U.S. Department of Labor

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

BRB No. 21-0287 BLA

LOUELLA E. SWINEY (Widow of DONALD SWINEY) Claimant-Respondent v. DONALD SWINEY MINING and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/23/2022 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits on Modification of John P. Sellers, III, 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 (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Olgamaris Fernandez (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: BUZZARD, 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 on Modification (2016-BLA-06061) 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 request for modification of a survivor's claim.

Claimant filed her survivor's claim on November 8, 2007.[1] In a March 19, 2012 Decision and Order Awarding Benefits, ALJ Lystra A. Harris found Claimant established the Miner had thirty-three years of coal mine employment, with at least fifteen years in underground mines, and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She also found Employer did not rebut the presumption and awarded benefits.

[1] Claimant is the widow of the Miner, who died on April 3, 2007. Director's Exhibit 9. The Miner had previously filed a subsequent miner's claim for benefits on August 8, 2006, which was finally denied by Administrative Law Judge Alan L. Bergstrom in a Decision and Order – Denying Benefits issued on March 18, 2009, as Claimant failed to establish the Miner had pneumoconiosis. Director's Exhibit 154. So the Miner never successfully established entitlement to benefits during his lifetime. Thus Claimant is not entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Employer appealed and the Benefits Review Board rejected Employer's argument that Claimant was collaterally estopped from litigating the issues of pneumoconiosis and total disability in her survivor's claim based on ALJ Alan L. Bergstrom's previous denial of the Miner's subsequent miner's claim. *Swiney v. Donald Swiney Mining*, BRB No. 12-0336 BLA, slip op. at 4 (Mar. 26, 2013) (unpub.). The Board also affirmed ALJ Harris's finding that Claimant established at least fifteen years of underground coal mine employment. *Id*. at 3 n.4. However, the Board vacated her finding that Claimant established total disability and invocation of the Section 411(c)(4) presumption. *Id*. at 6. Further, the Board vacated her determination that Employer failed to rebut the presumption. *Id*. at 9-11. Thus the Board remanded the case for further consideration. *Id*.

In an April 24, 2015 Decision and Order Denying Benefits on Remand, ALJ Harris found Claimant failed to establish total disability and thus invocation of the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2). She also found Claimant failed to establish the Miner had clinical or legal pneumoconiosis. 20 C.F.R. §718.202. Thus she denied benefits. Claimant timely requested modification of that denial on August 28, 2015. Director's Exhibit 166.

In a January 29, 2021 Decision and Order Awarding Benefits on Modification, the subject of the current appeal, ALJ Sellers (the ALJ) found Claimant established at least fifteen years of underground coal mine employment and total disability. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. In addition, he found Employer did not rebut the presumption. Thus he found Claimant established modification based on a mistake in a determination of fact. 20 C.F.R. §725.310. Furthermore, he found granting modification would render justice under the Act and awarded benefits.

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.[3] It further asserts the removal provisions applicable to the

[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.

ALJ rendered his appointment unconstitutional. In addition, it again contends collateral estoppel precludes Claimant from litigating the issues of pneumoconiosis and total disability. On the merits, it asserts the ALJ erred in finding Claimant established total disability when invoking the Section 411(c)(4) presumption.[4] Finally, Employer 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 the Board to reject Employer's constitutional challenges and its argument that collateral estoppel bars Claimant's entitlement to benefits. Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 18-22; Employer's Reply Brief at 2-6. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all

---

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges 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 (DOL) has conceded 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.

sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 19-22; Employer's Reply Brief at 2-4.

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 4-7. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* at 6-7. We agree with the Director's arguments.

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). It 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*, 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)); *see* Employer's Reply Brief at 3-4.

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

---

[7] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] 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.

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*. In doing so, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified ALJ Sellers's appointment. Employer's Brief at 22; Employer's Reply at 2. 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.[8] *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 of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier 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 19-20; Employer's Reply Brief at 15-16. 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

[8] While Employer asserts the Secretary's ratification of the ALJ's appointment was unaccompanied by any ceremony or formality, Employer's Brief at 21, 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 thus agree with the Director: "Employer's argument that the appointment was invalid because the exact wording of the letter varied from internal government guidance and that the Secretary's action lacked sufficient pomp and circumstance is unpersuasive." Director's Brief at 6 n.4.

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'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.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.[9]

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 4-6. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It 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). *Id.*

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue with regard to DOL ALJs has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (holding 5 U.S.C. §7521 constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees

[9] The ALJ was previously assigned to this case. He issued a Notice of Hearing on February 22, 2010. Director's Exhibit 82. On June 29, 2010, he granted Claimant's request for a continuance and returned the case back to the unassigned docket of the Office of Administrative Law Judges. Director's Exhibit 97. The ALJ was reassigned the case in 2019. He found that because Employer did not challenge his prior actions in 2010 and all of his actions on modification occurred after the ratification of his appointment, Employer does not have a valid challenge to his appointment. Decision and Order at 5. As Employer does not challenge this finding, we affirm it. *Skrack*, 6 BLR at 1-711.

who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* 561 U.S. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[10] 140 S. Ct. at 2201. It did not address ALJs.

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

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *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 the removal provisions at 5 U.S.C. §7521 are unconstitutional as applied to DOL ALJs. *Pehringer*, 8 F.4th at 1137-38.

[10] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau 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).

Modification

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Moreover, a party need not submit new evidence because an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Collateral Estoppel

Initially, Employer again argues that Claimant is collaterally estopped from litigating the issues of pneumoconiosis and total disability in her survivor's claim based on the previous final denial of benefits in the Miner's subsequent miner's claim. We reject Employer's collateral estoppel argument. Employer's Brief at 27-29. Collateral estoppel bars relitigation of an issue that was previously litigated only when, among other requirements, the issue was raised and actually litigated in the prior proceedings and the party against whom estoppel is sought had a full and fair opportunity to litigate the issue. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014). ALJ Bergstrom denied the Miner's August 8, 2006 subsequent miner's claim because he found the evidence did not establish the Miner had pneumoconiosis. Director's Exhibit 154 - March 18, 2009 Decision and Order at 21-26. He declined to address as "moot" the issues of total disability and total disability causation. *Id*. at 26. Employer maintains that based on ALJ Bergstrom's denial of benefits in the subsequent miner's claim, Claimant is collaterally estopped from relitigating whether the Miner had pneumoconiosis or whether he was totally disabled in the survivor's claim. Employer's Brief at 27-29.

The Board previously addressed the application of collateral estoppel to this survivor's claim in Employer's appeal of ALJ Harris's March 19, 2012 Decision and Order Awarding Benefits. *Swiney*, BRB No. 12-0336 BLA, slip op. at 4. Because Claimant "was not a party to the [M]iner's claim and, therefore, did not have a full and fair opportunity to litigate the issues in that claim," the Board held collateral estoppel did not apply. *Id*. As Employer has not shown the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989).

In addition, as the Director correctly notes, ALJ Bergstrom found Claimant was not entitled to benefits because the evidence did not establish the Miner had pneumoconiosis

and, therefore, declined to address or resolve the issue of total disability in the subsequent miner's claim. Director's Exhibit 154 - March 18, 2009 Decision and Order at 26; Director's Brief at 12. Thus total disability was not litigated in the prior proceedings. *Lawson*, 739 F.3d at 320-21. Further, with respect to the issue of pneumoconiosis, collateral estoppel does not bar relitigation of a factual issue where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than in the second, or where his or her adversary has a heavier burden in the second action than in the first. *See Collins v. Pond Creek Mining Co*., 468 F.3d 213, 217 (4th Cir. 2006); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988). Because the Section 411(c)(4) presumption of pneumoconiosis was not available to the Miner in the miner's subsequent claim, the Miner had the affirmative burden of proving the existence of the disease. In the survivor's claim, however, the availability and invocation of the Section 411(c)(4) presumption shifted the burden to Employer to affirmatively disprove the existence of pneumoconiosis. For these reasons, the doctrine of collateral estoppel is not applicable under the facts of this case.

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

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish the Miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). 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, medical opinions, and evidence as a whole.[11] 20 C.F.R. §718.204(b)(2); Decision

[11] The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 12-13; Director's Exhibits 11, 13, 40.

and Order at 14, 18. Employer does not challenge the ALJ's finding that the arterial blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 12-14. Thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in weighing the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 30-34. The ALJ considered the medical opinions of Drs. Forehand, Rosenberg, and Dahhan.[12] Director's Exhibits 13, 67 at 3, 68 at 5. He determined all three doctors opined the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. Decision and Order at 15-18. Moreover, he found the opinions of Drs. Forehand and Rosenberg credible and entitled to substantial weight. *Id.* Although he did not render a specific finding on whether Dr. Dahhan's opinion was credible, he determined the physician's diagnosis of total disability does not undermine the qualifying blood gas testing[13] or the opinions of Drs. Forehand and Rosenberg. *Id.*

Employer argues the ALJ erred in finding the opinions of Drs. Rosenberg and Dahhan support a finding of total disability. Employer's Brief at 30-32. It concedes both doctors opined the Miner was totally disabled at the time of his death due to the effects of lung cancer. *Id.* It maintains both doctors "attributed" the Miner's "post-exercise hypoxemia to his fast-acting lung cancer, not a chronic,[14] primary pulmonary process." *Id.*

---

[12] The ALJ found Drs. Perper, Caffrey, and Oesterling did not render opinions on whether the Miner was totally disabled. Decision and Order at 15. This finding is affirmed, as Employer does not challenge it. *Skrack*, 6 BLR at 1-711.

[13] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[14] Employer contends Claimant must establish the Miner's disabling hypoxemia was due to a chronic lung condition. Employer's Brief at 31-32. Contrary to Employer's argument, nothing in the Act or regulations requires a showing that the Miner's total disability was chronic in order to invoke the Section 411(c)(4) presumption. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). In *Tanner*, the Board squarely addressed this issue, holding that, "[u]nder the plain language of Section 411(c)(4) of the Act and the implementing regulation . . . [a miner] is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic." *Tanner*, 10 BLR at 1-86. Thus, the relevant inquiry for invocation of the Section 411(c)(4) presumption is whether the deceased miner had a totally disabling respiratory impairment "at the time of his death,"

The Board previously rejected Employer's argument that evidence regarding the cause of the Miner's totally disabling respiratory impairment is relevant at 20 C.F.R. §718.204(b)(2). *Swiney*, BRB No. 12-0336 BLA, slip op. at 5. As Employer has not shown the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, the Board's prior determination is the law of the case. *See Brinkley*, 14 BLR at 1-151; *Williams*, 22 BRBS at 237.

Further, Employer's argument lacks merit as the ALJ correctly found the opinions of Drs. Rosenberg and Dahhan support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order a 15-18. 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.[15] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). As Employer does not dispute the ALJ's finding that Dr. Rosenberg's opinion is credible and entitled to substantial weight, we affirm it. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Skrack*, 6 BLR at 1-711; Decision and Order at 24-25.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on Dr. Rosenberg's medical opinion.[16] 20

---

not whether the disability preceded a miner's death by some undefined time period to be considered "chronic." 20 C.F.R. §718.305(b)(1)(iii); *see generally Price v. Califano*, 468 F. Supp. 428 (N.D. W.Va. 1979) (inquiry under Section 411(c)(4) is whether the miner was totally disabled "at the time of death," not some point in time "prior to death"). Regardless, Employer does not explain why the Miner's terminal lung cancer, which it concedes caused his hypoxemia, is not a chronic disease even if it is "fast-acting."

[15] 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 ultimately concluded a physician's testimony, that a miner's "severe degenerative neuromuscular problem" was affecting 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. The Board did not hold a physician's opinion that a miner has a totally disabling respiratory or pulmonary impairment due to lung cancer supports a finding that a miner is not totally disabled.

[16] As Claimant established total disability based on Dr. Rosenberg's opinion, we need not address Employer's argument that the ALJ erred in crediting Dr. Forehand's

C.F.R. §718.204(b)(2)(iv). We further affirm the ALJ's finding that Claimant established total disability when considering the record as a whole.[17] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 15-18. Therefore, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 19.

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

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[18] or that "no part of [his] death 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 found Employer did not 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

---

opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 35.

[17] Employer asserts the ALJ failed to properly consider the non-qualifying pulmonary function studies as contrary probative evidence. Employer's Brief at 34. We disagree. Because they measure different types of impairment, non-qualifying pulmonary function studies do not necessarily call into question valid and qualifying arterial blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Thus, we affirm the ALJ's permissible finding that the non-qualifying pulmonary function studies do not preclude a finding of total disability based on the qualifying exercise blood gas study. Decision and Order at 14.

[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).

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ found the record establishes the Miner had five lung diseases or impairments: exercise-induced hypoxemia, basilar pulmonary fibrosis, lung cancer, chronic bronchitis, and emphysema. Decision and Order at 32-41. Based on his credibility findings, the ALJ found Employer's evidence insufficient to rebut the presumption that each of these conditions was significantly related to, or substantially aggravated by, coal mine dust exposure. *Id*. Thus he found Employer failed to establish the Miner's exercise-induced hypoxemia, basilar pulmonary fibrosis, lung cancer, chronic bronchitis, and emphysema do not constitute legal pneumoconiosis. *Id*.

Employer does not specifically challenge the ALJ's finding that the Miner's basilar pulmonary fibrosis, lung cancer, chronic bronchitis, and emphysema constitute legal pneumoconiosis. Therefore, we affirm these findings.[19] *See Young*, 947 F.3d at 405; *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[20] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii). He considered Drs. Rosenberg's, Dahhan's, and Oesterling's opinions that the Miner's death was due to lung cancer and unrelated to pneumoconiosis. Director's Exhibits 67 at 4; 70 at 6; 77 at 2; 78 at 2.

The ALJ correctly found that, because Drs. Rosenberg, Dahhan, and Oesterling attributed the Miner's death to lung cancer, and Employer failed to rebut the presumption that the Miner's lung cancer is significantly related to or substantially aggravated by coal mine dust exposure, their opinions are insufficient to rebut the presumption that no part of

[19] We thus need not address Employer's argument that the ALJ erred in discrediting the opinions of Drs. Rosenberg and Dahhan that the Miner's exercise-induced hypoxemia was due to his lung cancer. Employer's Brief at 36-38.

[20] Because we affirm the ALJ's findings on legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 38-39.

the Miner's death was caused by legal pneumoconiosis. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019). Furthermore, the ALJ rationally discredited the opinions of Drs. Rosenberg, Dahhan, and Oesterling because they failed to address whether no part of the Miner's death was caused by basilar pulmonary fibrosis, chronic bronchitis, and emphysema, as the ALJ found each of these diseases also constitute legal pneumoconiosis.[21] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 42. As it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

Thus we affirm the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption and that Claimant therefore established a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order at 14, 19. We further affirm, as unchallenged, the ALJ's determination that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order at 45.

[21] We reject Employer's argument that the ALJ erred in finding Dr. Caffrey offered an opinion that the Miner's legal pneumoconiosis caused his death. Employer's Brief at 39. The ALJ did not make such a finding. Decision and Order at 41. Dr. Caffrey opined the Miner had lung carcinoma unrelated to coal mine dust exposure, but did not render an opinion on the cause of the Miner's death. Director's Exhibit 78 at 2.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge