefits. Employer's Brief at 32-33. We disagree. The Board rejected this argument in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 16-17 (Oct. 18, 2022) as inconsistent with the regulations and case law. Thus, for the reasons set forth in *Howard*, we reject this argument. *See also* 20 C.F.R. §718.204(a) ("any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000).

[15] Contrary to Employer's argument, the ALJ did not shift the burden of proof in this case. Employer's Brief at 26-27. He properly evaluated the evidence and found Claimant established total disability based on a preponderance of the evidence. Decision and Order at 31-34.

[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).

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Farney and Rosenberg that the Miner did not have a lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 38. He found their opinions inadequately reasoned, and therefore insufficient to rebut legal pneumoconiosis. *Id*. at 38, 44. Employer argues the ALJ erred in rejecting Drs. Farney's and Rosenberg's opinions. We are not persuaded.

Dr. Farney diagnosed the Miner with chronic obstructive pulmonary disease (COPD), chronic bronchitis, and possible emphysema due solely to cigarette smoking and unrelated to coal mine dust exposure. Director's Exhibits 15 at 8, 10, 16 at 18-20, 24, 57-58. He also diagnosed hypoxemia due to obesity. Director's Exhibit 15. Specifically, he explained the Miner had significant exposure to tobacco smoke and relatively low risk from coal mine dust exposure based on his occupational history. *Id*. He opined that it was highly unlikely, but theoretically possible, for an individual with the Miner's coal mine employment history to develop a coal mine dust-induced lung disease, Employer's Exhibit 5 at 5-6, and stated it would be "very, very difficult to say that any of [the Miner's] pulmonary impairment is due to coal dust exposure" because his "risk factor" for developing lung disease from coal mine dust exposure was minor relative to the impact of his smoking and obesity. *Id*. at 43-44, 48. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Farney's opinion as based on statistical generalities not specific to the Miner's case. *Spring Creek Coal Company v. McLean*, 881 F.3d 1211, 1224-6 (10th Cir. 2018); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 76 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Dr. Farney also noted the Miner worked for seventeen years on the surface of an underground mine, including eleven years as a shop mechanic, where "he had no exposure at all to coal [mine] dust in a form that would be worrisome." Director's Exhibit 16 at 18. Further, he stated the Miner worked at the tipple for seven years and explained the tipple "can be dusty, but it tends to be more intermittent than, say, working underground." *Id*. at 19. He excluded legal pneumoconiosis, in part, because it would be "unprecedented to develop coal dust related lung disease" in such a working environment. *Id*. The ALJ rationally found Dr. Farney's opinion unpersuasive because he did not "offer any support for his claim that it is 'unprecedented' for a miner who works as a shop mechanic to develop coal dust related lung disease" or "that above-ground miners [at underground mine sites] have less risk than underground miners for developing lung disease." Decision and Order at 39; *see Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370.

Dr. Farney also excluded legal pneumoconiosis because he opined that for lung disease related to coal mine dust to progress years after exposure, as occurred with the

Miner, it would have to involve progressive massive fibrosis. Employer's Exhibit 16 at 25-26. Thus he believed it is "highly improbable that [the Miner] would have coal-dust-related disease emerge years after exposure." *Id.* The ALJ permissibly found this reasoning inconsistent with the regulations, which state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 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); *see also* 65 Fed. Reg. 79.920, 79,971 (Dec 20, 2000) ("it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period"); Decision and Order at 39.

Meanwhile, Dr. Rosenberg acknowledged the Miner had symptoms indicative of chronic bronchitis, such as cough and sputum production, but opined that it was unlikely they are related to his past coal mine dust exposure given the length of time since his exposure had ceased. Employer's Exhibit 3 at 14-17. The ALJ again permissibly found this reasoning inconsistent with the regulations, which state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va*, 484 U.S. at 151; *Keathley*, 773 F.3d at 737-40; *see also* 65 Fed. Reg. at 79,971; Decision and Order at 42.

Finally, the ALJ permissibly found that even if the Miner's hypoxemia on arterial blood gas testing was due to obesity, as Dr. Rosenberg opined, the doctor did not adequately explain why the impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure.[17] *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 43.

Because the ALJ permissibly discredited the opinions of Drs. Farney and Rosenberg, the only opinions[18] supportive of Employer's burden on rebuttal, we affirm his

[17] Because the ALJ provided valid reasons for discrediting Dr. Farney's and Dr. Rosenberg's opinions, any error in discrediting them for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[18] We reject Employer's argument that Dr. Gagon's opinion supports its burden on rebuttal. Employer's Brief at 51-52. Substantial evidence supports the ALJ's finding that Dr. Gagon diagnosed legal pneumoconiosis, and thus his opinion does not aid Employer. Decision and Order at 38. He diagnosed COPD and opined that the "etiology . . . is likely both cigarette smoking and coal dust exposure. His degree of COPD is much worse than expected by smoking by itself." Director's Exhibit 10 (unpaginated). During his deposition, Dr. Gagon agreed there was a good argument that the Miner's obesity and

finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 43. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[19] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established 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] 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the opinions of Drs. Farney and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove the disease. *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); Decision and Order at 44. We therefore affirm the ALJ's finding that Employer failed to prove that no part of the Miner's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the ALJ's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

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smoking could account for his symptoms but opined that coal dust exposure worsened his condition and there was no way to exclude it as a factor in his COPD. Director's Exhibit 11 at 65-67. Because Employer does not otherwise challenge the ALJ's finding that Dr. Gagon's diagnosis of legal pneumoconiosis is reasoned and documented, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 38.

[19] Because we have affirmed the ALJ's finding that Employer failed to rebut the existence of legal pneumoconiosis, we need not consider Employer's argument that the ALJ erred in finding it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 40-41; Employer's First Reply Brief at 7.

[20] We reject Employer's argument that the "no part" regulatory standard the ALJ applied to determine whether it rebutted the presumed fact of total disability causation is invalid. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014); Employer's Brief at 51-52.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge:

I concur in result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge