U.S. Department of Labor

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

BRB No. 20-0405 BLA

SHELBY M. CLISSO (Widow of FRANK CLISSO) Claimant-Respondent v. ELRO COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/23/2021 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Ann Marie Scarpino (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) William S. Colwell's Decision and Order on Remand Awarding Benefits (2012-BLA-05813) 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 survivor's claim filed on March 23, 2012, and is before the Benefits Review Board (the Board) for the second time.

In a Decision and Order Denying Benefits in Living Miner's Claim and Awarding Benefits in Survivor's Claim[] (2012-BLA-05813) issued on May 6, 2014, ALJ Linda S. Chapman credited the Miner with at least twenty years of underground coal mine employment and found he suffered from a totally disabling respiratory impairment. She therefore determined Claimant[1] invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4).[3] She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant is the surviving spouse of the Miner, who died on January 24, 2012. Director's Exhibit 5.

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

[3] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018). The Miner filed a claim on November 17, 2000, which was consolidated with this survivor's claim for purposes of decision only, and was finally denied by ALJ Chapman. *Clisso v. Elro Coal Co.*, OALJ No. 2009-BLA-05889 (May 6, 2014) (unpub.). Claimant therefore cannot benefit from the Section 422(*l*) provision.

Upon review of Employer's appeal, the Board affirmed as unchallenged ALJ Chapman's determination that the Miner had at least twenty years of underground coal mine employment. *Clisso v. Elro Coal Co.*, BRB No. 14-0306 BLA, slip op. at 6 (July 17, 2015) (unpub.). The Board further affirmed her finding that the Miner was totally disabled, and Claimant therefore invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 30 U.S.C. §921(c)(4); *Clisso*, BRB No. 14-0306 BLA, slip op. at 6. The Board vacated the ALJ's determination that Employer did not rebut the presumption, however, and remanded the case for further consideration. *Clisso*, BRB No. 14-0306 BLA, slip op. at 6-10.

On remand, the case was reassigned to ALJ William S. Colwell (the ALJ). The ALJ determined Employer rebutted the existence of clinical pneumoconiosis. But he further found it did not rebut the existence of legal pneumoconiosis or establish that no part of the Miner's death was due to pneumoconiosis. He therefore found Employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

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 ALJs render his appointment unconstitutional. On the merits, Employer argues the Board should reconsider its determination that ALJ Chapman did not err in finding the Miner was totally disabled due to a respiratory or pulmonary impairment, and in invoking the Section 411(c)(4) presumption. It further argues the ALJ erred in finding Employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's constitutional challenges to the ALJ's appointment and removal protections. Employer filed separate reply briefs to Claimant's and the Director's responses, reiterating its arguments.

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[4] 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.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer argues the Board should vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 21-26; Employer's Reply to the Director at 2-6. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 23-26; Employer's Reply at 2-6. The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 4-7. We agree with the Director.

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[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[6] *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. Comm'r*, 501 U.S. 868 (1991)).

[7] 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 Associate Chief 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 Colwell. The ALJ did not issue any orders in this case until his August 16, 2018 Notice of Reassignment.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison,* 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). 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. 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 but rather specifically identified the ALJ and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Colwell. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of the ALJ "as an Associate Chief Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," and generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified the ALJ's appointment. Employer's Brief at 25. Employer therefore has not overcome the presumption of regularity.[8] *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. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997)

[8] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 24-25, 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").

(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 that it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.[9]

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 26-30; Employer's Reply to the Director at 6-9. 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*. Employer's Brief at 26-30; Employer's Reply to the Director at 6-9. 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 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 26-27; Employer's Reply to the Director at 6-9.

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.*

[9] Employer also argues the ALJ erred in finding it waived its challenges to ALJ Chapman's appointment, which it raised for the first time on remand in its March 8, 2019 Motion for Reconsideration and Reassignment. Employer's Brief at 22; Employer's Reply to the Director at 2 n.1. We disagree. Employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) (upholding forfeiture for failure to raise Appointments Clause challenge pursuant to Board's issue-exhaustion requirements); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (internal citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief).

Pehringer, 8 F.4th 1123, 1136 (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.

[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).

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 1136.

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

Employer asserts that the ALJ erred in finding the Miner was totally disabled due to a respiratory and pulmonary impairment under 20 C.F.R. §718.204(b)(2), alleging the Miner's inability to work was due to his advanced age (ninety-two years old at death) and significant heart disease. Employer's Brief at 11-13. The Board previously held the ALJ permissibly found the Miner had a totally disabling respiratory impairment, and thus, affirmed the ALJ's finding that Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4). *Clisso*, BRB No. 14-0306 BLA, slip. op. at 6. As Employer has not shown that the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[11] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[12]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

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

[12] The ALJ found Employer rebutted the existence of clinical pneumoconiosis, but not legal pneumoconiosis. Decision and Order at 6-7, 9.

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015).

The ALJ considered the opinions of Drs. Fino and Rosenberg that the Miner did not have legal pneumoconiosis. Dr. Fino opined the Miner suffered from asthma unrelated to coal mine dust exposure. Miner's Claim Director's Exhibits 75, 76;[13] Employer's Exhibits 4, 5. Dr. Rosenberg opined the Miner likely had a restrictive impairment due to chronic atrial fibrillation with congestive heart failure and pneumonia. Miner's Claim Director's Exhibit 92; Employer's Exhibit 6. The ALJ found both opinions not well-reasoned or documented, and therefore found them insufficient to rebut the existence of legal pneumoconiosis. Decision and Order on Remand at 7-9.

Employer asserts that the ALJ erred in discrediting their opinions. Employer's Brief at 14-16. We disagree.

The ALJ accurately found that, although Dr. Fino opined pneumoconiosis can be latent and progressive, he asserted the Miner's chronic obstructive pulmonary disease (COPD) was unrelated to coal mine dust exposure because it developed years after he left his coal mine employment. Decision and Order on Remand at 8; Miner's Claim Director's Exhibits 75, 76; Employer's Exhibits 4, 5. The ALJ permissibly found Dr. Fino's reasoning internally contradictory, as well as inconsistent with the regulations' acknowledgment that pneumoconiosis can be a "latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure." *See* 20 C.F.R. §718.201(c); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order on Remand at 8. He further accurately noted Dr. Fino opined the Miner's obstructive lung disease is unrelated to coal mine dust exposure because it is consistent with asthma, a disease of the general public. Decision and Order on Remand at 8; Miner's Claim Director's Exhibits 75, 76; Employer's Exhibits 4, 5. The ALJ noted the preamble recognizes asthma as a form of COPD that can constitute legal pneumoconiosis if it is caused or aggravated by coal mine dust exposure. Decision and Order on Remand at 8, *citing* 65 Fed. Reg. at 79,937-39. He permissibly found Dr. Fino's opinion inadequately reasoned, because he did not sufficiently explain why coal mine dust exposure did not significantly contribute to or substantially aggravate the Miner's impairment, along with his other diagnosed conditions. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining*

[13] Claimant's survivor's claim was initially consolidated with the Miner's claim for benefits for the purposes of a hearing. Because of this, some of the evidence admitted into the survivor's claim is contained within the file for the associated Miner's claim, which has been finally denied.

Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order on Remand at 8.

The ALJ further accurately noted Dr. Rosenberg opined the Miner's pulmonary impairment "likely relates to a combination of factors, namely chronic atrial fibrillation with congestive heart failure, coupled with his recent pneumonia" rather than his coal mine employment. Decision and Order on Remand at 8-9; Miner's Claim Director's Exhibit 92; Employer's Exhibit 6. The ALJ permissibly found his opinion similarly does not adequately explain why the Miner's twenty years of underground coal mine dust exposure did not significantly contribute to or substantially aggravate his impairment, along with his other diagnosed conditions. *See Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 313-14; Decision and Order on Remand at 9.

As the trier-of-fact, the ALJ is charged with assessing the credibility of the medical evidence and assigning it appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 314-15. Employer's arguments amount to a request to reweigh the evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish the Miner did not have legal pneumoconiosis.[14] 20 C.F.R. §718.305(d)(2)(i).

[14] Employer further contends the ALJ erred in not considering Dr. Sargent's opinion in the Miner's treatment records that "although the Clissos insisted that Mr. Clisso had black lung disease, there was no objective support for such a finding." Employer's Exhibit 2 at 26; Employer's Brief at 16-17. We disagree. Employer bears the burden to establish the Miner did not have legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015). While Dr. Sargent stated he could not confirm the Miner's reported history of black lung disease and COPD, noting he read an x-ray as negative for pneumoconiosis and a pulmonary function study showed a restrictive rather than obstructive impairment, he did not opine the Miner did not have legal pneumoconiosis. Employer's Exhibit 2. Moreover, Dr. Sargent did not address the etiology of the restrictive impairment and subsequently diagnosed the Miner with COPD on October 13, 2011, and on January 24, 2012. *Id.* The ALJ rationally found that while his opinion supports Employer's burden to disprove the existence of clinical pneumoconiosis, it does not support Employer's burden to disprove legal pneumoconiosis. *Minich*, 25 BLR at 159; Decision and Order on Remand at 4-5, 7.

Death Causation

The ALJ next considered whether Employer established "no part" of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); Decision and Order on Remand at 10. Contrary to Employer's arguments, the ALJ did not erroneously require it to rebut the cause of the Miner's totally disabling respiratory impairment. Employer's Brief at 17-20. Nor was the ALJ required to accept Employer's experts' uncontradicted opinions. *Id.* Rather, the ALJ appropriately considered whether Employer met its burden to demonstrate "that no part of the Miner's death was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order on Remand at 10.

The ALJ permissibly discredited the opinions of Drs. Fino and Rosenberg that the Miner's death was unrelated to legal pneumoconiosis because neither physician diagnosed the Miner with the disease, contrary to the ALJ's finding.[15] *Epling*, 783 F.3d at 504-05 (physician who fails to diagnose pneumoconiosis, contrary to the administrative law judge's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order on Remand at 10. Therefore, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

[15] We further reject Employer's argument that Dr. Sargent's opinion supports a finding that the Miner's death was unrelated to pneumoconiosis. Employer's Brief at 19. While Dr. Sargent did not attribute the Miner's death to pneumoconiosis, he did not opine the Miner's death was unrelated to pneumoconiosis and his final diagnoses included COPD of no stated origin. Employer's Exhibit 2. Therefore, any error by the ALJ not considering this opinion at 20 C.F.R. §718.305(d)(2)(ii) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge