U.S. Department of Labor

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

BRB Nos. 20-0456 BLA, 21-0037 BLA,
and 21-0038 BLA

MILLARD R. SLUSS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOSANNA, LLC	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY (now BERKLEY INDUSTRIAL COMP)	)	DATE ISSUED: 9/30/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order Awarding Attorney's Fees and Costs, and Order Denying Reconsideration of Order Awarding Attorney's Fees and Costs of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor, and the Proposed Order Supplemental Award Fee for Legal Services of Debbie Quick, Claims Examiner, United States Department of Labor.

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

Anne L. Rife (Midkiff, Muncie & Ross, P.C.), Bristol, Tennessee, for Employer and its Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2015-BLA-05627) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer also appeals ALJ Johnson's Order Awarding Attorney's Fees and Costs (ALJ's Fee Award) and Order Denying Reconsideration of Order Awarding Attorney's Fees and Costs (Order Denying Reconsideration) and Claims Examiner Debbie Quick's (the district director) September 25, 2020 Proposed Order Supplemental Award Fee for Legal Services (District Director's Fee Award).[1] This case involves a miner's claim filed on August 11, 2014, and is before the Benefits Review Board for the second time.[2]

[1] Employer's appeal of the ALJ's Decision and Order Awarding Benefits was assigned BRB No. 20-0456 BLA, its appeal of the ALJ's Fee Award and Order Denying Reconsideration was assigned BRB No. 21-0037 BLA, and its appeal of the District Director's Fee Award was assigned BRB No. 21-0038 BLA. The Board consolidated these appeals for purposes of decision only. *Sluss v. Hosanna, LLC*, BRB Nos. 20-0456 BLA, 21-0037 BLA, and 21-0038 BLA (Nov. 24, 2020) (Order) (unpub.).

[2] On August 23, 2017, ALJ Alan L. Bergstrom awarded benefits. On November 29, 2017, ALJ Bergstrom also issued Orders granting attorney's fees and denying Employer's request for reconsideration.

Employer appealed ALJ Bergstrom's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Remand with the Board, which the Board granted and therefore vacated the award of benefits and remanded the case. *Sluss v. Hosanna, LLC*, BRB No. 17-0661 BLA (Mar. 9, 2018) (Order) (unpub.) (directing ALJ Bergstrom in light of his recent ratification "to reconsider the substantive and procedural actions previously taken and to issue a decision accordingly"). On June 7,

The ALJ found Employer, Hosanna, LLC (Hosanna), is the responsible operator and American Mining Insurance Company (American Mining) is the responsible carrier. On the merits of Claimant's entitlement to benefits, he found the evidence did not establish the existence of complicated pneumoconiosis and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). 30 U.S.C. §921(c)(3) (2018). However, the ALJ found Claimant established 20.83 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and, thus, invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits. Subsequently, the ALJ awarded Claimant's counsel attorney's fees and costs and the district director awarded him attorney's fees.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further asserts the removal provisions applicable to the

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2018, ALJ Bergstrom issued a Decision and Order upon Reconsideration on Remand - Awarding Benefits. On July 5, 2018, Employer filed a Motion for Reconsideration requesting that ALJ Bergstrom's decision on remand be vacated, asserting the case should be remanded to the district director for reassignment to a properly appointed ALJ. Employer's Motion for Reconsideration, *citing Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). In the interim, ALJ Bergstrom retired, and the case was assigned to ALJ Johnson (the ALJ). He granted Employer's motion insofar as he agreed it was entitled to a new hearing but denied its request to remand the case to the district director. November 2, 2018 Order Granting Motion for Reconsideration and Denying Motion for Remand.

Employer had also appealed ALJ Bergstrom's Orders granting attorney's fees and denying Employer's request for reconsideration. In light of the Board's vacating of ALJ Bergstrom's award of benefits, the Board also vacated his Order granting attorney fees. *Sluss v. Hosanna, LLC*, BRB No. 18-0521 BLA (Jan. 11, 2019) (Order) (unpub.).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory 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:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls,

ALJ rendered his appointment unconstitutional. In addition, it challenges the validity of the Section 411(c)(4) presumption as part of the Affordable Care Act (ACA). Furthermore, Employer argues liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund because the ALJ erred in finding American Mining is the responsible carrier. It also alleges the ALJ violated its due process by denying its request to obtain discovery from the Department of Labor (DOL) regarding the science set forth in the preamble to the 2001 revised regulations, while relying on the preamble when weighing the credibility of Employer's experts. On the merits, Employer contends the ALJ erred in finding Claimant is totally disabled, thereby invoking the Section 411(c)(4) presumption, and that it did not rebut the presumption.[5]

Claimant responds in support of the award of benefits. The Director responds, urging the Board to reject Employer's constitutional challenges, its argument that American Mining is not the responsible carrier, its due process argument, its challenge to the validity of the Section 411(c)(4) presumption and its specific contention that the ALJ failed to properly consider Claimant's non-respiratory conditions prior to finding him totally disabled. Employer replied to Claimant's and the Director's briefs, reiterating its contentions on appeal. In a separate appeal, Employer challenges the ALJ's and district director's fee awards. Claimant responds in support of the ALJ's fee award. The Director did not file a response to Employer's appeals of the fee awards.

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).

> 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, the ALJ's finding that Claimant established 20.83 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 41; Director's Exhibit 6.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See*

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order awarding benefits and remand the case to be heard by a different, constitutionally appointed ALJ. Employer's Brief at 14-18 (citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018)). It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[8] *Id.*

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 Brief at 17-19. 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 18 (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

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibit 3; Hearing Transcript at 28.

[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 a District 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 District Chief ALJ Johnson.

[8] On July 20, 2018, the DOL expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

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 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 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. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Johnson and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to District Chief ALJ Johnson. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Johnson "as a District Chief Administrative Law Judge." *Id*.

Employer generally asserts the Secretary's ratification did not reflect a "genuine, let alone thoughtful consideration" but does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Johnson's appointment. Employer's Brief at 16. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[9] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where 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 appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid 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

[9] While Employer notes the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 16, 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").

because incumbent ALJs remain in the competitive service. Employer's Brief at 14-15. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Johnson's appointment, which we have held constituted a valid exercise of his authority, thereby bringing his appointment into compliance with the Appointments Clause.

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

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-18. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* at 17. Employer also relies on the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *Id.* at 16-17.

Employer's arguments are rejected, 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 rejecting a similar argument raised with respect to the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise*[10] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th

[10] 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.* 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.

Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Calcutt*, 37 F.4th at 315. Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Calcutt*, 37 F.4th at 315-16. Employer in this case has not alleged it suffered any harm due to the ALJ's removal protections.

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. 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 as applied to DOL ALJs. *Pehringer*, 8 F.4th at 1137-38.

Responsible Insurance Carrier

Employer does not contest its designation as the responsible operator but rather asserts the ALJ erred in finding American Mining is the responsible carrier.[11] Employer's Brief 1-2, 11-14; Employer's Reply Brief at 2-4. We disagree.

[11] The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must

The district director issued a Notice of Claim on October 2, 2014, identifying Hosanna as the potentially liable operator and American Mining as the potentially liable carrier. Director's Exhibit 13. This notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id*. Employer responded on October 8, 2014, denying liability and asserting that American Mining provided insurance coverage from November 25, 2000 until November 1, 2001, which was subsequent to Claimant's last day of employment with Hosanna in October 2000. Director's Exhibit 14. It did not submit any liability evidence to support this assertion.

On January 13, 2015, the district director issued a Schedule for the Submission of Additional Evidence (SSAE). Director's Exhibit 16. The district director informed Employer in the SSAE that it had until March 14, 2015, to submit liability evidence and until April 13, 2015, to submit evidence responsive to evidence submitted by another party. *Id*. at 3. Further, the district director advised that "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id*. at 2-3, *citing* 20 C.F.R. §725.456(b)(1). On February 17, 2015, Employer contested its designation as the responsible operator and Claimant's entitlement to benefits, but it did not submit any liability evidence. Director's Exhibit 18.

The district director issued a Proposed Decision and Order on April 24, 2015, awarding benefits and designating Hosanna and American Mining as the responsible operator and carrier, respectively. Director's Exhibit 20. Specifically, the district director found Claimant's last day of work with Hosanna was "approximately" October 12, 2000, and that it was insured by American Mining from September 29, 2000 to October 1, 2001. *Id*. at 10 (unpaginated). Employer requested a hearing and the case was transferred to the OALJ. Director's Exhibit 24. At the hearing, the ALJ admitted Employer's insurance policy with American Mining and a sworn statement from Chandler Cox, President and CEO of American Mining. Mr. Cox alleged Hosanna's policy was effective from November 25, 2000 to November 1, 2001.[12] Hearing Transcript at 9-10; Employer's Exhibits 1, 17.

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be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[12] Mr. Cox explained that the policy period initially ran from September 29, 2000 to October 1, 200, but was changed to November 25, 2000 to November 1, 2001. Employer's Exhibit 1. He testified that this change is documented by the hand-written notations on the information page and is confirmed by a separate endorsements page. *Id*. Further, he explained that the use of hand-written notations is a common and efficient

In addressing American Mining's assertion that it is not the responsible carrier, the ALJ considered Claimant's testimony, CM-911a Employment History Form, treatment records, and Social Security Administration (SSA) earnings records, Hosanna's insurance policy, and Chandler Cox's sworn statement. Director's Exhibits 3, 6; Employer's Exhibits 1, 11 at 178-180, 17. The ALJ found that Hosanna's insurance policy with American Mining ran from November 25, 2000 through October 1, 2001, but noted it was unclear if it was a new policy rather than a renewal of an earlier policy. Decision and Order at 54-55. Regardless, the ALJ noted that there was conflicting evidence as to when Claimant last worked for Employer but concluded he last worked sometime in early 2001, after the insurance policy's November 2000 effective date but before its termination in October 2001. *Id.* Thus, the ALJ found American Mining was properly designated as the responsible carrier. *Id.* at 51-55.

Employer asserts the ALJ's determination that American Mining is the responsible carrier is not supported by substantial evidence. Employer's Brief at 11; Employer's Reply Brief at 2-3. Specifically, it contends the ALJ erred in finding Claimant last worked for Employer in 2001, because Claimant's SSA earnings records show he had no earnings with Employer in that year. Director's Exhibit 6; Employer's Brief at 13; Employer's Reply Brief at 3. Instead, Employer maintains Claimant's last day of work with it was "on or around" October 12, 2000, as the district director determined. Employer's Brief at 11-14, *referencing* Director's Exhibit 20. We reject Employer's arguments.

As the ALJ correctly noted, Claimant indicated on his CM-911a form that his employment for Employer ended in April 2001. Director's Exhibit 3. Claimant testified he stopped working in July 2000 due to a back injury that required surgery and that after his back surgery, he attempted to return to work for a period of a month but could not perform the work because of his back. Hearing Transcript at 33-34. He also testified that he did not remember his start and end dates with Employer. *Id.* at 31. On cross-examination, he agreed that the district director's finding that he stopped working in October 2000 sounded correct. *Id.* at 32.

Claimant's 2001 and 2013 SSA earnings records do not document any earnings for the year 2001. Director's Exhibit 6. But Claimant's treatment records indicate that he stopped working in July 2000 because of his back injury and a February 26, 2001 entry in those same records describes that he "missed work for the last week because of worsening low back pain," suggesting Claimant was working sometime in February 2001. Employer's Exhibit 11 at 178-80.

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means of confirming the change in the policy period and a way to make sure there is no confusion over the terms of the policy if it changes. *Id.*

The ALJ found Claimant's testimony that he did not remember his last day of work with Employer diminished the probative value of his CM-911a form on which he self-reported his work history. Decision and Order at 54. The ALJ also gave little weight to his 2001 SSA earning records, which do not report earnings with Employer in 2001, because those records state that "earnings for the years after 1999 may not be shown, or only partially shown, because they may not yet be on our records." *Id.* at 54, *quoting* Director's Exhibit 6. Instead, the ALJ gave the most weight to Claimant's treatment records from February 26, 2001, which include a notation that Claimant had missed work for "the last week." *Id.*; *see* Employer's Exhibit 11 at 178. Specifically, the ALJ found that Claimant's treatment records corroborated his testimony that he attempted to return to work for a period of a month sometime after his back injury and those records indicate his return to work occurred in the beginning of 2001. Decision and Order at 54; Employer's Exhibit 11 at 178; Hearing Transcript at 33-34. Taken as a whole, the ALJ concluded the credible evidence supported a finding that Claimant was working subsequent to October 2000 (the date the district director determined was Claimant's last date of coal mine employment) and before the termination of Hosanna's insurance policy in October 2001. Decision and Order at 54-55.

Although Employer argues Claimant's SSA earnings records establish American Mining is not the liable carrier because they reflect no earnings with the company in 2001, the ALJ had discretion to give greatest weight to Claimant's contemporaneous medical records reflecting a return to work in early 2001. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); Decision and Order at 54. His finding that Claimant worked in 2001 is based on his consideration of the record as a whole – he acknowledged the discrepancies in the evidence and resolved the conflict as he was required to do. *See Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why he did it).

We further agree with the Director that the ALJ was not required to credit the 2013 SSA earnings records as establishing Claimant did not work for Employer in 2001 due to its lack of a disclaimer indicating they may be incomplete. Director's Brief at 7 (a "disclaimer simply makes the unremarkable point that [SSA] records are imperfect and sometimes incomplete — which remains true whether or not the records contain express disclaimers to that effect"); *see* Director's Exhibit 6. Contrary to Employer's arguments, the ALJ's decision to credit Claimant's testimony that he attempted to return to work for Employer sometime after his injury, along with contemporaneous medical records setting that date as occurring in early 2001, constitute substantial evidence supporting the ALJ's determination that Claimant was employed during Employer's insurance policy period. *See Newport News Shipbldg. and Dry Dock Co. v. Ward*, 326 F.3d 434, 438 (4th Cir. 2003)

(substantial evidence is "more than a scintilla but less than a preponderance") (citations omitted).

We also reject Employer's contention that Claimant's statement on cross-examination that the district director was probably correct about his last day of coal mine employment precluded the ALJ from crediting other aspects of Claimant's testimony. The ALJ acknowledged Claimant was unclear about the specific dates he worked for Hosanna but permissibly credited Claimant's statement that he attempted to return to work after his back injury as credible.[13] Decision and Order at 54-55. He also permissibly inferred from Claimant's February 2001 treatment records that he attempted to return to work in 2001. *See Stallard*, 876 F.3d at 670; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 54.

As the trier-of-fact, the ALJ has the discretion to assess the credibility of the evidence and draw inferences, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Stallard*, 876 F.3d at 670; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Because it is supported by substantial evidence, we affirm the ALJ's permissible finding that, when considered overall, Claimant's testimony in conjunction with his treatment records support a finding that his last day of work with Hosanna occurred in 2001, while it was still insured. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999) (the Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis."); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable.") (citation omitted); Decision and Order at 54-55.

We therefore affirm the ALJ's conclusion that Hosanna and American Mining are the responsible operator and carrier, respectively, for this claim.[14] *See Harman Mining Co.*

[13] Employer asserts the ALJ did not consider Claimant may have been referring to returning to work with a different employer in 2001 but fails to point to any evidence to support its theory that Claimant worked for another employer after it.

[14] Employer also contends the ALJ erred in stating that the evidence "does not affirmatively show that American Mining did not insure Employer before" November 2000. Employer's Brief at 13. We need not address Employer's contention, as we affirm the ALJ's determination that Claimant's last day of work was in 2001 and prior to the termination of its insurance coverage on October 1, 2001. *See Shinseki v. Sanders*, 556

v. Director, OWCP [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the Administrative Procedure Act is satisfied); Decision and Order at 55.

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

Employer also contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 24. Employer's argument is now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies,[15] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[16] 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, 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). Employer challenges the ALJ's finding that Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole. 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 42-45.

We first address Employer's overall contention that the ALJ failed to consider Claimant's non-pulmonary or non-respiratory conditions in evaluating the evidence regarding total disability. Citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994),

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U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

[15] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[16] The ALJ found that none of the arterial blood gas studies were qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 43.

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 18-24; Employer's Reply Brief at 4-5. However, the 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. 79,920, 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]."). Moreover, the Board has declined to apply *Vigna* to cases arising in the Fourth Circuit, specifically rejecting Employer's argument that the Fourth Circuit adopted *Vigna's* holding in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). *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.

Pulmonary Function Studies

The ALJ considered the results of four pulmonary function studies[17] dated November 7, 2014, July 18, 2016, September 2, 2016,[18] and May 7, 2019. Decision and Order at 10, 34, 42. Dr. Green's November 7, 2014 study produced non-qualifying pre-bronchodilator and post-bronchodilator results. Director's Exhibit 11 at 11 (unpaginated). Dr. Rosenberg's July 18, 2016 study produced qualifying results before and after administration of a bronchodilator. Employer's Exhibit 3 at 4-5. Dr. Green's September 2, 2016 study produced qualifying pre-bronchodilator results and non-qualifying post-bronchodilator results. Claimant's Exhibit 1 at 7 (unpaginated). Dr. Green's May 7, 2019

[17] Because the pulmonary function studies reported varying heights for Claimant ranging from 67.5 to 68 inches, the ALJ calculated an average height for Claimant of 67.75 inches. He then used the closest greater table height at Appendix B of Part 718 of 68.1 inches for determining the qualifying or non-qualifying nature of the studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 9-10, n.11.

[18] The ALJ rejected Dr. Tuteur's opinion that the September 2, 2016 pulmonary function study was invalid, because he found it conclusory and not well-reasoned. Decision and Order at 42. We affirm the ALJ's determination as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

study produced non-qualifying pre-bronchodilator results and qualifying post-bronchodilator results. Claimant's Exhibit 7.

The ALJ noted the only test that did not have qualifying values was administered in 2014. Relying on the more recent studies, he found Claimant established total disability based on the preponderance of the qualifying pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i).[19] Decision and Order at 42.

Employer asserts the ALJ failed to consider Dr. Robinette's non-qualifying October 19, 2015 study contained in Claimant's treatment records.[20] Employer's Brief at 19. However, the ALJ included the October 19, 2015 study in his summary of the evidence and further noted Employer's own expert, Dr. Tuteur, was unable to assess whether the test was valid. Decision and Order at 10, 24, 34. Thus, while the ALJ did not specifically explain the weight he accorded the study, Employer sets forth no basis for us to conclude it would change the ALJ's overall weighing of the pulmonary function study evidence, given his explanation that he gave greatest weight to the more recent studies. *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"); *see Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

Medical Opinions

The ALJ considered three medical opinions. He credited Dr. Green's opinion that Claimant is totally disabled over the opinions of Drs. Rosenberg and Tuteur. Decision and Order at 45.

Employer contends Dr. Green's opinion lacks credibility because he "switched course" regarding whether Claimant is totally disabled based on the blood gas study or pulmonary function study results, and did not discuss the exertional requirements of Claimant's work in relation to his impairment. Employer's Brief at 20-21. In addition, Employer argues the ALJ did not adequately consider its experts' opinions that Claimant's disability is related to non-respiratory or non-pulmonary impairments. We disagree.

[19] We affirm, as unchallenged, the ALJ's findings as to whether the studies were qualifying or non-qualifying. *See Skrack*, 6 BLR at 1-711.

[20] The October 19, 2015 study produced non-qualifying values before and after administration of a bronchodilator. Employer's Exhibit 12 at 4.

Dr. Green

Dr. Green conducted the DOL's complete pulmonary evaluation of Claimant on November 7, 2014, and also examined him on September 2, 2016. Contrary to Employer's contentions, the ALJ permissibly credited Dr. Green's opinion as reasoned and documented because he explained how Claimant's objective test results show an impairment that would preclude the performance of his usual coal mine employment.

Dr. Green opined that Claimant is totally disabled based on his September 2, 2016 pulmonary function study results indicating a "FEV1 of 1.78 which is 59% of predicted today[,], and his [MVV] of 41 L/minute which is 32% of predicted." Claimant's Exhibit 1 at 4. Specifically, Dr. Green stated that these measurements reflect "a significant degree of ventilatory impairment," and "[d]ue to his ventilatory insufficiency," Claimant "could not perform the demands of his previous coal mine employment operating a roof bolter, scoop and shuttle car and lifting 50 pounds at any given time." *Id.* Dr. Green also explained that while Claimant's prior November 7, 2014 pulmonary function study values were non-qualifying, they nonetheless showed "moderate chronic airflow obstruction." Director's Exhibit 11; *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Although Employer is correct that Dr. Green did not review pulmonary function studies obtained after his examinations, the ALJ found those studies qualifying for total disability, thereby supporting Dr. Green's opinion that Claimant is totally disabled. Decision and Order at 42.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Green's opinion is sufficiently reasoned to support a finding that Claimant is totally disabled. Decision and Order at 43, 45; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark*, 12 BLR at 1-155.

Drs. Rosenberg and Tuteur

Dr. Rosenberg examined the Claimant on July 18, 2016 and reviewed his medical records. Employer's Exhibit 5. He opined that Claimant would "have limitations from performing his previous coal mine job" and "probably" be disabled. *Id.* at 90. Dr. Tuteur reviewed Drs. Green's and Rosenberg's reports. Employer's Exhibit 6. He opined that the November 7, 2014 and July 18, 2016 pulmonary function study results showed "the development of a moderately severe obstructive defect without significant restrictive component." *Id.* at 2.

The ALJ gave little weight to Dr. Rosenberg's opinion because he misstated that the pulmonary function study he obtained was non-qualifying. Therefore, the ALJ concluded that "[t]o the extent Dr. Rosenberg's opinion deserves any weight," his opinion weighs in favor of finding Claimant totally disabled. Decision and Order at 44. The ALJ also gave no weight to Dr. Tuteur's opinion because he did not "explicitly address" whether Claimant is totally disabled by a respiratory impairment and because he misidentified the July 18, 2016 pulmonary function study as non-qualifying. *Id*. at 44. Because Employer identifies no specific error regarding the ALJ's stated basis for rejecting their opinions, we affirm them.[21] *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Employer's primary argument is that the ALJ failed to properly consider that Drs. Rosenberg and Tuteur explained that Claimant's qualifying pulmonary function results are attributable to non-respiratory or non-pulmonary conditions. Employer's Brief at 19-25; Employer's Reply Brief at 4-5. But it 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*, 9 BLR at 1-68; *Sisak v. Helen Mining Co*., 7 BLR 1-178, 1-181 (1984).

Because it is supported by substantial evidence, we affirm the ALJ's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. Decision and Order at 44-45. We therefore affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2); Decision and Order at 41, 45.

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 he has neither legal nor clinical pneumoconiosis,[22] or that "no part of [his] respiratory or pulmonary total disability

[21] Contrary to Employer's contention, the ALJ considered the qualifications of its experts but permissibly found their opinions were not adequately reasoned.

[22] "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

was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method. Decision and Order at 48-50.

Due Process

Employer initially argues the ALJ violated its due process rights by preventing discovery on the preamble to the 2001 revised regulations and then discrediting Dr. Rosenberg's opinion as inconsistent with the preamble when considering rebuttal of the Section 411(c)(4) presumption. Employer's Brief at 27-28. We disagree.

While the case was before the ALJ, Employer sought discovery from the DOL related to its deliberative process underlying the preamble to the 2001 revised regulations. Employer's Exhibit 13. The district director objected to Employer's discovery request and filed a Motion for a Protective Order. The ALJ concluded that the discovery Employer sought would not lead to relevant information that is not already available, as the preamble sets forth, at length, the scientific literature that the DOL relied on and how it arrived at its conclusions. Order Granting Protective Order at 4. Instead, the ALJ noted the Employer "may challenge the scientific basis for medical conclusions in the relevant regulation by presenting scientific studies or evidence post-dating the effective date of the 2001 amended regulations, which calls into question the scientific basis supporting the regulations." *Id*., *citing Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012); *Vance v. Hobet Mining Inc.*, BRB No. 13-0212 BLA, slip op. at 8-9 (Feb. 28, 2014) (unpub.).

Due process requires that Employer be given notice and an opportunity to mount a meaningful defense. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183-84 (4th Cir. 1999) (the core elements of procedural due process are notice and opportunity to be heard); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). Employer had the opportunity to challenge the preamble by submitting evidence establishing that the science that the DOL relied on in promulgating it is no longer valid. *See Cochran*, 718 F.3d at 324 (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). In this regard, Employer

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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).

submitted Dr. Rosenberg's testimony criticizing the scientific findings in the preamble regarding whether pneumoconiosis is a latent or progressive disease. Hearing Transcript at 81-83, 99-100. As explained below, the ALJ considered Dr. Rosenberg's opinion but permissibly rejected it. *See Stallard*, 876 F.3d at 670 (ALJ evaluates the credibility of the evidence of record, including witness testimony); Decision and Order at 49. Because Employer was afforded and took advantage of the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate a due process violation. *See Borda*, 171 F.3d at 184.

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on Drs. Rosenberg's and Tuteur's opinions to disprove legal pneumoconiosis. Dr. Rosenberg attributed Claimant's obstructive respiratory impairment to morbid obesity. Employer's Exhibits 5 at 4; 8 at 5. He excluded coal mine dust exposure as a causative factor for Claimant's respiratory impairment, in part, because Claimant's pulmonary function studies did not show a reduction in FEV1 values until over a decade after he left the mines. Hearing Transcript at 81, 88. The ALJ permissibly found Dr. Rosenberg's opinion inconsistent with the both the regulations and the preamble which recognize that pneumoconiosis is a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §§718.201 (a), (c); 65 Fed. Reg. at 79, 971; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 49.

Dr. Tuteur initially opined that there was "no convincing evidence to indicate the presence of legal coal workers' pneumoconiosis." Employer's Exhibit 6 at 4. However, in his supplemental report, he opined the etiology of Claimant's chronic obstructive pulmonary disease (COPD) is unclear, explaining that inhalation of coal dust "may produce such a condition" but that "uncontrolled gastroesophageal reflux disease . . . may" produce similar symptoms. Employer's Exhibit 9 at 4-5. We affirm the ALJ's determination that Dr. Tuteur's opinion is equivocal and unpersuasive to affirmatively establish that Claimant does not have legal pneumoconiosis. Decision and Order at 49; *see Owens*, 724 F.3d at 550; *Looney*, 678 F.3d at 316-17.

Lastly, we reject Employer contention that the ALJ ignored the qualifications of its experts. Employer's Brief at 28-29. Having already permissibly found the opinions of Drs. Rosenberg and Tuteur not well-reasoned, the ALJ could not subsequently credit their opinions based solely on their qualifications.[23] *See Underwood*, 105 F.3d at 951; Decision and Order at 48-49.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish that Claimant does not have legal pneumoconiosis. [24] *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 50.

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner'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 50-51. The ALJ permissibly discounted Dr. Rosenberg's opinion that Claimant is not totally disabled due to legal pneumoconiosis because Dr. Rosenberg did not diagnose legal pneumoconiosis, contrary to the ALJ's finding Employer failed to disprove the existence of the disease. *See Epling*, 783 F.3d at 504-05; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 50-51; Employer's Brief at 29. Similarly, to the extent the ALJ found Dr. Tuteur's opinion equivocal as to the etiology of Claimant's respiratory impairment, we see no error in his conclusion that Dr. Tuteur's opinion is "plainly insufficient" to support Employer's burden to affirmatively establish that Claimant's respiratory impairment is not related to legal pneumoconiosis.[25] Decision and Order at 50; *see Stallard*, 876 F.3d at 673 n.4; *Hicks*, 138 F.3d at 533; *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015). We therefore affirm the ALJ's conclusion that Employer failed to rebut the Section 411(c)(4) presumption by establishing no part of

[23] Since Employer has the burden of proof on rebuttal, and we have affirmed the ALJ's rejection of its medical experts, we need not address Employer's contention that the ALJ erred in crediting Dr. Green's opinion that Claimant has legal pneumoconiosis. Employer's Brief at 25-29.

[24] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.

[25] Dr. Tuteur opined the etiology of Claimant's moderate COPD is unclear, stating both that he "is not totally disabled solely by a respiratory or ventilatory impairment caused by the inhalation of coal [dust]" and that his disability is "multifactorial including morbid obesity and musculoskeletal issues." Employer's Exhibit 9 at 4-5.

Claimant's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the award of benefits.

ALJ's Fee Award

On August 3, 2020, Claimant's counsel (counsel) filed a complete, itemized fee petition requesting $15,423.66 for legal services performed, and expenses incurred, before the OALJ from June 10, 2015 to July 6, 2020. The total fee requested represents: $9,537.50 for 27.25 hours of legal services performed by Attorney Joseph E. Wolfe at an hourly rate of $350; $1,650 for 8.25 hours of legal services performed by Attorney Brad A. Austin at an hourly rate of $200; $150 for 1 hour of legal services performed by Attorney Rachel Wolfe at an hourly rate of $150; and $1,725 for 17.25 hours of legal assistant services performed at an hourly rate of $100, and expenses of $2,361.16.[26] ALJ Fee Request at 1, 11-12.

Employer objected to the hourly rates of Attorneys Joseph Wolfe, Brad Austin, and the legal assistants, and challenged several of the services and times charged. But the ALJ did not receive Employer's objections until after he awarded the fee and ultimately found them untimely filed. Order Denying Reconsideration of Fee Award at 1-2. The ALJ awarded the requested hourly rates, found the times charged compensable, and ordered Employer to pay counsel $15,423.66. ALJ's Fee Award at 1-2; Order Denying Reconsideration of Fee Award at 1-2.

On appeal, Employer contends the ALJ erred in not addressing its challenges and reiterates its objections to the hourly rates and time awarded. Counsel responds, urging affirmance of the hourly rates awarded and asserting his quarter-hour billing increments comply with the regulations. The Director declined to file a substantive response brief to Employer's appeal of the ALJ's fee award.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010); *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc).

We decline to address Employer's challenges to the ALJ's award of the hourly rates or the time charged because Employer failed to timely raise its objections before the ALJ. Neither the Act nor the regulations sets a time period for when fee petitions or any objections to them must be filed with the ALJ. *See* 33 U.S.C. §928. The regulations permit

[26] Counsel requested $2,341.16 in costs but submitted receipts totaling $2,361.16. ALJ Fee Request at 1, 12, 31-42.

the ALJ who considers a fee request to set the time limit for filing the fee petition and any objections to it. 20 C.F.R. §725.366(a) (requiring the documents to be filed "within the time limits allowed by the . . . [ALJ]."). In his decision awarding benefits, the ALJ required counsel to file his fee petition no later than 30 days after the date of his award of benefits and Employer to file its objections to it no later than 21 days after receiving it. Decision and Order at 55-56. Counsel filed his fee petition on August 3, 2020, and the ALJ rationally found Employer's objections were therefore due on or before August 27, 2020, allowing for three days of mailing time for its receipt of the fee petition. Order Denying Reconsideration of Fee Award at 1-2. On appeal, Employer does not assert its objections to counsel's fee petition were timely filed. Employer's Brief in Appeal of ALJ's Fee Award at 3-4. Based on these facts, the ALJ permissibly refused to consider Employer's untimely filed objections. *See Cox*, 602 F.3d at 289; *Jones*, 21 BLR at 1-108; Decision and Order at 55-56; Order Denying Reconsideration of Fee Award at 1-2.

Additionally, Employer asserts the ALJ erred in awarding a fee that exceeded the fee request by $20.00. Employer's Brief in Appeal of ALJ's Fee Award at 3 (asserting ALJ improperly awarded $15,423.66 in fees and costs while counsel's fee petition requested only $15,403.66). We disagree. The $20.00 discrepancy is due to counsel's error on the first page of his fee petition where he asserted $2,341.16 in costs, when he actually submitted receipts for $2,361.16 in costs. ALJ Fee Request at 1, 12, 31-42. Consequently, the ALJ properly awarded fees and costs of $15,423.66, and we therefore affirm it. ALJ's Fee Award at 1-2.

District Director's Fee Award

On September 6, 2017, counsel filed a complete, itemized fee petition requesting $3,975 for legal services performed before the district director from August 7, 2014 to May 13, 2015. The total fee requested represents: $3,825 for 9 hours of legal services performed by Attorney Joseph E. Wolfe at an hourly rate of $425; $100 for .5 hour of legal services performed by Attorney Brad A. Austin at an hourly rate of $200; and $50 for .5 hour of legal assistant services performed at an hourly rate of $100. District Director Fee Request at 11. On September 28, 2017, Employer objected to the hourly rates of Attorneys Wolfe and Austin, and the legal assistants, and to certain time charged.[27] The district director reduced the hourly rates of Attorneys Wolfe and Austin to $200 and $175, respectively, and the legal assistants to $50. She disallowed three hours of time as clerical, unnecessary,

[27] The law firm of Greenberg Traurig LLC previously represented Employer and filed its objections to counsel's fee request before the district director.

or duplicative and excessive.[28] District Director's Fee Award at 2. The district director's fee award totaled $1,350. *Id.*

Employer contends the district director erred in awarding the hourly rate of $175 to Attorney Austin and that he is entitled to no more than $125. Employer's Brief in Appeal of District Director's Fee Award at 5. Claimant's counsel did not respond to Employer's appeal of the district director's fee award. The Director has declined to file a substantive response brief in this appeal.

Under fee-shifting statutes, the United States Supreme Court has held that courts must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Cox*, 602 F.3d at 276.

An attorney's reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "[T]he rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record" comprises the market rate. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 (6th Cir. 2008). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *see Gosnell*, 724 F.3d at 571. Further, the regulation states: "[a]ny fee approved under . . . this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." 20 C.F.R. §725.366(b).

Employer contends "the record and local market rates [support] no more than $125 as an hourly rate for black lung counsel with Attorney Austin's experience." Employer's Brief in Appeal of District Director's Fee Award at 5. We disagree.

[28] The district director disallowed or reduced times charged on the following dates: October 31 and November 12, 2014; January 12, February 10, 23, and 28; March 17, 24, 27, April 3, and May 13, 2015. District Director's Fee Award at 2.

The district director appropriately assessed the reasonableness of the requested hourly rate by considering the regulatory criteria set forth at 20 C.F.R. §725.366(b), including the qualifications of the representatives, complexity of the issues involved, and level at which the claim was decided. 20 C.F.R. §725.366(b); District Director's Fee Award at 2. In reducing Attorney Austin's hourly rate from $200 to $175, the district director stated the "work was performed in a routine case which did not call for special ability and effort" and "the approved rate is comparable to that being charged by other highly qualified attorneys within the same geographical location who also have considerable expertise in the handling of [f]ederal black lung claims." District Director's Fee Award at 2.

Contrary to Employer's contention, the district director's award of an hourly rate of $175 to Attorney Austin is supported by the record and the local market rates. Counsel identified eighteen cases in which a district director awarded Attorney Austin $150 per hour and one case in which a district director awarded him $225 per hour. District Director Fee Request at 4-6, 8-10. "[P]rior fee awards constitute evidence of a prevailing market rate that may be considered in fee-shifting contexts, including those prescribed by the [Act]." *Gosnell*, 724 F.3d at 572. "[T]he most reliable indicator of prevailing market rates in a black lung case will be evidence of rates allowed in other black lung cases." *Id*. at 573. If both $150 and $225 "represent reasonable approximations of the going rate for like work and like experience, it is hard to fathom" how $175 (a number in the middle) does not as well. *See, e.g.*, *Bentley*, 522 F.3d at 664. "Because hourly rates are not set on the trading floor, reasonable differences in opinion about what constitutes the appropriate rate can be expected." *Id*. at 665.

Given that the record establishes a reasonable hourly rate for Attorney Austin is either $150 or $225, Employer has not established an abuse of discretion in the district director's award of an hourly rate at $175. *Gosnell*, 724 F.3d at 572-73; *Cox*, 602 F.3d at 289; *Bentley*, 522 F.3d at 664-65; District Director Fee Request at 4-6, 8-10. We therefore affirm the district director's award of $175 per hour to Attorney Austin. As Employer raises no other challenges, we affirm the district director's fee award.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits, the ALJ's Order Awarding Attorney's Fees and Costs and Order Denying Reconsideration of Order

Awarding Attorney's Fees and Costs, and the district director's Proposed Order Supplemental Award Fee for Legal Services.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge