U.S. Department of Labor

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

BRB Nos. 21-0446 BLA
and 21-0520 BLA

ANNA L. CONLEY (o/b/o and Widow of WILBUR L. CONLEY) Claimant-Respondent v. BRUSH[1] CREEK COAL COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 9/13/2022 DECISION and ORDER

Appeal of the Order Setting Aside April 29, 2021 Decision and Order Awarding Benefits in Living Miner's and Surviving Widow's Claims and

[1] As Employer notes, Employer's name is Brush Creek Coal Company, Inc., not Bush Creek Coal Company, Inc. as incorrectly found on the ALJ's Decision and Order captions and the Director's response brief. Employer's First Reply Brief at 1 n.1; Employer's Second Reply Brief at 1 n.1.

Issuing Amended Decision and Order Awarding Benefits of Larry A. Temin, 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 and Brian Straw (Greenberg Traurig LLP), Washington, D.C., 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's Order Setting Aside April 29, 2021 Decision and Order Awarding Benefits in Living Miner's and Surviving Widow's Claims and Issuing Amended Decision and Order Awarding Benefits (2019-BLA-06259 and 2019-BLA-06366) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act).[2] This case involves a subsequent miner's claim[3] filed on July 6, 2017, and a survivor's claim filed on June 20, 2019.

The ALJ found Claimant[4] established the Miner had 19.68 years of coal mine employment, with 18.18 years in underground mines, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant

[2] Employer's appeal in the miner's claim was assigned BRB No. 21-0446 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0520 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[3] The Miner filed his first claim on December 14, 1988, which the district director denied on September 12, 1991 because he did not establish any element of entitlement. Director's Exhibit 1. The Miner later filed a subsequent claim. Director's Exhibit 4.

[4] Claimant is the widow of the Miner, who died on May 19, 2019. Employer's Exhibit 5. She is pursuing the miner's claim on his behalf and her own survivor's claim.

established a change in an applicable condition of entitlement,[5] 20 C.F.R. §725.309(c), and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[6] Further, he found Employer failed to rebut the presumption and awarded benefits in the miner's claim. Finally, he determined Claimant is entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[7]

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[8] It also argues the removal provisions applicable to

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied the Miner's prior claim because he did not establish any element of entitlement; therefore, Claimant had to submit new evidence establishing at least one of the elements of entitlement in order to have the miner's claim reviewed on the merits. 20 C.F.R. §725.309(c).

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

[7] Section 422(*l*) of the Act provides 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

[8] 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.

ALJs rendered his appointment unconstitutional. Alternatively, Employer contends the ALJ erred on the merits in determining the length of the Miner's coal mine employment and finding Claimant established the Miner was totally disabled, and thus invoked the Section 411(c)(4) presumption. It also argues the ALJ erred in determining it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument that the ALJ erred in determining the length of the Miner's coal mine employment. Employer filed reply briefs to Claimant's and the Director's responses, reiterating its arguments.

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.[9] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[10] Employer's Brief at 10-15; Employer's First Reply Brief at 3-5; Employer's Second Reply Brief at 2-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December

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U.S. Const. art. II, § 2, cl. 2.

[9] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibits 5, 7, 8; Hearing Tr. at 19.

[10] *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)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

21, 2017,[11] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.*

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 Brief at 5-6. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 6-7. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response 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 authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

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

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

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

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

Employer does not assert the Secretary had no "knowledge of all material facts" or did not make a "detached and considered judgement" when he ratified ALJ Temin's appointment, but instead generally speculates he did not provide "genuine consideration" of the ALJ's qualifications. Employer's Brief at 14-15. It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where 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*" all its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 20-21. 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 Temin's appointment, which we have held constituted a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

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

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-21; Employer's First Reply Brief at 6-7; Employer's Second Reply Brief at 3-5. Employer generally argues the removal provisions in the

Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.*

Employer's arguments are not persuasive 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 regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, noted that in *Free Enterprise*[12] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th 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. In this case, Employer has not alleged an appropriate harm.

Nor do *Seila Law* or *Arthrex* support Employer's argument. In *Seila Law*, the Supreme 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

[12] 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 applicable to ALJs. *Lucia*, 138 S. Ct. at 2050 n.1.

Executive Branch because the CFPB was an "independent agency led by a single Director and vested with significant executive power."[13] 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. 1970. 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.* (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 a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show 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 the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

The Miner's Claim - Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial

[13] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau 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).

evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In determining the length of the Miner's coal mine employment, the ALJ considered the Miner's testimony, application for benefits form, employment history form, and Social Security Administration (SSA) earnings records. Decision and Order at 5-6; Director's Exhibits 4, 5, 7, 8, 36, 56. He permissibly found the Miner's SSA earnings records to be the most probative evidence. *See Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA earnings records over a miner's testimony and other sworn statements); Decision and Order at 6; Director's Exhibits 7, 8.

For the Miner's pre-1978 coal mine employment, the ALJ credited him with a full quarter of a year of coal mine employment for each quarter in which his SSA earnings records indicate he earned at least $50.00 from coal mine operators. Decision and Order at 6-7, *citing Tackett*, 6 BLR at 1-841 n.2; *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019) (ALJ may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"); *Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"); Employer's Brief at 31-32; Employer's First Reply Brief at 11-12; Employer's Second Reply Brief at 7-8. Using this method, the ALJ credited the Miner with 50 quarters, or 12.5 years, of coal mine employment from 1961 to 1977. *Id.* at 7.

For the Miner's coal mine employment from 1978 to 1987, the ALJ found the record insufficient to identify the beginning and ending dates of his coal mine employment. Decision and Order at 7. He thus applied the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[14] Decision and Order at 7. He divided the Miner's annual earnings for the operators set forth in the Miner's SSA earnings records by the yearly average wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Decision and Order at 7; Director's Exhibit 7. When the Miner's wages exceeded the 125-day average, the ALJ credited him with a

[14] If the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or if the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.

full year of coal mine employment. *Id*. If the Miner's earnings fell below the 125-day average, the ALJ credited him with a fractional year. *Id*. Applying this method of calculation, the ALJ found the Miner worked 7.18 years from 1978 to 1987. Decision and Order at 7. Adding those years to the Miner's 12.5 years of coal mine employment from 1961 to 1977, the ALJ credited the Miner with a total of 19.68 years of coal mine employment.[15] *Id*. at 6-7.

We initially reject Employer's argument that the ALJ erred in crediting the Miner with full quarters of coal mine employment from 1961 to 1977. Employer's Brief at 31-32; Employer's First Reply Brief at 11-12; Employer's Second Reply Brief at 7-8. Unlike *Shepherd*, which included specific evidence that the miner did not work the entire three months during some quarters, Employer's noting that the Miner's income was lower in some quarters than in others does not establish the ALJ erred in crediting the Miner with full quarters of coal mine employment. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019); Decision and Order at 6-7; Employer's Brief at 31-32.

We also reject Employer's argument that those portions of *Shepherd* that the ALJ relied on to calculate the Miner's post-1978 coal mine employment constituted dicta and were "unreasonable," "wrong," and "not controlling precedent." Employer's Brief at 21-31; Employer's First Reply Brief at 9-10; Employer's Second Reply Brief at 6-7. In *Shepherd*, the Sixth Circuit held a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a calendar year, "regardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year." 915 F.3d at 401-02. Thus, a miner need not also establish a full 365-day employment relationship with Employer. *Id.* The court in *Shepherd* expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)," including Section 725.101(a)(32)(i), which states 125 working days comprises a year of coal mine employment. *Id.* at 407. An inferior tribunal has no power or authority to deviate from an appellate court's mandate. *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). Thus, in this

[15] The ALJ found that except for the Miner's 1.5 years of work for Martin County Coal, the Miner's coal mine employment was performed underground. Decision and Order at 6-7, *citing* Director's Exhibits 5, 8, 20, 31. Employer does not challenge the ALJ's finding that the Miner had 18.18 years of underground coal mine employment. Thus we affirm his finding that the Miner had at least fifteen years of qualifying coal mine employment. Decision and Order at 6-7; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(b)(1)(i).

instance, the ALJ, and indeed the Board, is bound by the Sixth Circuit's decision in *Shepherd*.

Further, although Employer contends the ALJ overestimated the Miner's employment by 0.373 of a year for the year 1987 (the difference between the 0.54 of a year the ALJ found and the 0.167 of a year Employer proposes), reducing the ALJ's determination by this amount does not affect his conclusion that the Miner had at least fifteen years of coal mine employment. Decision and Order at 7; Employer's Brief at 21. Thus Employer has failed to explain how the error it alleges could have made any difference. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[16] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 15-19. Employer argues the ALJ erred in weighing the pulmonary function study and medical opinion evidence. Employer's Brief at 33-39; Employer's First Reply Brief at 12-13. We are not persuaded by Employer's arguments.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated March 14, 2016, February 28, 2018, and August 28, 2018. Decision and Order at 9-10, 15-17. The August

[16] The ALJ found the arterial blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 17. Additionally, there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

28, 2018 study produced qualifying[17] results for total disability both before and after the administration of bronchodilators, while the March 14, 2016 study produced non-qualifying results without the administration of bronchodilators and the February 28, 2018 study produced non-qualifying results before and after the administration of bronchodilators. Director's Exhibits 26, 31; Employer's Exhibit 1. The ALJ gave greatest weight to the August 28, 2018 study based on its recency and thus found the pulmonary function study evidence supports finding Claimant established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 16.[18]

Employer argues the ALJ erred in failing to address whether Claimant established the August 28, 2018 qualifying pulmonary function study revealed a compensable disability or, rather, whether its results were due to the secondary effects of his morbid obesity and congestive heart failure. Employer's Brief at 34-35, *citing Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); Employer's Frist Reply Brief at 12. However, Employer's argument is rejected because it conflates the issue of total respiratory or pulmonary disability with the issue of disability causation. Employer's Brief at 34-35. The relevant inquiry at 20 C.F.R. §718.204 and its subparts is whether the Miner had 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

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

[18] Employer does not raise any issue with the ALJ's giving greatest weight to the most recent pulmonary function study.

411(c)(4) presumption pursuant to 20 C.F.R. §718.305.[19] *See Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989).[20]

As it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a determination that the Miner suffered from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 17-19.

Medical Opinions

The ALJ considered the medical opinions of Drs. Dahhan, Jarboe, and Raj. Decision and Order at 11-14, 17-19; Director's Exhibits 20, 30, 31, 35; Employer's Exhibits 4, 6, 8, 10. Dr. Raj opined the Miner suffered from a disabling respiratory or pulmonary impairment based on the pulmonary function study evidence. Decision and Order at 16. Conversely, Dr. Dahhan opined the Miner did not suffer from a disabling respiratory or pulmonary impairment because the February 28, 2018 pulmonary function

[19] We reject Employer's argument that the Board held otherwise in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). In that case, the Board ultimately concluded a physician's testimony, that a miner's "severe degenerative neuromuscular problem" affected his objective testing, may be "relevant to the issue of the reliability of pulmonary function studies as indicators of a chronic respiratory or pulmonary disease." *Id*. at 1-134. But the Board did not hold that a doctor's opinion that a miner has a totally disabling respiratory or pulmonary impairment due to lung cancer supports a finding that a miner is not totally disabled.

[20] Employer is mistaken in contending that the issue to be determined in order to establish total disability at 20 C.F.R. §718.204 is whether Claimant proved the Miner suffered from a totally disabling respiratory impairment separate and apart from any other non-respiratory conditions and that, consequently, a respiratory impairment caused by a non-respiratory condition cannot be considered. Employer's Brief at 34-38. The pertinent regulation provides: "If, however, a *nonpulmonary or nonrespiratory condition or disease* causes a *chronic respiratory or pulmonary impairment, that condition or disease shall be considered* in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a) (emphasis added). Moreover, in defining total disability, the regulation addresses a "*pulmonary or respiratory impairment* which, standing alone, prevents or prevented the miner" from (i) "performing his . . . usual coal mine work" and (ii) "engaging in gainful employment . . .." 20 C.F.R. §718.204(b)(1). Thus it is the existence of a totally disabling pulmonary or respiratory impairment that is at issue when considering total disability, not the origin of the impairment. *See Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989).

study produced non-qualifying results and the Miner demonstrated normal oxygenation at rest. *Id*. at 17. Dr. Jarboe opined the Miner had a respiratory or pulmonary impairment due to his cardiac condition and obesity. *Id*.

The ALJ found Dr. Raj's opinion well-reasoned and well-documented, and Drs. Dahhan's and Jarboe's opinions not well-reasoned and well-documented. Decision and Order at 17-19. Thus he found Claimant established total disability based on Dr. Raj's medical opinion. *Id.* at 18-19.

Employer argues the ALJ erred in crediting Dr. Raj's opinion because the doctor does not "cite to any medical literature or authority" to support his "conclusion that [the Miner's] disability was the result of coal dust exposure." Employer's Brief at 36-37. We disagree because, as we previously noted, the relevant inquiry at 20 C.F.R. §718.204 is whether the Miner's respiratory or pulmonary condition precluded the performance of his usual coal mine work, not the etiology of the Miner's respiratory or pulmonary condition. The ALJ accurately recognized Dr. Raj's opinion supports the conclusion that the Miner was totally disabled. Decision and Order at 17-18. As Employer raises no further arguments regarding Dr. Raj's opinion, we affirm the ALJ's finding that it is supported by substantial evidence. *Id*.

We also are not persuaded by Employer's argument that the ALJ erred in discrediting Dr. Dahhan's opinion by substituting his own judgment and the conclusions set forth in the preamble to the 2001 revised regulations for those of the medical experts. Employer's Brief at 38-39.

Dr. Dahhan stated "there was no evidence of a functional pulmonary impairment or disability and the Miner retained the physiological capacity to return to his previous coal mine job as he demonstrated normal oxygenation at rest and with exercise and his February 2018 [pulmonary function study] results were above disability standards." Decision and Order at 18. However, as the ALJ noted, Dr. Dahhan did not address the August 28, 2018 qualifying pulmonary function study which he had conducted. *Id*. The ALJ permissibly found Dr. Dahhan's opinion not well-reasoned and well-documented because he did not explain the omission of addressing his qualifying pulmonary function study and how it would impact the Miner's ability to work. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 18.

Employer further argues the ALJ erred in discrediting Dr. Jarboe's opinion. Employer's Brief at 37-39. The ALJ noted "Dr. Jarboe was asked if the Miner was disabled from his pneumoconiosis and opined that he was not because he did not have pneumoconiosis." Decision and Order at 18. He also noted Dr. Jarboe "stated that 'any

impairment' the Miner had stemmed from cardiac diseases." *Id.* Based on Dr, Jarboe's statements, the ALJ stated he was "unable to determine if Dr. Jarboe felt the Miner was disabled or impaired solely from a cardiac standpoint or if he suffered from a disabling pulmonary or respiratory impairment as a consequence of his cardiac conditions." *Id.* The ALJ permissibly found Dr. Jarboe's opinion not well-reasoned and well-documented because he did not adequately address the issue of total disability. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 18.

Thus, because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on Dr. Raj's medical opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 18-19.

Employer also argues the ALJ erred in failing to weigh the qualifying August 28, 2018 pulmonary function study and the totality of the pulmonary function study evidence against the non-qualifying arterial blood gas studies. Employer's Brief at 33-34; Employer's First Reply Brief at 12. Contrary to Employer's contention, the ALJ found the blood gas studies did not support finding total disability; however, in weighing the evidence as a whole, he determined that the non-qualifying blood gas study results did not preclude a conclusion that the miner was totally disabled. Decision and Order at 18. As the ALJ noted, blood gas studies and pulmonary function studies measure different types of impairment; therefore, non-qualifying arterial blood gas studies do not necessarily call into question valid and qualifying pulmonary function studies. *Id.*; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 798 (1984). Thus we affirm the ALJ's permissible finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 19. We therefore affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

As the Miner had at least fifteen years of underground coal mine employment and was totally disabled by a respiratory or pulmonary impairment, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 19.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[21] or "no

[21] 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). This definition

part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[22]

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 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). The Sixth Circuit, within whose jurisdiction this case arises, holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the Miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Drs. Dahhan's[23] and Jarboe's[24] opinions that the Miner did not have legal pneumoconiosis. Director's Exhibit 31; Employer's Exhibits 4, 6, 8, 10. The

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

[22] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 21.

[23] Dr. Dahhan diagnosed the Miner with sleep apnea, coronary artery disease, peripheral vascular disease, congestive heart failure and hyperthyroidism. Director's Exhibit 31; Employer's Exhibit 6. He attributed the Miner's respiratory impairment to his obesity, sleep apnea, cardiac condition, and smoking history, and opined the Miner did not have any obstructive or restrictive pulmonary disease arising out of coal mine employment. *Id.*

[24] Dr. Jarboe diagnosed the Miner with coronary artery disease with associated ischemic cardiomyopathy and chronic kidney failure. Employer's Exhibit 4, 8, 10. He

ALJ found their opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 23.

Employer does not challenge the ALJ's discrediting of Dr. Dahhan's opinion. Decision and Order at 21-23; Director's Exhibit 20, 30, 31, 35; Employer's Exhibit 6. Thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ did not give permissible reasons for discrediting Dr. Jarboe's opinion. Employer's Brief at 38-39. We disagree. The ALJ accurately observed Dr. Jarboe excluded coal mine dust exposure as a causative factor for the Miner's respiratory impairment, in part, because the Miner had normal pulmonary function study results in 2016 – almost thirty years after his last coal mine employment – and then developed a marked deterioration in pulmonary function study results in 2018. Decision and Order at 22; Employer's Exhibit 4 at 9. Dr. Jarboe believed an impairment caused by coal mine dust would not cause "such a rapid fall in lung function." Employer's Exhibit 4 at 9. In accordance with case precedent, the ALJ permissibly found Dr. Jarboe's reasoning inconsistent with the regulations that recognize pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[25] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014) (affirming an ALJ's decision to discredit, as inconsistent with the Act, the opinion of a physician who eliminated coal mine dust as a cause of the miner's disease because "bronchitis associated with coal dust exposure usually ceases with cessation of exposure"); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); Decision and Order at 22-23.

Employer's arguments on legal pneumoconiosis are a request to re-weigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah,*

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opined the Miner did not have any obstructive or restrictive pulmonary disease arising out of coal mine employment. *Id.*

[25] Contrary to Employer's contention, an ALJ may evaluate opinions of medical experts in conjunction with the preamble to the 2001 revised regulations, as it sets forth medical studies the DOL found credible and provides the Department's statement of medical principles underlying the regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Brief at 38-39; Employer's First Reply Brief at 12.

Inc., 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis.[26] *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 23.

Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[27] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Employer has not challenged the ALJ's finding that it failed to establish no part of the Miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 24-25. Thus, we affirm this finding. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 23-25. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in the miner's claim. Decision and Order at 25.

The Survivor's Claim - Derivative Entitlement

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge as to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 26.

[26] As the ALJ gave valid reasons for discrediting Drs. Jarboe's opinion, we need not address Employer's other arguments regarding the ALJ's weighing of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 37-40.

[27] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts, we need not address Employer's arguments concerning the ALJ's weighing of Drs. Raj's opinion that the Miner had legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 23; Employer's Brief at 36-37.

Accordingly, the ALJ's Order Setting Aside April 29, 2021 Decision and Order Awarding Benefits in Living Miner's and Surviving Widow's Claims and Issuing Amended Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge