U.S. Department of Labor

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

BRB No. 19-0211 BLA

VERA M. ABSTON (Widow of GASCHOL ABSTON, JR.) Claimant-Respondent v. ABSTON CONSTRUCTION COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/08/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., and John C. Webb and Aaron D. Ashcraft (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05635) of Administrative Law Judge Clement J. Kennington on a survivor's claim[1] filed on October 13, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found the miner had at least thirty-three and one-half years of surface coal mine employment[2] in conditions substantially similar to those in an underground mine and was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[3] He found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also challenges his authority in light of the procedures for removing administrative law judges. In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, but nevertheless contends the

[1] Claimant is the widow of the miner, who died on August 18, 2009. Director's Exhibit 5.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the miner's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6-9.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *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, 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.

administrative law judge improperly invoked the presumption based on erroneous findings that the miner had qualifying coal mine employment and was totally disabled. Employer finally argues he erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief at 10-16. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[6] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior

[5] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge 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 administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

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

Secretary's December 21, 2017 Letter to Administrative Law Judge Kennington.

appointment.[7] *Id*. at 14-16. Employer further alleges no evidence demonstrates the Secretary engaged in a "genuine . . . thoughtful, consideration of potential candidates for these positions" or "interviewed them, or administered an oath or took any other action that suggests that these appointments were his own." *Id*. at 15. We reject employer's argument, as the Secretary's ratification was a valid exercise of his authority and brought the administrative law judge's appointment into compliance with the Appointments Clause.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time of the ratification of the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, it is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Kennington and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Kennington. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Kennington "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, employer

[7] On July 20, 2018, the Department of Labor (DOL) expressly conceded that the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

has not overcome the presumption of regularity.[8] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge.[9] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

Employer also argues *Lucia* precludes the administrative law judge from hearing this case notwithstanding the Secretary's ratification because the administrative law judge took significant action before December 21, 2017, while not properly appointed. We disagree.

Employer generally asserts the administrative law judge's decision must be vacated because he "was not properly appointed . . . when he resolved various discovery disputes." Employer's Brief at 13. Employer does not, however, identify any of those discovery disputes or explain why the administrative law judge's actions entitle it to have the case reheard by a different administrative law judge pursuant to *Lucia*. The Supreme Court did not order reassignment to a new adjudicator in *Lucia* simply because the administrative law judge was improperly appointed during an early phase of the proceedings. Reassignment was necessary because the administrative law judge, while improperly

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[8] While employer notes correctly that the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 15, 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.").

[9] We also reject employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 14-16. Employer's argument has no merit. 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).

appointed, "already both heard Lucia's case and issued an initial decision on the merits" and thus could not "be expected to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. Accordingly, pre-ratification actions "not based on the merits of the case" do not require remand as they "would not be expected to color the administrative law judge's consideration of the case" and therefore do not "taint the proceedings" with an Appointments Clause violation. *Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020).

Our review of the record reveals the administrative law judge issued three orders before the ratification of his appointment, none of which requires remand under *Lucia*. On May 1, 2017, he issued a Notice of Hearing setting deadlines for the parties to exchange evidence and submit briefs, as well as scheduling the hearing date. On June 8, 2017, he issued a Notice of Canceling Hearing granting the parties' joint motion to cancel the hearing and set new deadlines. Neither action involves consideration of the merits of the case. The Notice of Hearing reiterates statutory and regulatory requirements governing the hearing procedures and the Notice of Canceling Hearing amended the Notice of Hearing at the parties' request. *Noble*, BRB No. 18-0533 BLA, slip op. at 4.

The only discovery dispute resolved before the ratification of the administrative law judge's appointment involved the denial of employer's request to depose unidentified DOL or "federal health authority" employees to testify with respect to "the medical literature cited in the preamble to the revised black lung regulations" and the "medical research and literature" used to promulgate regulations implementing the Section 411(c)(4) presumption. June 16, 2017 Notice of Deposition. Employer sought this testimony to attempt to invalidate the medical science the DOL relied on in promulgating the 2001 regulatory revisions and 20 C.F.R. §718.305. Employer's Opposition to Motion for Protective Order.

In a July 18, 2017 Order, the administrative law judge granted the Director's motion for a protective order, ruling that employer's request involved "the thought processes and factual findings of agency interpretations and policies" that were "irrelevant to the merits of [c]laimant's instant claim" and "not reasonably calculated to lead to the discovery of admissible evidence." July 18, 2017 Order at 3. He further found the request would lead to unnecessary delay because it is "merely a 'fishing expedition' to depose DOL officials regarding topics that do not pertain to" the miner and do "not resolve the key issues in this black lung claim." *Id*. As employer's discovery request involved an irrelevant collateral attack on both the preamble[10] and the regulations, unnecessary to resolve this claim, the

[10] An administrative law judge may evaluate expert opinions in conjunction with the preamble to the 2001 revised regulations, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Harman Mining Co. v. Director,*

administrative law judge's denial of its request did not involve consideration of the merits or "critically shape the administrative record." *Lucia*, 138 S.Ct. at 2053.

Thus, unlike *Lucia*, in which the judge presided over a hearing and issued a decision on the merits while not being properly appointed, the orders the administrative law judge issued in this claim did not affect his ability to consider the merits of the claim after the ratification of his appointment "as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. Because the administrative law judge took no action that would "taint the adjudication with an Appointments Clause violation," we decline to remand this case to the Office of Administrative Law Judges. *Noble*, BRB No. 18-0533 BLA, slip op. at 4; *see also Lucia*, 138 S.Ct. at 2055.

Removal Provisions

Employer argues the administrative law judge lacked authority to adjudicate this case because "he is still subject to the removal provisions of the Civil Service" and thus his consideration of this case violates "the separation of powers doctrine." Employer's Brief at 11-13. Employer has failed to adequately brief this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of argument that the FTC is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

OWCP [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). But the administrative law judge did not refer to the preamble in this case.

Employer states that the administrative law judge's appointment was improper in view of the removal provisions contained in the Administrative Procedure Act, 5 U.S.C. §7521. Employer's Brief at 11-13. Employer has not specified how those provisions violate the separation of powers doctrine or explained how such a holding undermines the administrative law judge's authority to preside over this case.[11] *Id*. Thus, we decline to address the issue. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 17-18. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting).[12] Moreover, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA.

[11] Employer cites the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and Justice Breyer's concurrence and dissent in *Lucia*. Employer's Brief 11-13. It notes that in *Free Enterprise*, the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus resulted in a "constitutionally impermissible diffusion of accountability." *Id*. at 12-13. Contrary to employer's argument, the Supreme Court in *Free Enterprise* stated that its holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10. Moreover, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

[12] Furthermore, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

Invocation of the Section 411(c)(4) Presumption - Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish the miner had at least fifteen years of employment in underground coal mines or surface coal mine employment in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found the miner had thirty-three and one-half years of surface coal mine employment.[13] Decision and Order at 5. He also found claimant's testimony credibly established the miner was regularly exposed to coal mine dust for this entire time.[14] *Id.* at 7. Further, he found the miner's coworker's testimony corroborated claimant's statements the miner was regularly exposed to coal mine dust.[15] *Id.* Thus he found claimant established greater than fifteen years of qualifying coal mine employment necessary to invoke the presumption.

We reject employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid because it "eliminates the distinction between underground and surface exposure" and is contrary to the Act. Employer's Brief at 18. The United States Courts of Appeals for the Sixth and Tenth Circuits have rejected similar arguments and upheld the validity of

[13] We affirm, as unchallenged, the administrative law judge's finding that the miner had thirty-three and one-half years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[14] Claimant testified the miner came home covered in dust almost every day he worked in coal mining for thirty-six years. Claimant's Exhibit 7 at 47. He was covered in dust because he worked in the pit. *Id.* at 45. Further, he was exposed to coal dust while he worked for employer as a coal loader. *Id.* at 42. When he came home, she could only see the "whites of his eyes" because his body was covered in dust. *Id.* When he worked as a supervisor, his clothes would be covered in dust. *Id.* She had to wash them under a hose pipe before putting them in the washing machine. *Id.* She also indicated his car was covered in dust when he came home from work. *Id.*

[15] The miner's coworker, Johnny Price, signed an affidavit stating he worked with the miner from 1976 to 1997 for employer and both of them were covered from head to toe with coal and rock dust daily. Claimant's Exhibit 6.

20 C.F.R. §718.305(b)(2). *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018) (Kethledge, J., concurring); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

Employer also alleges the administrative law judge failed to consider relevant evidence when finding substantial similarity between the miner's surface coal mine employment and underground coal mine employment, but does not identify what evidence he failed to discuss. *See Cox*, 791 F.2d at 446; *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 Brief at 18. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(2).

Total Disability

To invoke the Section 411(c)(4) presumption, claimant must establish the miner was totally disabled at the time of his death. 20 C.F.R. §718.305(b)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions.[16] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge 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). 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 administrative law judge considered three arterial blood gas studies conducted on October 29, 1997, January 17, 2002, and June 15, 2009. Decision and Order at 10. The October 29, 1997 and January 17, 2002 studies produced non-qualifying[17] values while the June 15, 2009 study produced qualifying values. Claimant's Exhibit 2; Employer's

[16] The administrative law judge found claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 21-22.

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

Exhibits 3, 6. The administrative law judge credited the June 15, 2009 qualifying study because it is the most recent. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 21-22.

Employer argues the administrative law judge erred in crediting the June 15, 2009 blood gas study because it asserts the study is invalid. Employer's Brief at 19. Employer, however, did not dispute the validity of this study before the administrative law judge. We will not consider such challenges for the first time on appeal. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (Levin, J., concurring). The administrative law judge rationally found the blood gas studies establish total disability because the June 15, 2009 study was performed over seven years after the next most recent study and was qualifying. *See Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1288 (11th Cir. 2019); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 21-22. Thus we affirm the administrative law judge's finding that the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 21-22.

The administrative law judge next weighed the medical opinions of Drs. O'Reilly, Rosenberg, and Tuteur. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22-24. Dr. O'Reilly reviewed medical records, including June 15, 2009 testing conducted as part of the miner's May 11, 2009 claim for benefits.[18] Claimant's Exhibits 2, 3. The June 15, 2009 testing revealed mild obstructive lung disease on pulmonary function testing and severe hypoxemia on arterial blood gas testing that was qualifying for total disability under the regulations. *Id*. Dr. O'Reilly noted the miner had an oxygen saturation of 90% on three liters of oxygen. *Id*. He indicated the blood gas testing was out of proportion to the pulmonary function testing and chest x-ray done on June 15, 2009. *Id*. He opined the miner's pneumoconiosis, standing alone, was not totally disabling and would not have prevented him from performing his usual coal mine work. *Id*.

Dr. Rosenberg reviewed medical records and initially opined the miner had mild, non-disabling airflow obstruction and no gas exchange abnormality with exercise. Employer's Exhibit 7 at 7. After reviewing the June 15, 2009 blood gas study and Dr. O'Reilly's report, he opined the miner did not have a disabling pulmonary impairment because his "heart disease and worsening congestive heart failure" caused the "hypoxia and gas exchange abnormalities noted by Dr. O'Reilly." Employer's Exhibit 12.

Dr. Tuteur reviewed medical records and initially opined the miner had mild obstructive and restrictive lung abnormalities with no gas exchange impairment. Employer's Exhibit 8 at 4-5. After reviewing the June 15, 2009 blood gas study, he agreed

[18] Dr. O'Reilly was scheduled to exam the miner in August 2009, but the miner died before the scheduled examination. Claimant's Exhibits 2, 3.

it evidenced an oxygen gas exchange impairment at rest, but attributed the impairment to the miner's advanced coronary artery disease. Employer's Exhibit 13.

Contrary to employer's argument, the administrative law judge permissibly discredited the opinions of Drs. O'Reilly, Rosenberg, and Tuteur because he found they "did not address . . . whether, given his hypoxemia on arterial blood gas studies and his need for supplemental oxygen, [the miner] was able to return to his previous coal mine employment." Decision and Order at 24; *see U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."). Further, he correctly noted Drs. Rosenberg and Tuteur acknowledged the miner's gas exchange impairment near the end of his life as evidenced by blood gas testing, but permissibly found their opinions unpersuasive because they focused on the cause of the impairment and thus "conflated the issues of total disability and causation."[19] Decision and Order at 24; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460.

Thus we affirm, as supported by substantial evidence, the administrative law judge's determination that the medical opinion evidence does not undermine the blood gas study evidence supporting a finding of total disability. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 24. Because there is no evidence undermining the qualifying June 15, 2009 arterial blood gas study, we further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and his determination that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 24.

[19] Employer asserts the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Tuteur because they indicated the results of the June 15, 2009 blood gas study could be attributed to the miner's "heart disease, not any respiratory or pulmonary impairment." Employer's Brief at 19. It also argues he failed to address that the medical evidence establishes the miner's need for supplemental oxygen was related to his cardiac conditions. *Id*. These arguments have no merit. As the administrative law judge correctly observed, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the impairment is a distinct and separate issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); Decision and Order at 12.

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

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[20] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *see Ferguson*, 920 F.3d at 1287-88; *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.[21]

To disprove legal pneumoconiosis, employer must demonstrate 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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge acknowledged Dr. Rosenberg's opinion that "during the 'latter part of his life,' [the miner's] heart disease and worsening congestive heart failure undoubtedly caused his hypoxia and gas exchange abnormalities as noted by Dr. O'Reilly" and evidenced by the blood gas testing. Decision and Order at 23, *quoting* Employer's Exhibit 12. He permissibly found Dr. Rosenberg did not adequately "discuss the role of [the miner's] coal mine dust exposure in the development of his disabling hypoxemia" when excluding the existence of legal pneumoconiosis.[22] Decision and Order

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

[21] The administrative law judge found that employer disproved clinical pneumoconiosis. Decision and Order at 26.

[22] Contrary to employer's argument, the administrative law judge did not discredit Dr. Rosenberg's opinion because he failed to identify a cause of the miner's impairment on blood gas testing. Employer's Brief at 20. Rather, he correctly stated employer has the burden of establishing the miner's lung disease or impairment was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); 20 C.F.R. §§718.201(b), 718.305(d)(2)(i); Decision and Order at 27. As noted, the administrative law judge acknowledged Dr. Rosenberg's opinion that the miner's disabling hypoxia was caused by

at 29-30; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); 20 C.F.R. §§718.201(b), 718.305(d)(2)(i).

Dr. Tuteur diagnosed mild to moderate emphysema based on CT scan readings. Employer's Exhibit 8 at 7. He opined the emphysema was unrelated to coal mine dust exposure because twenty percent of adult smokers who never engage in coal mining develop the chronic obstructive pulmonary disease (COPD) "phenotype," whereas one percent of adult miners who never smoke cigarettes develop the disease. *Id*. Contrary to employer's argument, the administrative law judge permissibly found this reliance on statistics unpersuasive to rebut the presumption of the existence of legal pneumoconiosis because, even assuming COPD in non-smoking miners is rare, the doctor did not address why the miner "could not be one of the statistically 'rare' individuals who develop obstruction as a result of coal mine dust exposure." Decision and Order at 29; *see Young*, 947 F.3d at 408-09; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Further, the administrative law judge noted that Dr. Tuteur opined the miner's coronary artery disease "fully explain[s]" his disabling blood gas exchange impairment. Decision and Order at 28; Employer's Exhibit 13. The administrative law judge permissibly found Dr. Tuteur "did not address the issue of whether [the miner's] significant history of coal mine dust exposure was a factor in his disabling hypoxemia." Decision and Order at 28; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *see Young*, 947 F.3d at 403-07; 20 C.F.R. §§718.201(b), 718.305(d)(2)(i). Thus we affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis and therefore did not rebut the presumption by establishing the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); *see Ferguson*, 920 F.3d at 1287-88; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

The administrative law judge next addressed whether employer established that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii). He permissibly discredited the opinions of Drs. Rosenberg and Tuteur because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that employer failed to disprove the miner had the disease. *See Ferguson*, 920 F.3d at 1288-89; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 31. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii).

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heart conditions, but permissibly found he did not adequately explain how he eliminated coal mine dust as a cause or contributor to that impairment.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge