U.S. Department of Labor

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

BRB Nos. 21-0202 BLA
and 21-0203 BLA

THELMA STILTNER (o/b/o and Widow of THOMAS D. STILTNER)	)	
Claimant-Respondent	)	
v.	)	
HARMAN MINING CORPORATION	)	DATE ISSUED: 5/16/2022
And	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2015-BLA-05771, 2017-BLA-06235) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a Miner's subsequent claim filed on March 24, 2014, and a survivor's claim filed on June 9, 2017.[1]

The ALJ found Claimant established 16.73 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment.[2] 20 C.F.R. §718.204(b)(2). He therefore found Claimant 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] and established a change in an applicable condition of entitlement.[4] 20 C.F.R.

[1] The Miner filed a prior claim for benefits on August 2, 1984, which the district director denied on July 10, 1985, for failure to establish pneumoconiosis or that his disease was caused by coal dust exposure. Decision and Order at 2; Miner's Claimant (MC) Director's Exhibit 1. Claimant is the widow of the Miner, who died on May 22, 2017, and is pursuing the miner's claim on his behalf, along with her own survivor's claim. Survivor's Claim Director's Exhibits 4, 7.

[2] We affirm, as unchallenged, the ALJ's finding that Claimant established 16.73 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, an 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

§§718.305, 725.309. The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding the Miner was totally disabled, that Claimant thereby invoked the Section 411(c)(4) presumption, and Employer failed to rebut it. The Director, Office of Workers' Compensation (Director), has filed a response, urging rejection of Employer's constitutional challenge and arguments against the establishment of total disability. Employer filed a reply reiterating some of its arguments.

The Benefits Review 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).

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conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner failed to establish pneumoconiosis or that his disease was caused by coal dust exposure in his prior claim, Claimant had to submit new evidence establishing at least one of these elements to obtain a review of the Miner's subsequent claim on the merits. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

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

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

U.S. Const. art. II, § 2, cl. 2.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the Miner performed his most recent coal mine employment in Virginia. *See*

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 13-16; Employer's Reply Brief at 1-5. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 13-16; Employer's Reply Brief at 1-5.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 3-7. 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 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*

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; MC Director's Exhibit 2.

[7] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)). The Department of Labor (DOL) 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 issued a letter to the ALJ on December 21, 2017, stating:

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

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

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

Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 13-16; Employer's Reply Brief at 1-5. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020) and the United States Court of Appeals for the Federal Circuit'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). *Id.*

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).

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 [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. U.S. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single

Director and vested with significant executive power."[9] 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 "'[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) (a 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.

Miner's Claim

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231,

[9] 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).

1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the arterial blood gas studies and medical opinions, and in consideration of the evidence as a whole.[10] Decision and Order at 24.

Employer does not challenge the ALJ's findings that a preponderance of the exercise blood gas studies is qualifying.[11] Nor does it allege the ALJ erred in crediting Drs. Ajjarapu's, Fino's and Jarboe's opinions that Claimant has a disabling blood gas impairment with exercise that would preclude the performance of his usual coal mine work. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23-24; MC Director's Exhibits 1, 12, 13; Claimant's Exhibits 5, 6, 7, 10, 14, 15;[12] MC Employer's Exhibits 5, 8, 9, 10, 11, 12. Rather Employer raises two arguments regarding the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption.

Citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), a decision interpreting a prior version of 20 C.F.R. § 718.204 (1999), Employer argues that because the Miner suffered from a disabling back injury that forced him to retire from his usual coal mine employment, he cannot be awarded benefits. Employer's Brief at 17-19. However, DOL explicitly rejected the premise that a non-pulmonary disability precludes entitlement when promulgating the 2001 revised regulations. 20 C.F.R. § 718.204(a) ("any non-pulmonary or non-respiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]"). Moreover, the Board has declined to apply *Vigna* to cases, such as this one, arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The Board has also specifically rejected a similar argument that Employer raises on appeal

[10] The ALJ found Claimant did not establish total disability based on the pulmonary function studies and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii).

[11] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

[12] At the hearing, exhibits Claimant submitted in the miner's and survivor's claims were combined but Claimant's Exhibits 4 and 6 were designated only in the miner's claim and Claimant's Exhibit 17 was designated only in the survivor's claim. Hearing Transcript at 6-7.

that the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) adopted the United States Court of Appeals for the Seventh Circuit's holding in *Vigna*. *See Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255 (2003). Additionally, Employer provides no support for its general assertion that the 2010 reinstatement of the section 411(c)(4) presumption, 30 U.S.C. § 921(c)(4), effectively invalidated the regulation at 20 C.F.R. §718.204.

Employer also contends the ALJ failed to properly consider the opinions of its medical experts that the Miner's qualifying blood gas results were attributable to non-respiratory conditions, prior to finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer's Brief at 19-24. However, Employer conflates the issues of total disability and causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *See Mabe v. Bishop Coal Co*., 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co*., 7 BLR 1-178, 1-181 (1984).

As Employer raises no further arguments, we affirm, as supported by substantial evidence, the ALJ's conclusion that Claimant established the Miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that she therefore 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 the Miner has neither legal nor clinical pneumoconiosis,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone*

[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). "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).

Coal Mining Corp., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal under either method. Employer challenges the ALJ's findings that it did not disprove clinical or legal pneumoconiosis.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish the Miner did not have any of the "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).

The ALJ considered x-rays dated March 5, 1984, and August 22, 1984, from the Miner's prior claim and x-rays dated February 16, 2014, May 21, 2014, October 23, 2014, February 20, 2015, and April 21, 2016, submitted in his current claim.[14] Decision and Order at 26-27; MC Director's Exhibits 1, 12, 14; Claimant's Exhibits 1, 2, 3, 4; MC Employer's Exhibits 1, 2, 3, 4, 7. Giving greatest probative weight to the readings by the physicians who are dually qualified Board-certified radiologists and B readers, the ALJ

[14] The ALJ permissibly determined Dr. Sutherland's sole reading of the March 5, 1984 x-ray was entitled to no weight because his qualifications are not in the record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 26; MC Director's Exhibit 1. All of the remaining interpreting physicians are dually qualified as Board-certified radiologists and B-readers, with the exception of Dr. Gaziano who is a B-reader only. MC Director's Exhibits 1, 12, 14; Claimant's Exhibits 1, 2, 3, 4; MC Employer's Exhibits 1, 2, 3, 4, 7. Dr. Gale interpreted the August 22, 1984 x-ray as positive for pneumoconiosis, while Drs. Gaziano and Sargent interpreted it as negative. MC Director's Exhibit 1. Dr. Miller read the February 16, 2014 x-ray as positive and Dr. Wolfe read it as negative. MC Director's Exhibit 14; MC Employer's Exhibit 3. Drs. DePonte and Miller interpreted the May 21, 2014 x-ray as positive, while Dr. Adcock interpreted it as negative. MC Director's Exhibit 12; Claimant's Exhibit 4; MC Director's Exhibit 7. Dr. Miller read the October 23, 2014 x-ray as positive, while Dr. Adcock read it as negative. Claimant's Exhibit 2; MC Employer's Exhibit 2. Dr. Alexander read the February 20, 2015 x-ray as positive and Dr. Wolfe read it as negative. Claimant's Exhibit 1; MC Employer's Exhibit 1. Dr. DePonte interpreted the April 21, 2016 x-ray as positive and Dr. Kendall interpreted it as negative. Claimant's Exhibit 3; MC Employer's Exhibit 4.

found the interpretations of the individual x-rays in equipoise and that the x-ray evidence as a whole was inconclusive as to the existence of clinical pneumoconiosis.[15] *Id.*

The ALJ also considered the x-ray and CT scan evidence contained within the Miner's treatment records and concluded they also neither support nor refute the existence of clinical pneumoconiosis. Decision and Order at 27; Claimant's Exhibits 10, 14, 15. Further, the ALJ noted that while the treatment records include physicians' diagnoses of coal workers' pneumoconiosis, "most of the diagnoses reference coal workers' pneumoconiosis in connection with a diagnosis of COPD and/or bronchitis." Decision and Order at 27; *see* Claimant's Exhibits 8-12, 14-15. He therefore concluded the treatment records were "silent or at best inconclusive as to the existence of clinical pneumoconiosis." Decision and Order at 27.

Considering the medical opinions, the ALJ found Dr. Ajjarapu diagnosed clinical pneumoconiosis, while Drs. Fino and Jarboe did not. Decision and Order at 27-28; MC Director's Exhibits 12, 13; MC Employer's Exhibits 5, 8, 9, 10, 11, 12. The ALJ gave no weight to any of their opinions because he found them to be based on the x-ray or CT scan readings that he had already determined were inconclusive. Decision and Order at 27-28.

On appeal, Employer alleges the ALJ erred in finding the "silent" evidence as to clinical pneumoconiosis insufficient to establish the absence of the disease. Employer's Brief at 30, *citing Marra v. Consolidation Coal*, 7 BLR 1-216 (1984); *Sacolick v. Rushton Mining Co.*, 6 BLR 1-930 (1984)). We disagree. While an ALJ may conclude that evidence not diagnosing clinical pneumoconiosis is probative of its absence, the ALJ is not required to do so. *See generally Marra*, 7 BLR at 1-218-19. Because the ALJ acted within his discretion, we reject Employer's contention of error and affirm the ALJ's overall conclusion that Employer failed to disprove the Miner had clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(A); Decision and Order at 28.

Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we also address the issue of

[15] The ALJ also permissibly found none of the remaining x-rays are sufficient to satisfy the preponderance of the evidence standard based upon the conflicting interpretations from equally qualified readers. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 26-27. Thus, we reject Employer's general assertion that the ALJ "declar[ed] any film that was read as positive and negative for the disease 'inconclusive.'" Employer's Brief at 30.

legal pneumoconiosis below because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i); *Minich*, 25 BLR at 1-155 n.8.

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); *see Minich*, 25 BLR at 1-155 n.8.

Employer relies on Drs. Fino's and Jarboe's opinions that the Miner did not have legal pneumoconiosis. MC Director's Exhibit 13; MC Employer's Exhibits 5, 8, 9, 10, 11, 12. The ALJ found their opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 28-31. Employer argues the ALJ did not give permissible reasons for discrediting their opinions.[16] We disagree.

Dr. Fino diagnosed the Miner with an oxygen transfer impairment, which he attributed to morbid obesity as opposed to a lung disease. He specifically eliminated coal mine dust exposure as a causative factor for the Miner's disabling blood gas impairment.[17] MC Employer's Exhibits 8, 9, 11. He further noted that while the Miner "never gave a good effort on the lung function studies," there is a reduction in the FVC and FEV1 values, which he attributed to poor effort and "morbid obesity." MC Employer's Exhibit 8. Dr. Fino concluded the Miner did not have chronic obstructive pulmonary disease (COPD) and that coal dust did not contribute to the blood gas or spirometry abnormalities. MC Employer's Exhibits 9 at 17-20, 24-25; 11.

[16] Employer also generally alleges the ALJ "applied the wrong standard as he never considered whether 'the miner's totally disabling respiratory or pulmonary impairment is unrelated to his pneumoconiosis.'" Employer's Brief at 25, *citing* 78 Fed. Reg. 59,102 (Sept. 15, 2013). Although this argument is insufficiently briefed, we see no basis for Employer's challenge as the ALJ specifically considered, as he was required to do, whether Employer disproved that the Miner's disabling respiratory disability was due to either clinical or legal pneumoconiosis under the second rebuttal prong.

[17] Dr. Fino examined the Miner and prepared a report dated November 11, 2014. MC Director's Exhibit 13. He also prepared supplemental reports dated May 24, 2017, and August 30, 2017, and provided testimony at a May 18, 2017 deposition, based on a review of additional pulmonary function studies, chest x-rays, medical opinions, and treatment records. MC Employer's Exhibits 8, 9, 11.

Employer generally alleges "the ALJ's rebuttal analysis rests entirely o[n] phantom diagnoses of chronic bronchitis and COPD." Employer's Brief at 24. However, the ALJ accurately observed that the Miner's treatment records "consistently show . . . diagnosis of and treatment for COPD and chronic bronchitis," and that the Miner was being treated with bronchodilators and supplemental oxygen for those conditions.[18] Decision and Order at 29; *see Skrack*, 6 BLR at 1-711. We see no error in the ALJ's permissible determination that Dr. Fino's opinion is not adequately reasoned or persuasive since he "fail[ed] to adequately discuss or explain how he excluded legal pneumoconiosis, or any lung disease, in light of the treatment records he reviewed."[19] Decision and Order at 29; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); MC Director's Exhibit 13; MC Employer's Exhibits 8, 9, 11. Thus, we affirm the ALJ's finding that Dr. Fino's opinion is insufficient to disprove the Miner had legal pneumoconiosis.

[18] The ALJ considered the Miner's treatment records from December 2006 to May 2017 from Drs. Jawad, Patel, and Thakkar and from Buchanan General Hospital, the Virginia Department of Health, and Clinch Valley Medical Center. Claimant's Exhibits 8-15. The records contained documentation of "[c]hronic obstructive pulmonary disease secondary to [coal workers' pneumoconiosis]," "[o]bstructive airway disease . . . will start the patient on Symbicort and Albuterol inhaler," possible bronchopneumonia, "chronic obstructive pulmonary disease with recurrent bronchitis," the use of supplemental oxygen, "[c]oal workers' pneumoconiosis with acute bronchitis and chronic hypoxemia, "COPD with recurrent bronchitis," "a known case of chronic obstructive pulmonary disease secondary to coal worker[s'] pneumoconiosis," "we will continue the patient on inhaled steroid with albuterol and ipratropium . . . . [and] will start the patient on inhaled steroid with long-acting beta agonist to try [to] avoid using excessive albuterol," and "acute exacerbation of chronic obstructive pulmonary disease." Claimant's Exhibits 8-12, 14-15. The Miner's death certificate identified "chronic obstructive pulmonary disease" as an "underlying cause" of his death. Claimant's Exhibit 13.

