U.S. Department of Labor

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

BRB No. 20-0087 BLA

FRED HUFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION, SELF-INSURED THROUGH SUNCOKE ENERGY, INCORPORATED	)	DATE ISSUED: 03/31/2021
	)	
Employer-Petitioner	)	
	)	
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 and the Order Modifying Award of Benefits of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for Employer.

William M. Bush (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Steven B. Berlin's Decision and Order Awarding Benefits and Order Modifying Award of Benefits (2017-BLA-05311) rendered on a claim filed on October 13, 2015[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge determined Claimant established seventeen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits. On reconsideration, the administrative law judge modified the award to include augmented benefits for a dependent child.

On appeal, Employer argues the administrative law judge 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 challenges the

[1] Claimant filed a claim in 2013, but subsequently withdrew it. Director's Exhibit 2; Employer's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a presumption that he is totally disabled due to pneumoconiosis if he establishes 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.

constitutionality of the Section 411(c)(4) presumption. On the merits, Employer contends the administrative law judge erred in finding that Claimant is totally disabled and invoked the Section 411(c)(4) presumption. It also argues the administrative law judge erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment and the Section 411(c)(4) presumption. Employer filed a reply to Claimant's Brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, Inc.*, 380 U.S. 359, 362 (1965).

Appointments Clause

Employer requests the Board vacate the administrative law judge's Decision and Order and remand this case to be heard by a constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer's Brief at

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U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established seventeen years of underground coal mine employment as well as the findings with respect to the dependency issue addressed in the Order Modifying Award of Benefits. 20 C.F.R. §§725.208, 725.209; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order Modifying Award of Benefits at 1-2.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 16; Director's Exhibit 3.

[6] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC administrative law judges 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

6-8.[7] It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id*.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought the appointment into compliance. Director's Brief at 3-4. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id*. We agree with the Director's arguments.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *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 at the time of 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*, 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

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administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] Employer raised this issue before the administrative law judge in a Motion to Cancel Formal Hearing and Place Claim in Abeyance. The administrative law judge denied Employer's motion in a February 14, 2018 Order Denying Motion to Stay.

[8] The Secretary issued a letter to the administrative law judge 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 Administrative Law Judge Berlin.

regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time he ratified the administrative law judge'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.

Under the presumption of regularity, it thus is presumed 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 administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Berlin and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Berlin. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of Judge Berlin "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the 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*" all its earlier actions was proper).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 8-10. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United*

States, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case and deny its request to hold this case in abeyance.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A miner 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 administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge determined Claimant established total disability based on the pulmonary function studies, medical opinions, and his weighing of the evidence as a whole. 20 C.F.R. §718.204(b)(i), (iv).

Pulmonary Function Studies

The administrative law judge considered three pulmonary function studies dated August 2, 2013, January 21, 2016, and May 18, 2016. Decision and Order at 4-5, 18-20; Director's Exhibits 10, 19; Employer's Exhibit 6. He determined the weight of the evidence established Claimant's height is 71 inches and concluded all three studies were valid. Decision and Order at 18-20. The August 2, 2013 study produced non-qualifying

values before and after the administration of a bronchodilator.[9] Employer's Exhibit 6. The January 21, 2016 study produced qualifying values pre-bronchodilator but non-qualifying values post-bronchodilator. Director's Exhibit 10. The May 18, 2016 study produced qualifying values both pre- and post-bronchodilator. Director's Exhibit 19. The administrative law judge found the pre-bronchodilator testing to be "a better indicator of a miner's disability" and gave greater weight to the more recent 2016 qualifying studies "in recognition of the progressive nature of pneumoconiosis." Decision and Order at 20. He therefore found a preponderance of the pulmonary function study evidence established total disability. *Id.*

Employer contends the administrative law judge erred in finding the pulmonary function study evidence establishes total disability. Employer's Brief at 11-22; Employer's Reply at 2-5. We disagree.

We initially reject Employer's assertion the administrative law judge erred in finding Claimant's height is 71 inches. Employer's Brief at 14-16; Employer's Reply at 2-4. If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine Claimant's actual height. *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). The task of weighing the evidence and rendering findings of fact is committed to the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The August 2, 2013, January 21, 2016, and May 18, 2016 pulmonary function studies listed Claimant's height as 68 inches, 71 inches, and 69 inches, respectively. Decision and Order at 4-5, 18-20; Director's Exhibits 10, 19; Employer's Exhibit 6. The administrative law judge noted Claimant testified he is 71 inches tall, and considered that his older treatment records indicate his height is 71 inches, and his most recent treatment records list a height of 180 centimeters, which converts to 70.87 inches. Decision and Order at 18; *see* Employer's Exhibits 8, 12, 14. He further noted Drs. Forehand and Vuskovich both discussed the different height measurements. Because Dr. Forehand provided a "detailed discussion" of the process he used to measure Claimant's height at 71 inches[10] while Dr. Vuskovich asserted without explanation that Claimant's height is under

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

[10] Dr. Forehand explained that he worked to overcome Claimant's difficulty in standing up straight to obtain an accurate height measurement:

71 inches and because 71 inches is consistent with the heights recorded in Claimant's treatment records, the administrative law judge permissibly found the weight of the evidence establishes Claimant's height is 71 inches.[11] *See Napier*, 301 F.3d at 713-14; *Clark*, 12 BLR at 1-155; *Protopappas*, 6 BLR at 1-223; Decision and Order at 18; Claimant's Exhibit 5 at 141; Employer's Exhibit 7 at 16.

Employer further argues the administrative law judge erred in finding the January 21, 2016 pulmonary function study valid. Employer's Brief at 17-19. We disagree. Dr. Vuskovich opined the January 21, 2016 study, administered by Dr. Forehand, is invalid because Claimant did not put forth sufficient effort and prematurely terminated his expiratory efforts. Employer's Exhibit 7. As the administrative law judge noted, Dr. Forehand responded to Dr. Vuskovich's criticism, stating "the study met the American Thoracic Society's validity criteria because a careful inspection of flow volume loops and volume time showed 'no evidence of delay in onset of peak expiration, premature termination of expiration, or excess variability.'"[12] Decision and Order at 19; Claimant's Exhibit 5 at 4-5.

Contrary to Employer's contention, the administrative law judge permissibly credited the opinions of Drs. Forehand and Rosenberg over that of Dr. Vuskovich based on

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> I personally measured [Claimant's] height in his stocking feet. His back and hip pain hindered his ability to stand up straight, but I persisted until his hips, back, neck and head were touching the back of the measuring device. He stood 71 inches. Shorter heights were the product of measurements complicated by his difficulty standing up straight. That is why his measurement varied from time to time.

Claimant's Exhibit 5.

[11] Contrary to Employer's argument, Dr. Forehand's deposition does not necessarily contradict his supplemental report. Employer's Brief at 16. Dr. Forehand testified his staff wrote down 71 inches but did not explain how that height was measured. Claimant's Exhibit 3 at 61. He explained how he measured Claimant's height in his supplemental report. Claimant's Exhibit 5. As such, there was no necessary conflict in Dr. Forehand's opinion regarding the measurement of Claimant's height for the administrative law judge to resolve.

[12] Dr. Gaziano reviewed the January 21, 2016 pulmonary function study and checked a box indicating the study was acceptable. Director's Exhibit 12. Dr. Rosenberg opined that Dr. Forehand's pulmonary function study "appeared valid." Director's Exhibit 19.

their "significantly greater experience in pulmonary function testing,"[13] and found the pulmonary function study valid. Decision and Order at 20; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Employer's argument that he should have found Dr. Vuskovich more qualified and credited his opinion over that of Dr. Forehand constitutes a request to reweigh the evidence, which the Board is not empowered to do.[14] *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer next contends the administrative law judge erred in giving greater weight to the qualifying pre-bronchodilator pulmonary function study results over the non-qualifying post-bronchodilator results. Employer's Brief at 19-21. We disagree. The administrative law judge explained he accorded greater weight to the pre-bronchodilator studies because they are a "better indicator of a miner's disability." Decision and Order at 20; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. He correctly observed the DOL has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of

[13] The administrative law judge noted Dr. Vuskovich is Board-certified in occupational and preventative medicine in which he has practiced since 2002, attended a symposium on pulmonary function studies in 2014, and obtained NIOSH certification as a spirometry technician in 2015. Decision and Order at 19-20; Employer's Exhibit 7. Dr. Forehand is Board-certified in pediatrics, allergy and immunology, and "has conducted about 15,000 Black Lung examinations for the Department of Labor since 1993." Decision and Order at 19-20; Director's Exhibit 14; Claimant's Exhibit 3; Employer's Exhibit 7. Dr. Rosenberg has been Board-certified in pulmonary medicine since 1980 and occupational medicine since 1995, and has "extensive experience in practicing, teaching and lecturing in pulmonary medicine, including the interpretation of pulmonary function test results." Decision and Order at 19-20; Director's Exhibits 19, 20.

[14] Employer's additional argument that the administrative law judge mischaracterized Dr. Vuskovich's opinion regarding the validity of Dr. Rosenberg's May 18, 2016 pulmonary function study lacks merit. Employer's Brief at 19. The administrative law judge accurately noted Dr. Vuskovich's opinion that the MVV portion of Dr. Rosenberg's study was invalid, Employer's Exhibit 7, contradicted Dr. Rosenberg's opinion that the May 18, 2016 study he administered "was conducted with [Claimant's] cooperation and was valid." Director's Exhibit 19. The administrative law judge credited Dr. Rosenberg's opinion based on Dr. Rosenberg's greater experience in pulmonary function testing, and Employer has not challenged that credibility determination. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis." Decision and Order at 20, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

We likewise reject Employer's contention that the administrative law judge erred in crediting the January 21, 2016, and May 18, 2016, qualifying pulmonary function studies over the August 2, 2013, non-qualifying study. Employer's Brief at 21-22. Contrary to Employer's argument, the administrative law judge explained his reasoning, indicating he gave greater weight to the more recent studies "in recognition of the progressive nature of pneumoconiosis." Decision and Order at 20; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). Because it is supported by substantial evidence, we affirm the administrative law judge's findings that the pulmonary function studies are valid and establish total disability at 20 C.F.R §718.204(b)(2)(i). *See Keathley*, 773 F.3d at 737-40; *Napier*, 301 F.3d at 713-14; *Clark*, 12 BLR at 1-155; Decision and Order at 20.

Medical Opinions

The administrative law judge considered the opinions of Drs. Forehand, Rosenberg and Vuskovich. Decision and Order at 21-23. Dr. Forehand opined that Claimant has a totally disabling respiratory or pulmonary impairment, whereas Drs. Rosenberg and Vuskovich opined he does not. *Id.*; Director's Exhibits 10, 19; Claimant's Exhibits 3, 5; Employer's Exhibits 2, 7. Giving diminished weight to the opinions of Drs. Rosenberg and Vuskovich, the administrative law judge found Dr. Forehand's opinion established that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22-23.

Employer contends the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Vuskovich. Employer's Brief at 23-26. We disagree. Contrary to Employer's contention, the administrative law judge permissibly gave reduced weight to the opinions of Drs. Rosenberg and Vuskovich because they based their opinions in part on their erroneous belief that the post-bronchodilator results from the May 18, 2016 pulmonary function study were non-qualifying. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002); Decision and Order at 23. He further noted their preference for post-bronchodilator results is contrary to the preamble's recognition that "pre-bronchodilator results on a pulmonary function test are the better indicator of a miner's disability," and that, while both physicians diagnosed Claimant with a respiratory impairment, neither explained "how Claimant could meet the physical demands of his last coal mine job notwithstanding the impairment."[15] *See Cornett v. Benham Coal, Inc.*,

[15] Because the administrative law judge gave valid reasons for discrediting Dr. Rosenberg's and Dr. Vuskovich's disability opinions, we need not address Employer's

227 F.3d 569, 577 (6th Cir. 2000); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 23.

Employer argues that the administrative law judge erred in crediting Dr. Forehand's opinion because he did not evidence an understanding of the exertional requirements of Claimant's last coal mine employment. Employer's Brief at 25. Dr. Forehand opined Claimant is unable to perform any work, Director's Exhibit 10 at 5, which necessarily excludes performing his last coal mine employment. Any error in crediting Dr. Forehand's opinion in this regard, therefore, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Weighing the Disability Evidence as a Whole

The administrative law judge found disability established by the qualifying pulmonary function testing and permissibly found that testing was not contradicted by the normal arterial blood gas test results or other credible evidence. Employer has not pointed to any evidence the administrative law judge found credible which is to the contrary. Therefore, we affirm the administrative law judge's determination that Claimant is totally disabled and invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[16] or "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); *Minich v. Keystone Coal Mining*

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remaining contentions of error regarding his weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[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). "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).

Corp., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found Employer failed to establish rebuttal by either method.[17]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). The United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of 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).

Dr. Rosenberg diagnosed Claimant with a mild-to-moderate restrictive impairment unrelated to coal mine dust exposure and instead caused by an elevated right hemi-diaphragm, pain medication and obesity. Decision and Order at 24-25; Director's Exhibit 19; Employer's Exhibit 2. Dr. Vuskovich opined that Claimant has a mild ventilatory impairment caused by beta-blocker medication, the bronchial effect of gastroesophageal reflux disease, and obesity and prior surgery unrelated to coal mine dust exposure. Decision and Order at 24-25; Employer's Exhibit 7. The administrative law judge found that although both doctors identified factors unrelated to coal mine employment that could be responsible for Claimant's restrictive impairment, neither explained how he eliminated Claimant's seventeen years of coal mine dust exposure as a factor contributing to Claimant's impairment. Decision and Order at 26-27. He further found that neither doctor adequately addressed whether Claimant's years of coal mine dust exposure contributed to his obstructive impairment. *Id*.

We reject Employer's argument the administrative law judge applied an incorrect legal standard when weighing the opinions of Drs. Rosenberg and Vuskovich on legal pneumoconiosis. Employer's Brief at 28-29. Contrary to Employer's contention, the administrative law judge permissibly found the physicians did not adequately explain why Claimant's past occupational exposure to coal mine dust did not contribute, in part, to his chronic restrictive or obstructive pulmonary disease. *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir.

[17] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 23-25.

2007); Decision and Order at 26-27. Thus we affirm the administrative law judge's determination that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether Employer established that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27. The administrative law judge rationally discounted the disability causation opinions of Drs. Rosenberg and Vuskovich because neither physician diagnosed Claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that Employer failed to disprove the existence of the disease.[18] *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 27. We therefore affirm the administrative law judge's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[18] Neither physician offered an explanation for why pneumoconiosis played no part in Claimant's disability other than its non-existence.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and his Order Modifying Award of Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge