**U.S. Department of Labor**

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

BRB No. 20-0575 BLA

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| CARLOS E. CASTLE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| PRICE COAL COMPANY, INCORPORATED | ) | |
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| and | ) | |
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| AMERICAN BUSINESS & MERCANTILE INSURANCE | ) | DATE ISSUED: 3/15/2022 |
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| Employer/Carrier-Petitioners | ) | |
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| 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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (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, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2015-BLA-05343) 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 subsequent claim filed on March 19, 2014.[1]

The ALJ credited Claimant with fourteen years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, he found Claimant established a change in an applicable condition of entitlement by establishing a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 725.309. He further found Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). Thus he awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[3] It also argues the removal provisions applicable to

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[1] Claimant filed three previous claims. Director's Exhibit 1. He filed his last claim on January 19, 2006, which Administrative Law Judge (ALJ) Larry S. Merck denied because he failed to establish pneumoconiosis. 20 C.F.R. §718.202(a); Director's Exhibit 1. Judge Merck did not address total disability in his decision, and Claimant took no further action until filing his current claim. Director's Exhibit 3.

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

ALJs rendered his appointment unconstitutional. In addition, it contends the ALJ deprived it of due process by refusing to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case.

With respect to the merits of entitlement, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis, disability causation, and a change in an applicable condition of entitlement.[4] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and its argument that the ALJ erred in denying its request for discovery. In a reply brief, Employer reiterates 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 and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

**Appointments Clause Challenge**

After Claimant filed his current claim on March 19, 2014, ALJ Alice M. Craft held a hearing, adjudicated the claim, and awarded benefits in a Decision and Order dated May 4, 2017. Employer timely appealed to the Board, challenging *inter alia* ALJ Craft's authority to render a decision. While the appeal was before the Board, the United States Supreme Court decided *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] In light of

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> 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.

[4] We affirm, as unchallenged, the ALJ's findings that Claimant established fourteen years of coal mine employment and total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 6-11.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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

that decision, the Board issued an order remanding the case to be assigned to a new ALJ for a prompt disposition. *Castle v. Price Coal Co., Inc.*, BRB 17-0449 BLA (May 7, 2018) (unpub. Order). On remand, the case was assigned to ALJ John P. Sellers, III. However, Employer filed a motion requesting the case be held in abeyance, arguing the Secretary of Labor's (the Secretary's) ratification of ALJ Sellers's prior appointment was invalid under *Lucia*. ALJ Sellers denied Employer's motion and ordered a new hearing and further proceedings. Subsequently, the case was reassigned to ALJ Bell. He held a new hearing on December 3, 2019, and rendered the Decision and Order that is the subject of this appeal.

Employer challenges ALJ Bell's authority to adjudicate this case, urging the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia*.[7] Employer acknowledges the Secretary ratified the prior appointment of all sitting DOL ALJs on December 21, 2017,[8] and the case was assigned to ALJ Bell after that, but it maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 8-12; Employer's Reply Brief at 1-4. The Director responds that ALJ Bell had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 2-4. We agree with the Director's position.

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

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Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[7] At the hearing before ALJ Bell, Employer objected to any DOL ALJ adjudicating the claim, asserting they are not properly appointed pursuant to *Lucia*. Hearing Transcript at 32-33.

[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 Bell. The ALJ took no significant actions prior to December 21, 2017, as this case was not assigned to him until June 24, 2019.

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 regularity," courts presume 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 ALJs 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 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.

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 Bell and gave "due consideration" to his appointment.[9] Secretary's December 21, 2017 Letter to ALJ Bell. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Bell "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified ALJ Bell's appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification 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 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

[9] While Employer notes correctly that the Secretary's ratification letter was signed with an autopen, 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"); Employer Brief at 11-12.

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).

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 civil service. Employer's Brief at 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 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 Bell's appointment, which we have held constituted a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

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

**Removal Provisions**

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. 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*. It also relies on the 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's holding 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 13-16; Employer's Reply Brief at 1-4.

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

Moreover, 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 who serve as administrative law judges" who, "unlike members of the

[PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[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 APJs 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 [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. 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 attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

**Employer's Request for Discovery**

While the case was before the ALJ, Employer sought discovery from the DOL related to the agency's deliberative process underlying the preamble to the 2001 revised regulations. In response, the Director filed a Motion for a Protective Order seeking to bar

[10] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

the requested discovery. Employer responded, urging the ALJ to deny the Director's motion. The ALJ granted the Director's motion, finding "Employer has not established how the requested discovery concerning the preamble and revised regulations is relevant to Claimant's claim for benefits."[11] Decision and Order at 4 n.15; *see* Hearing Transcript at 9.

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians as contrary to the scientific evidence cited in the preamble. Employer's Brief at 26-29. We disagree.

Due process requires Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer had the opportunity to submit evidence challenging the science that the DOL relied on in the preamble when promulgating its regulations. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 490-91 (4th Cir. 1997); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). Employer did not submit such evidence. Because Employer was afforded the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

**Entitlement to Benefits**

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis arose out of coal mine

[11] Citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), Employer argues the ALJ erred by failing to resolve this discovery issue before issuing his Decision and Order. Employer's Brief at 26. In *Preston*, the Board recognized that consistent with the principles of fairness and administrative efficiency, an ALJ "should" make his or her evidentiary rulings before issuing the decision and order so the parties have the opportunity to respond to evidence admitted into the record. Contrary to Employer's argument, the ALJ indicated at the hearing that he was going to grant the Director's motion for a protective order. Hearing Transcript at 9.

employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits.[12] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

**Legal Pneumoconiosis**

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[13] To establish the disease, Claimant must demonstrate he has 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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a claimant satisfies this standard by establishing his lung disease or impairment was caused "in part" by coal mine employment. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014).

The ALJ considered the medical opinions of Drs. Mettu, Tuteur, and Rosenberg.[14] Dr. Mettu diagnosed legal pneumoconiosis in the form of chronic bronchitis and a disabling pulmonary impairment caused by both coal mine dust exposure and cigarette smoking. Director's Exhibit 9. Dr. Tuteur diagnosed disabling chronic obstructive pulmonary

[12] Where 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 he finds that "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); *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)(3).

[13] "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).

[14] Contrary to employer's contention, the ALJ permissibly gave little weight to Claimant's treatment records because they are silent regarding the presence or absence of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 10; Employer's Brief at 21.

disease (COPD) attributable to cigarette smoking, fossil fuel combustion fume exposure, and gastroesophageal reflux disease, and unrelated to coal mine dust exposure. Employer's Exhibits 3, 5. Finally, Dr. Rosenberg opined Claimant has emphysema attributable to cigarette smoking and asthma, and unrelated to coal mine dust exposure. Employer's Exhibit 7.

The ALJ found Dr. Mettu's opinion well-reasoned, documented, and entitled to significant weight. Decision and Order at 16, 21. Conversely, he found the opinions of Drs. Tuteur and Rosenberg inadequately explained and inconsistent with the medical science set forth in the preamble to the 2001 revised regulations. *Id.* at 16-21. Thus he determined the medical opinion evidence establishes legal pneumoconiosis.[15] *Id*. at 21.

Employer contends the ALJ erred in relying on the preamble when weighing the medical opinions. Employer's Brief at 21-26. We disagree.

As part of the deliberative process, an ALJ may permissibly evaluate expert opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 483; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Contrary to Employer's contention, the preamble does not constitute evidence outside the record requiring the ALJ to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802.

[15] Employer argues the ALJ shifted the burden of proof to it to disprove legal pneumoconiosis. Employer's Brief at 17, *citing* Decision and Order at 15. Employer's argument is unavailing. The ALJ recognized that "[i]n the Sixth Circuit, *Claimant can satisfy his burden to prove* that his impairment is 'significantly related to, or aggravated by, exposure to coal dust' by showing that his disease is caused 'in part' by coal mine employment." Decision and Order at 15 (emphasis added), *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014). Although in a separate portion of his decision the ALJ set forth the Section 411(c)(4) rebuttal standard, the ALJ ultimately applied the proper standard when he assessed the evidence of record, with the burden on Claimant to affirmatively establish pneumoconiosis as well as the other elements of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc); Decision and Order at 6-23.

We next reject Employer's argument that the ALJ erred in weighing Dr. Tuteur's opinion. Employer's Brief at 20-21, 25. In assessing the etiology of Claimant's disabling COPD, Dr. Tuteur stated he used "statistically based studies for important clinical decision making." Employer's Exhibit 3 at 4. He explained "cigarette smokers who have never mined develop the COPD phenotype about [twenty percent] of the time," while "[n]ever smoking coal miners develop the COPD phenotype about [one percent] of the time or less." *Id*. at 4. Dr. Tuteur compared the relative risk of COPD among smokers who never mined to the risk for non-smoking miners and, applying this statistical data to Claimant, concluded Claimant's COPD "is uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." *Id*. at 5. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied heavily on general statistics, not Claimant's specific case. *See Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000) (statistical averaging can hide the effect of coal mine dust exposure in individual miners); Decision and Order at 17.

Further, the ALJ noted Dr. Tuteur excluded legal pneumoconiosis because "cigarette smoke causes COPD more frequently than coal mine dust." Decision and Order at 17-18, *citing* Employer's Exhibit 3. The ALJ recognized, however, that the preamble states "coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking." *Id*. at 17-18, *quoting* 65 Fed. Reg. at 79,940. Thus, the ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he failed "to consider or appreciate the additive effect that coal dust exposure may have had" on Claimant's COPD. *Id*.; *see Adams*, 694 F.3d at 801-02; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 65 Fed. Reg. at 79,940-43.

We also reject Employer's contention that the ALJ erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 21, 25-26. Dr. Rosenberg explained he eliminated coal mine dust exposure as a source of Claimant's lung disease, in part, because he found the reduction in Claimant's FEV1/FVC ratio on pulmonary function testing to be incompatible with obstruction due to coal mine dust exposure. Employer's Exhibit 7 at 11-13. The ALJ permissibly discredited his opinion as conflicting with the DOL's recognition as set forth in the preamble that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio. *See Sterling*, 762 F.3d at 491; 65 Fed. Reg. at 79,943; Decision and Order at 18-19.

Dr. Rosenberg also excluded legal pneumoconiosis based, in part, on the partial reversibility of Claimant's obstructive impairment in response to bronchodilators on

pulmonary function testing. Employer's Exhibit 7 at 15. The ALJ noted, however, that "every post-bronchodilator [pulmonary function study] submitted in this subsequent claim is qualifying" for total disability.[16] Decision and Order at 21-22. The ALJ permissibly found Dr. Rosenberg's reasoning unpersuasive because he failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Barrett*, 478 F.3d at 356; *Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 20-21.

Finally, Dr. Rosenberg opined Claimant's chronic bronchitis is not due to his "remote coal dust exposure," which "ended in 1984," as compared to his continued cigarette smoking because "chronic bronchitis dissipates within months after [coal mine dust] exposure ceases." Employer's Exhibit 7 at 14-15. The ALJ also permissibly discredited Dr. Rosenberg's reasoning as contrary to the regulations recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); Decision and Order at 20.[17]

Nor is there merit to Employer's assertion that the ALJ erred in finding Dr. Mettu's opinion sufficient to establish the existence of legal pneumoconiosis. Employer's Brief at 17-19. Dr. Mettu diagnosed Claimant with chronic bronchitis based on symptoms of cough, sputum production, and an abnormal pulmonary function study. Director's Exhibit 9. When asked to list the cause or causes of the chronic bronchitis, he listed both cigarette smoking and coal mine dust exposure. *Id*. He also diagnosed a severe disabling pulmonary impairment based on reduced FEV1 and FVC values on pulmonary function testing. *Id*. He concluded coal mine dust exposure "substantially aggravated" the pulmonary impairment, thus constituting a diagnosis of legal pneumoconiosis. *Id*. Contrary to Employer's argument, Dr. Mettu's opinion meets the regulatory definition of legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407 ("[I]n [*Groves*]

[16] 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).

[17] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Tuteur and Rosenberg, we need not address Employer's other arguments pertaining to the weight he accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'"); 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 16.

In weighing Dr. Mettu's opinion, the ALJ summarized the objective testing the doctor relied on to diagnose legal pneumoconiosis. Decision and Order at 8, 16. He found Dr. Mettu's opinion consistent with the DOL's recognition that the effects of smoking and coal dust exposure can be additive. 65 Fed. Reg. at 79,940; Decision and Order at 16. In addition, he found "Dr. Mettu considered accurate smoking and coal dust exposure histories." Decision and Order at 16. The ALJ thus permissibly found Dr. Mettu's opinion reasoned and documented. *See Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407; *see also Tennessee 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); Decision and Order at 16, 21.

Employer's additional argument, that Dr. Mettu did not adequately explain his opinion or set forth how his findings and the objective testing demonstrate a respiratory impairment consistent with legal pneumoconiosis, amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because the ALJ acted within his discretion in crediting Dr. Mettu's opinion and rejecting the opinions of Drs. Tuteur and Rosenberg, we affirm his finding that Claimant established the existence of legal pneumoconiosis.[18] 20 C.F.R. §718.202(a)(4); Decision and Order at 21.

[18] Employer states the ALJ misidentified total disability as an element of entitlement previously adjudicated against Claimant because the denial of his prior claim was based on Claimant's failure to establish pneumoconiosis, not total disability. Employer's Brief at 16-17. The ALJ determined ALJ Merck denied Claimant's prior claim because Claimant failed to establish pneumoconiosis. Decision and Order at 2. He also found that, because ALJ Merck did not address whether Claimant was totally disabled, Claimant failed to establish "any element of entitlement in this prior claim." *Id*. at 2 n.6. The ALJ found the new evidence establishes total disability, and Claimant thus established a change in an applicable condition of entitlement. *Id*. at 11. As discussed above, however, the ALJ fully addressed the new evidence of record to determine Claimant established legal pneumoconiosis, and we have affirmed that finding. Decision and Order at 11-21. Thus Claimant has established a change in an applicable condition of entitlement and any error by the ALJ in misstating the applicable conditions of entitlement is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); 20 C.F.R. §725.309(c).

**Disability Causation**

To prove he is totally disabled due to pneumoconiosis, Claimant must establish pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Robinson v. Pickands Mather & Co*., 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Employer does not challenge the ALJ's finding the opinions of Drs. Tuteur and Rosenberg not credible on disability causation because they failed to diagnose legal pneumoconiosis. Decision and Order at 22-23. Thus we affirm this finding. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Skrack* 6 BLR at 1-711.

We also reject Employer's argument that Dr. Mettu's opinion cannot establish disability causation. Employer's Brief at 19-20. Dr. Mettu opined Claimant is totally disabled by a severe pulmonary impairment, and "coal dust exposure substantially [aggravated] his pulmonary impairment." Director's Exhibit 9. As discussed above, the ALJ permissibly relied on Dr. Mettu's opinion to conclude Claimant's totally disabling pulmonary impairment constitutes legal pneumoconiosis. Thus Dr. Mettu's opinion supports a finding that legal pneumoconiosis is a substantially contributing cause of Claimant's disability. *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's opinion that a miner has a totally disabling pulmonary impairment supports disability causation if that impairment is found to be legal pneumoconiosis); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (legal pneumoconiosis inquiry "completed the causation chain from coal mine employment

to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 256 (2019).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to pneumoconiosis through Dr. Mettu's opinion. 20 C.F.R. §718.204(c). We therefore affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge