U.S. Department of Labor

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

BRB Nos. 20-0562 BLA
and 21-0149 BLA

OLIS W. McNARY	)	
Claimant-Respondent	)	
v.	)	
BLACK BEAUTY COAL COMPANY	)	DATE ISSUED: 3/30/2022
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 Supplemental Decision and Order Awarding Attorney Fees of Timothy J. McGrath, Administrative Law Judge, United states Department of Labor.

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for Claimant.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer.

Steven Winkelman (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (2014-BLA-05373) rendered on a subsequent miner's claim filed on March 25, 2013,

pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited Claimant with eighteen years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant established a change in an applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] He further found Employer failed to rebut the presumption and awarded benefits. In a supplemental decision, the ALJ awarded attorney fees to Claimant's attorney in the amount of $16,038.75, to be enforceable and payable if and when the decision awarding benefits becomes final.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[4] It also argues the removal provisions applicable to Department

[1] This is Claimant's third claim. It was previously assigned to ALJ Jonathan Calianos, who conducted a hearing but did not issue a decision. Employer challenged his authority to decide the case pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), and the case was reassigned on October 31, 2018, to ALJ McGrath, who conducted a new hearing on January 15, 2019. Decision and Order at 2.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, 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). Claimant's most recent prior claim was denied on June 13, 2011, for failure to establish any element of entitlement, and Claimant took no further action on that claim. Decision and Order at 2, 23; Director's Exhibit 2. Consequently, Claimant had to establish at least one element of entitlement to obtain review of the merits of his current claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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

of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. As to the merits, Employer argues the ALJ applied an incorrect standard in finding Claimant established a change in applicable condition of entitlement at 20 C.F.R. §725.309. Employer additionally contends the ALJ improperly relied on the preamble to the 2001 revised regulations in weighing the medical opinion evidence on rebuttal. Finally, Employer asserts various errors to the ALJ's award of attorney fees.

The Director, Office of Workers' Compensation Programs (the Director), filed a response urging rejection of Employer's challenges to the ALJ's appointment and removal protections, reliance on the preamble, and assertion of legal error at 20 C.F.R. §725.309. Claimant filed a response, urging affirmance of the award of benefits and his attorney's fee. Employer filed a consolidated reply brief reiterating its arguments on the issues that the Director and Claimant addressed.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees 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

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

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant has eighteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3 n.1, 24 n.24.

[6] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Indiana. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 26.

(2018)."[7] Employer's Brief at 11, 24; Employer's Reply Brief at 3, 12. Although it acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[8] and concedes "the matter was heard following the [ALJ's] ratification," it maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 10, 12; Employer's Reply Brief at 2, 3, 12.

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 Response at 2-9. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 8 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819

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

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

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ McGrath.

F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. 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, 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 ALJs in a single letter. Rather, he specifically identified ALJ McGrath and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ McGrath. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ McGrath "as an Administrative Law Judge." *Id.* Having put forth no contrary evidence, Employer has not overcome the presumption of regularity.[9] *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 ALJ. *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).

Removal Provisions

Employer 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

[9] While Employer avers the Secretary's ratification letter was a "form letter" signed "with a robopen" and unaccompanied by any ceremony, Employer's Brief at 12, 17; Employer's Reply Brief at 2, 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").

and the Solicitor General's argument in *Lucia*. Employer's Brief at 11-13; Employer's Reply Brief at 3-5. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). Employer's Brief at 11, 14; Employer's Reply Brief at 2-5.

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, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is 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 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, Inc. v. Smith & Nephew, Inc.*, 594 U.S. , 141 S. Ct. 1970, 1988 (2021), the Supreme 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*." 141 S. Ct. 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*

[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).

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. 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 that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-1138.

20 C.F.R. 725.309 & Invocation of the Section 411(c)(4) Presumption

Employer contends the ALJ failed to properly apply the requirements of 20 C.F.R. §725.309 for establishing a change in an applicable condition of entitlement. It argues the ALJ erred in not comparing the evidence in Claimant's prior claims with the new evidence in his current claim to determine "if there had, in fact, been a change in [an] element of entitlement." Employer's Brief at 27. Employer contends Claimant "must prove – for each element of entitlement adversely decided against him in the prior denial – that there had been a change in condition since that prior denial;" therefore, Claimant "must show evidence of a medical or a legal pneumoconiosis" and "must demonstrate that he is totally disabled due to pneumoconiosis." *Id*. Further, alleging the opinions of Drs. Tuteur and Rosenberg establish Claimant is not totally disabled due to pneumoconiosis, Employer contends the ALJ's failure to compare the old and new evidence under Section 725.309 requires remand. *Id.* at 27-28; Employer's Reply Brief at 12. We disagree.

When a miner files a claim for benefits more than one year after the final denial of a previous claim, 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). Claimant's most recent prior claim was denied on June 13, 2011, for failure to establish disease, total disability, and disability causation. Decision and Order at 2, 23; Director's Exhibit 2. Consequently, Claimant had to submit new evidence establishing *one* of these elements to establish a change in an applicable condition of entitlement; he did not have to establish all of them to obtain a review of the merits of his subsequent claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

Further, we reject Employer's assertion that the ALJ was required to compare the prior evidence with the new evidence under 20 C.F.R. §725.309, as the Seventh Circuit has rejected this contention. *See Consolidation Coal Co. v. Dir., OWCP* [*Burris*], 732 F.3d 723, 731 (7th Cir. 2013) ("[T]he ALJ need not compare the old and new evidence to determine a change in condition . . . .") (quoting *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012)).

As Employer raises no further challenge to the ALJ's determinations that Claimant established total respiratory disability at 20 C.F.R. §718.204(b) and therefore a change in applicable condition of entitlement at 20 C.F. R. §725.309, we affirm them.[11] Further, since Employer does not challenge Claimant's establishment of the other requirements for invocation of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis, we also affirm the ALJ's determination that Claimant invoked the presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R.

[11] While Employer's brief suggests the ALJ improperly found Claimant to be totally disabled, Employer does not clearly articulate any error in this regard. It was the opinion of all of the medical experts in this case that Claimant suffers from a totally disabling respiratory or pulmonary impairment and Employer does not dispute the ALJ's finding that all the pulmonary function studies were at levels qualifying for total disability. *See Skrack*, 6 BLR at 1-711.

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

§718.305(d)(1)(i), (ii). The ALJ found Employer did not rebut the presumption under either method.[13]

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."[14] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015).

Employer relies on the opinions of Drs. Tuteur and Rosenberg that Claimant's chronic obstructive pulmonary disease (COPD) is due solely to smoking.[15] Decision and Order at 25; Employer's Exhibits 1, 3-6. The ALJ found their opinions not well-reasoned and inconsistent with the preamble to the revised 2001 regulations. Thus, he concluded Employer did not satisfy its burden of proof. Employer generally asserts the ALJ improperly relied on the preamble to assess the credibility of its physicians' opinions. We disagree.

The preamble sets forth the DOL's review of the scientific literature concerning certain matters related to the elements of entitlement. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000). The ALJ therefore permissibly considered the medical opinions in conjunction with the scientific evidence that the DOL found credible and discussed in the preamble. *See Beeler*, 521 F.3d at 726; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486,

[13] Although the ALJ did not address whether Employer disproved the existence of clinical pneumoconiosis, its failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Decision and Order at 29 & n.31.

[14] Because Employer has the burden of proof, we reject its general contention that the ALJ failed to adequately address whether the medical opinion evidence is sufficient to "establish legal pneumoconiosis." Employer's Brief at 20; *see* Decision and Order at 25 & n.26.

[15] Dr. Rosenberg reviewed Claimant's medical records and diagnosed disabling COPD in the form of emphysema and bronchitis, and opined that coal mine dust exposure played no role in these conditions. Employer's Exhibits 3 at 6, 8-11; 4 at 2; 6 at 29, 39. Dr. Tuteur examined Claimant on November 29, 2018, and reviewed Claimant's medical records. Employer's Exhibit 1. He diagnosed disabling COPD with symptoms of chronic bronchitis due to smoking, not coal dust exposure. Employer's Exhibits 1 at 4-6; 5 at 20.

490 (7th Cir. 2004). Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990), and does not constitute evidence outside the record requiring the ALJ to give notice and an opportunity to respond.[16] Employer's Brief at 20; Employer's Reply Brief at 6; *see generally A & E Coal Co., v. Adams*, 694 F.3d 798, 801-03 (6th Cir. 2012).

Regarding the ALJ's specific credibility determinations, we reject Employer's contention that the ALJ erred in discounting Drs. Tuteur's and Rosenberg's opinions that Claimant's COPD is due entirely to smoking. The ALJ observed correctly that both physicians eliminated coal mine dust exposure as a cause of Claimant's obstruction, in part, because they believed smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 27-28; Employer's Exhibits 1 at 4-5, 3 at 6-8. He permissibly found their opinions were based on generalities drawn from medical literature and not persuasive. *Beeler*, 521 F.3d at 726 (ALJ "sensibl[y]" discounted physician's opinion attributing the miner's COPD to only smoking because physician "did not rely on information particular to [the miner]"); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The ALJ also correctly noted Dr. Rosenberg based his opinion on his view that coal dust exposure does not result in a reduced FEV1/FVC ratio on pulmonary function testing, which is inconsistent with the DOL's recognition of credible scientific studies that coal dust exposure may cause COPD with associated decrements in FEV1 and FEV1/FVC ratio. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 26 (citing 65 Fed Reg. at 79,943); Employer's Exhibit 3 at 4-6. Similarly, the ALJ permissibly rejected both physicians' explanations that coal dust exposure rarely results in clinically significant obstructive impairments, as scientific studies that the DOL found credible show that coal dust-induced obstructive impairments can be clinically significant. Decision and Order at 29 (citing 65 Fed. Reg. at 79,938-940, 70,943); Employer's Exhibits 1 at 4-5, 3 at 8; *see Beeler*, 521 F.3d at 726. Further, we see no error in the ALJ's overall finding that Drs. Tuteur and Rosenberg failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating Claimant's COPD. *See* 20 C.F.R. §718.201(a)(2), (b); *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 27-29.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because the ALJ permissibly

[16] The ALJ noted Employer's experts cited post-preamble medical studies to support their opinions, but he found those studies had "little probative value" because they "do not appear to address black lung disease." Decision and Order at 26. We affirm the ALJ's finding as Employer does not challenge it. *See Skrack*, 6 BLR at 1-711.

discredited Drs. Tuteur's and Rosenberg's opinions, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis,[17] we affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 29.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ permissibly discredited the opinions of Drs. Tuteur and Rosenberg on the cause of Claimant's respiratory disability because their conclusions were tied to their erroneous beliefs that Claimant does not have legal pneumoconiosis, contrary to the ALJ's findings. *See Burris*, 732 F.3d at 735; Decision and Order at 30; Employer's Brief at 24. Thus, we affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis at 20 C.F.R. § 718.305(d)(1)(ii).

Consequently, we affirm the award of benefits.

Attorney's Fees

Claimant's counsel requested a fee of $18,025.00, representing 103 hours of legal services he performed before the ALJ at an hourly rate of $175.00. In considering Employer's objections, the ALJ approved the requested hourly rate but disallowed 11.35 hours of services. He therefore awarded Claimant's counsel a fee of $16,038.00 for 91.65 hours of legal services.

The amount of an attorney fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

[17] Because we affirm the ALJ's rejection of Employer's experts, we need not address Employer's arguments concerning the ALJ's weighing of Dr. Chavda's opinion that Claimant has legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 25 n.26; Employer's Brief at 21-22, 27-28; Employer's Reply Brief at 8-11.

Employer challenges eighteen "block billed" entries[18] that total fifteen hours of legal services. Employer alleges some of the entries were clerical, unnecessary, or excessive.[19] Employer's Brief at 30; Employer's Reply Brief at 12. Employer's contention lacks merit.

Services that counsel billed are compensable if the amount of time is not excessive and, at the time he performed the work in question, counsel could reasonably regard it as necessary to establish Claimant's entitlement. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 316 (1984).

In addressing the eighteen entries Employer challenged as "block billed," the ALJ reduced seven entries by half[20] and reduced another two entries by eighty percent.[21] Supplemental Decision and Order at 2-4. He thus reduced counsel's requested time for these services by 7.6 hours and awarded the remaining 7.4 hours. In so doing, the ALJ stated, "I reviewed each entry individually, in keeping with the requirement that a request for attorney's fees must be 'reasonably commensurate with the necessary work done.'" *Id.* at 4. Finding "that the work performed is legal in nature, and is necessary and appropriate for the successful prosecution of this matter," the ALJ awarded the requested services at the reduced time. *Id.* at 4-5. Although Employer generally challenges the ALJ's

[18] Block billing is the practice of assigning a single time charge for multiple tasks. The ALJ stated block billing can make it more difficult for an adjudicator to assess the reasonableness of the time spent on specific tasks.

[19] Employer initially appealed the ALJ's hourly rate award of $175.00; however, Employer withdrew its objection in its reply brief. Employer's Brief at 28-29, 32; Employer's Reply Brief at 12. We therefore affirm, as unchallenged, the ALJ's hourly rate award of $175.00. *See Skrack*, 6 BLR at 1-711.

[20] The ALJ reduced the time requested on the following dates of services by half because it was "block billed" and "renders the determination of reasonableness nearly impossible:" February 24, 2016, 1.5 hours; April 1, 2016, 1 hour; April 11, 2016, 3.5 hours; August 1, 2016, 1.5 hours; August 15, 2016, 4 hours; December 17, 2018 1 hour; and February 6, 2019, 2.5 hours. Supplemental Decision and Order at 2-3.

[21] The ALJ reduced the requested 0.5 hour of time to 0.1 hour of time for services rendered on March 14, 2019, because he found the request excessive for the services provided. Supplemental Decision and Order at 3. He also reduced the requested 0.5 hour of time to 0.1 hour of time for services rendered on January 11, 2019, because he found a portion of the time was "not within the scope of tasks performed by an attorney." *Id.* at 4.

determination, it does not identify any specific error by the ALJ.[22] Because Employer has not demonstrated the ALJ abused his discretion, we affirm the ALJ's finding that 7.4 of the 15 hours that Employer challenged are compensable. 20 C.F.R. §725.366; *see Hawker*, 326 F.3d at 902; *Lanning*, 7 BLR at 1-317. As Employer raises no further challenges to the ALJ's attorney fee award, we affirm his finding that Claimant's counsel is entitled to fees in the amount of $16,038.00, payable by Employer, representing 91.65 hours of legal services at an hourly rate of $175.00.

Accordingly, the ALJ's Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[22] With the exception of a single notation in its appellate brief that "[t]he ALJ agreed" counsel's fee petition "contains block billed entries," Employer's arguments on this issue are identical to those it raised to the ALJ. That brief similarly did not identify any specific "block billed" time entry as excessive in light of the fee petition's corresponding list of itemized services. Employer's Objection to Fee Petition at 4-5; *c.f.*, Employer's Brief at 30-32. Employer's reply merely reiterates a single sentence contained in its initial appellate brief and objections to the fee petition. Employer's Reply Brief at 12; *c.f.*, Employer's Brief at 31; Employer's Objections to Fee Petition at 4-5.