[19] Dr Fino noted that at the time of his examination of the Miner on November 11, 2014, the Miner was not using breathing medications but had been using "supplemental oxygen for the last ten years." MC Director's Exhibit 13. He also noted that during the Miner's January 2017 hospitalization, the Miner was described in the records as a "known case of chronic obstructive pulmonary disease secondary to coal workers' pneumoconiosis . . ."; and that following the Miner's death, his death certificate listed the cause of his death as "cardiorespiratory arrest due to (or as a consequence of) acute-on-chronic respiratory failure due to (or as a consequence of) chronic obstructive pulmonary disease due to (or as a consequence of) coal workers' pneumoconiosis." MC Employer's Exhibit 11.

Regarding Dr. Jarboe's opinion,[20] the ALJ accurately observed he excluded coal mine dust exposure as a causative factor for Claimant's chronic bronchitis, in part, because he believed the Miner's respiratory symptoms would have dissipated when he left the mines over thirty years ago. MC Employer's Exhibit 5 (When chronic bronchitis is due to coal dust exposure, the symptoms "generally resolve after withdrawal from coal dust exposure"). The ALJ permissibly found Dr. Jarboe's reasoning inconsistent with the regulations, which recognize that pneumoconiosis is "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 Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014) (affirming an ALJ's decision to discredit, as inconsistent with the Act, the opinion of a physician who eliminated coal mine dust as a cause of the miner's disease because "bronchitis associated with coal dust exposure usually ceases with cessation of exposure"); 65 Fed. Reg. at 79,971 ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); Decision and Order at 29-31; Employer's Brief at 26-27.

Dr. Jarboe also opined that coal dust exposure did not contribute to the Miner's restrictive impairment because there was no "scarring in the lung parenchyma which would manifest as clinical pneumoconiosis." MC Employer's Exhibit 5; *see also* MC Employer's Exhibit 12. The ALJ permissibly found Dr. Jarboe's opinion unpersuasive because he excluded a diagnosis of legal pneumoconiosis based on the absence of radiographic evidence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. at 79,939; *Looney*, 678 F.3d at 316-17; Decision and Order at 30; Employer's Brief at 26.

Employer's arguments on legal pneumoconiosis are a request to re-weigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we

[20] Dr. Jarboe examined the Miner on April 21, 2016. MC Employer's Exhibit 5. He also prepared supplemental reports dated May 24, 2017, and September 4, 2017, based on a review of additional records. MC Employer's Exhibits 10, 12. Dr. Jarboe noted the spirometry values he obtained were not valid but "[a]ccording to the GOLD Guidelines, there is moderate airflow obstruction." MC Employer's Exhibit 5. However, he indicated the flow volume loops' morphology were more consistent with a restrictive pulmonary impairment and subsequently concluded the evidence does not show a severe airflow obstruction. *Id.*; MC Employer's Exhibit 12. He diagnosed the Miner with chronic bronchitis and a restrictive impairment unrelated to coal dust exposure. MC Employer's Exhibit 10.

affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis.[21] 20 C.F.R. §718.305(a); Decision and Order at 31.

Disability Causation

The ALJ next considered whether Employer established "no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 31. Because Employer raises no specific arguments on disability causation apart from its assertion that the ALJ erred in finding it failed to disprove the existence of clinical and legal pneumoconiosis, we affirm the ALJ's determination that Drs. Fino's and Jarboe's opinions are not adequately reasoned to satisfy Employer's burden to prove the Miner's total disability is unrelated to pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 32; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995) (an ALJ "may not credit" a physician's opinion on causation where the physician failed to properly diagnose pneumoconiosis, absent "specific and persuasive reasons," in which case the opinion is entitled to "little weight"). We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was due to clinical or legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 32. We thus affirm the award of benefits in the Miner's claim.

[21] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts, we need not address Employer's arguments concerning the ALJ's weighing of Drs. Ajjarapu's and Thakkar's opinions 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 31; Employer's Brief at 29-30.

Survivor's Claim

Because we have affirmed the ALJ's award of benefits in the Miner's claim and Employer raises no specific challenge to his award of benefits in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 33; Employer's Brief at 30.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge