U.S. Department of Labor

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

BRB No. 21-0635 BLA

BEVERLY A. HAMPTON (o/b/o LARRY C. HAMPTON)	)	
Claimant-Respondent	)	
v.	)	
UNIT COAL CORPORATION	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 01/10/2023
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

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

Olgamaris Fernandez (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2016-BLA-06049)[1] 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 Miner's subsequent claim filed on June 3, 2015.[2]

The ALJ found Claimant established the Miner had at least fifteen years of qualifying surface coal mine employment and a totally disabling pulmonary impairment. Thus, he found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 41l(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and

[1] ALJ Larry A. Temin previously awarded benefits after holding a formal hearing. In response to Employer's appeal in that case, the Benefits Review Board remanded the matter to the Office of Administrative Law Judges (OALJ) for reassignment to a new ALJ in light of the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *See Hampton v. Unit Coal Corp.*, BRB No. 18-0426 BLA (Feb. 21, 2019) (unpub.).

[2] The Miner filed two prior claims. The district director denied the Miner's initial claim on June 1, 1989, due to failure to establish any element of entitlement. ALJ's Exhibit 5. The Miner's second claim was withdrawn and therefore is considered not to have been filed. 20 C.F.R. §725.306; ALJ's Exhibit 6. The Miner filed the current, subsequent claim on June 3, 2015, but died on September 29, 2019, while his claim was pending. Claimant's Exhibit 9. Claimant, the Miner's widow, is pursuing the Miner's claim on his behalf.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

established a change in an applicable condition of entitlement.[4] The ALJ 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.[5] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, Employer argues the ALJ erred in crediting the Miner with at least fifteen years of qualifying coal mine employment and therefore also erred in finding Claimant invoked the Section 411(c)(4) presumption. Alternatively, it contends 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), filed a limited response, urging the Board to reject Employer's constitutional challenges.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance

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[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless the ALJ finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c). Because the Miner failed to establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element to obtain a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; ALJ's Exhibit 5.

[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.

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, 362 (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).[7] Employer's Brief at 16; Employer's Reply Brief at 2-6. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 18-21. The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought the appointment into compliance. Director's Brief at 3-6. We agree with the Director's position.

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[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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15, 30-31.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor issued a letter to the ALJ on 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 Sellers.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, 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 at the time of the ratification the authority to take the action to be ratified; 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). 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 Sellers and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Sellers. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Sellers "as an [ALJ]." *Id*.

Employer does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Sellers' appointment. 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 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).

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 26-

27. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Sellers' appointment, which we have held constituted a valid exercise of his authority, thereby bringing his appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the OALJ 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 22-27; Employer's Reply Brief at 3-5. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 23-26. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit 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 22-26; Employer's Reply Brief at 4-5. 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

Length of Coal Mine Employment

Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of computation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered the Miner's employment history form, Social Security Administration (SSA) earning records, hearing testimony, and a Black Lung Claim Employment Inquiry completed by Employer. Decision and Order at 5; Director's Exhibits 2, 8-10; July 13, 2017 Hearing Transcript at 16. The ALJ indicated the employment inquiry from Employer stated the Miner worked continuously for it from October 8, 1973, until

October 16, 1988. Decision and Order at 5; Director's Exhibit 27. He also found "the Miner received earnings from other coal mine employers, but the record does not contain the exact start and end dates of his employment with each employer." Decision and Order at 5.

Because the ALJ found the beginning and ending dates of the Miner's coal mine employment are unknown, he divided the Miner's yearly earnings as reported in his SSA earning records by the daily earnings for miners who worked 125 days set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* to determine whether the Miner's wages demonstrated full or partial calendar years of coal mine employment. Decision and Order at 5-7, citing 20 C.F.R. §725.101(a)(32)(iii),[9] *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019). For each year in which the calculation resulted in at least 125 working days, the ALJ credited him with a full calendar year of coal mine employment. *Id*. For the years in which the Miner's earnings fell short, he credited him with a fractional year, based on "the ratio of the days the Miner worked to 125 [days]." *Id*. at 6. Applying this method, the ALJ credited the Miner with a full year of coal mine employment for every year from 1971 to 1988 with the exception of 1983, during which he found the Miner had 0.66 years of coal mine employment. *Id*. at 6-7. Thus, the ALJ found Claimant established 17.66 years of coal mine employment.

Employer argues the ALJ erred in relying on the Sixth Circuit's decision in *Shepherd* to calculate the Miner's coal mine employment using a 125-day divisor without first determining if he established a calendar year of coal mine employment in each year. Employer's Brief at 33-41. We disagree.

Contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, holding that 125 days may constitute a year of coal mine

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[9] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

employment even if the miner did not have a calendar year of coal mine employment, is not dicta. Employer's Brief at 33-34. In *Shepherd*, the Court expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating the Miner's length of coal mine employment." *Shepherd*, 915 F.3d at 407. Thus, regardless of Employer's disagreement with the Court's interpretation of the regulation, the ALJ was bound by the Sixth Circuit's holding in *Shepherd*. As the ALJ was bound by *Shepherd*, we also reject Employer's additional arguments about the correct interpretation of what constitutes "a year" of coal mine employment.[10] Employer's Brief at 33-40.

Because the ALJ's calculations are reasonable, supported by substantial evidence and in accordance with Sixth Circuit law, we affirm the ALJ's finding that Claimant established 17.66 years of coal mine employment. *Muncy*, 25 BLR at 1-27; *see Shepherd*, 915 F.3d at 401.

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must also establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar to those in underground mines." 30 U.S.C. §921(c)(4) (2018); *see Muncy*, 25 BLR at 1-29. 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); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

Employer does not challenge, and we therefore affirm, the ALJ's finding that the entirety of the Miner's coal mine employment took place on the surface of an underground mine.[11] *Skrack*, 6 BLR at 1-711; Decision and Order at 16; Hearing Transcript at 18;

[10] Employer contends "the ALJ must first determine whether [Claimant] worked for an entire calendar year, and then whether the work was regular, *i.e.*, included at least 125 days during the period. Establishing 125 working days does not establish a full year of employment." Employer's Brief at 33. It further asserts the "DOL promulgated section 725.101(a)(32) to provide a uniform definition of a 'year' to determine the length of a claimant's coal mine employment and what operator . . . would be deemed responsible for benefits." *Id.* at 39.

[11] In the alternative, the ALJ found that even if the Miner did not perform all of his surface coal mine work at an underground mine, the Miner's uncontested testimony

Employer's Brief at 30-32. Rather, Employer argues Claimant is required to establish the Miner was regularly exposed to coal mine dust during his work on the surface at an underground mine. Employer's Brief at 30-32. It further asserts the ALJ erred in his evaluation by focusing on the "dustier jobs" the Miner performed and by failing to assess whether the Miner's jobs which had less dust exposure, such as when he was working in an enclosed cab and a washing plant, regularly exposed him to coal mine dust. *Id*. at 30-32.

Contrary to Employer's argument, the ALJ correctly determined that the type of mine (underground or surface), rather than the location of the particular worker (underground or on the surface), determines whether a miner is required to show comparability of conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy*, 25 BLR at 1-28-29; Decision and Order at 16. Thus, a miner who worked on the surface at an underground mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine.[12] *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.

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. 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 consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Defore v. Ala. By-*

established that it was in conditions substantially similar to an underground mine because he was regularly exposed to coal dust. Decision and Order at 16.

[12] We reject Employer's argument that the ALJ's comparability finding renders the regulation at 20 C.F.R. § 718.305(b)(2) invalid because "it would impermissibly read the distinction between underground and surface exposure (whether experienced at an underground mining site or otherwise) out of the statute." Employer's Brief at 31. The United States Courts of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has upheld the validity of 20 C.F.R. §718.305(b)(2). *Zurich American Insurance Group v. Duncan*, 889 F.3d 293 (6th Cir. 2018); see also *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).

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 pulmonary function studies, medical opinions, and the evidence as a whole.[13] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 7-14. Employer does not challenge the ALJ's finding that the pulmonary function studies establish total disability; thus we affirm it. 20 C.F.R. §718.204(b)(2)(i); *see Skrack*, 6 BLR at 1-711; Decision and Order at 9.

Employer argues the ALJ erred in weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and the evidence as a whole. Employer's Brief at 27-30. The ALJ considered the medical opinions of Drs. Baker, Green, Rosenberg, and Tuteur. Decision and Order at 10-14; Director's Exhibits 34, 39, 40; Claimant's Exhibits 6, 7, 8, 11; Employer's Exhibits 3, 6, 7, 10, 13, 14, 17, 18. Drs. Baker, Green, and Rosenberg opined the Miner had a totally disabling respiratory impairment and the ALJ determined Dr. Tuteur did not specifically address whether the Miner had a totally disabling respiratory or pulmonary impairment.[14] *Id*. Finding Drs. Baker and Green's opinions entitled to "substantial weight" and Dr. Rosenberg's opinion entitled to "full probative weight," he determined Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 10-13. Weighing the evidence as a whole, the ALJ gave "paramount weight" to the medical opinion evidence, as supported by the qualifying pulmonary function study evidence, and therefore determined Claimant established the Miner was totally disabled at 20 C.F.R. §718.204(b)(2). *Id*. at 14.

Employer argues the ALJ erred in finding Dr. Rosenberg's opinion supports a finding of total disability as he did not diagnose a compensable primary pulmonary process but rather attributed the Miner's restrictive impairment to non-pulmonary conditions.[15]

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[13] The ALJ found there is no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §§718.204(b)(2)(iii), 718.304; Decision and Order at 7.

[14] In the alternative, the ALJ found that even assuming Dr. Tuteur opined the Miner did not have a totally disabling respiratory or pulmonary impairment, his opinion is "poorly reasoned" and entitled to "no probative weight" as it is inconsistent with the objective evidence of record. Decision and Order at 14.

[15] Employer states Dr. Rosenberg "blamed [the Miner's] restrictive function to his three open heart surgeries, liver resectioning, and thoracotomy, which 'alter[ed] the normal chest mechanics, not allowing full expansion of the lungs, resulting in restriction.'"

Employer's Brief at 27-30, citing *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). We reject Employer's argument because it conflates the issues of total disability and causation. 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.[16] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984).[17] Because it is supported by substantial evidence, we affirm the ALJ's findings that Claimant established

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Employer's Brief at 28, quoting Employer's Exhibit 14 at 9-10; *see also* Director's Exhibit 18.

[16] We reject Employer's argument that the Board held otherwise in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). Employer's Brief at 28-29. In that case, the Board ultimately concluded a physician's testimony, that a miner's "severe degenerative neuromuscular problem" affected his objective testing, may be "relevant to the issue of the reliability of pulmonary function studies as indicators of a chronic respiratory or pulmonary disease." *Id.* at 1-134. But the Board did not hold that a physician's opinion that a miner has a totally disabling respiratory or pulmonary impairment due to heart surgeries, liver resectioning, and a thoracotomy supports a finding that a miner is not totally disabled.

[17] Employer is mistaken in contending that the issue to be determined in order to establish total disability at 20 C.F.R. §718.204 is whether Claimant proved the Miner suffered from a totally disabling respiratory impairment separate and apart from any other non-respiratory conditions and that, consequently, a respiratory impairment caused by a non-respiratory condition cannot be considered. Employer's Brief at 27-30. The pertinent regulation provides: "If, however, 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). Moreover, in defining total disability, the regulation addresses a "*pulmonary or respiratory impairment* which, standing alone, prevents or prevented the miner" from (i) "performing his . . . usual coal mine work" and (ii) "engaging in gainful employment . . .." 20 C.F.R. §718.204(b)(1). Thus, it is the existence of a totally disabling pulmonary or respiratory impairment that is at issue when considering total disability, not the origin of the impairment. *See Bosco*, 892 F.3d at 1480-81.

total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. Decision and Order at 14. Consequently, we affirm the ALJ's conclusion that Claimant therefore established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309(c).

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,[18] 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)(2)(i), (ii). The ALJ determined Employer failed to rebut the presumption by either method. Decision and Order at 23-24, 28-29.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner does 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). The Sixth Circuit holds that an employer may rebut legal pneumoconiosis by showing that 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. Rosenberg and Tuteur to establish the Miner did not have legal pneumoconiosis. It contends the ALJ erred in finding their opinions not well-reasoned. We disagree.

[18] "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).

Drs. Rosenberg and Tuteur each opined the Miner had a disabling restrictive impairment without obstruction and that he did not have legal pneumoconiosis, in part, because his restrictive impairment did not manifest until years after his coal mine employment ceased. Employer's Exhibits 14, 17. They both attributed his impairment to other factors, including multiple heart surgeries, liver cancer resection, and obesity. Director's Exhibit 39; Employer's Exhibits 3, 6, 14, 17. The ALJ permissibly found their opinions that coal mine dust exposure could not have contributed to the Miner's restriction were unpersuasive because they did not account for the regulatory definition of pneumoconiosis as a latent and progressive disease that "may first become detectable only after the cessation of coal mine dust exposure."[19] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *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 25- 27; Employer's Exhibits 13, 14. Moreover, the ALJ permissibly gave less weight to Dr. Rosenberg's opinion excluding legal pneumoconiosis as a cause of the Miner's restrictive impairment because the Miner either did not have clinical pneumoconiosis or it was not of a sufficient degree to cause impairment, as this is contrary to the regulations recognizing that legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See* 20 C.F.R. §§718.202(a)(4), 718.202(b); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical

[19] Dr. Rosenberg opined that the Miner's "current respiratory complaints are of recent onset and are not representative of legal [pneumoconiosis]. . . . multiple non coal mine dust exposure-related factors explained his worsening impairment since leaving the coal mines in 1989. . . . All these factors superimposed on his obesity were responsible for his worsened restrictive lung function." Employer's Exhibit 14 at 11-12. Similarly, Dr. Tuteur explained:

> For more than 25 years following cessation of coal mine employment, pulmonary function was essentially normal or nearly normal. Subsequently, as spirometry worsened and demonstrated a mild restrictive abnormality, an intermittent impairment of oxygen gas exchange was documented, particularly during times of crucial illness, and was explained fully by non-coal mine dust induced processes. Thus, he did not fulfil the diagnosis of legal coal workers' pneumoconiosis.

Employer's Exhibit 13 at 4.

pneumoconiosis); *Howard*, BLR , BRB No. 20-0229 BLA, slip op. at 18; Decision and Order at 26; Employer's Exhibits 6, 14, 18.

Employer's arguments on legal pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited the opinions of Drs. Rosenberg and Tuteur, the only opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis.[20] Decision and Order at 28. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner does not have pneumoconiosis.[21] 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 as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 28-29. Contrary to Employer's contention, the ALJ permissibly discredited the opinions of Drs. Rosenberg and Tuteur on the cause of the Miner's pulmonary disability because they did not diagnose pneumoconiosis, contrary to his determination that Claimant has the disease.[22] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43

[20] Because the ALJ provided a valid reason for discrediting Drs. Rosenberg's and Tuteur's opinions concerning the restrictive impairment they diagnosed, we need not address Employer's additional challenges to the ALJ's discrediting of their opinions, including that they did not diagnose chronic bronchitis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 44-45. Further, because Drs. Baker's and Green's opinions do not support Employer's burden on rebuttal, we also need not address Employer's arguments concerning the ALJ's weighing of their opinions. Employer's Brief at 44-45.

[21] Because the ALJ's determination that Employer did not disprove legal pneumoconiosis precludes a finding that the Miner does not have pneumoconiosis, we need not address Employer's argument that he erred in finding it failed to disprove clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 41-44.

[22] Drs. Rosenberg and Tuteur did not address whether legal pneumoconiosis caused the Miner's total respiratory disability independent of their conclusions that he did not have the disease.

F.3d 109, 116 (4th Cir. 1995); Decision and Order at 29. We therefore affirm the ALJ's conclusion that Employer failed to disprove disability causation by establishing no part of the Miner's respiratory disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge