U.S. Department of Labor

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

BRB No. 21-0111 BLA

HELEN KENDRICK (o/b/o HASSEL KENDRICK)	)	
Claimant-Respondent	)	
v.	)	
CIMARON MINERALS, INCORPORATED	)	
and	)	DATE ISSUED: 4/29/2022
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

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

David N. Miracchi (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2013-BLA-05518) in a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification[1] of a subsequent claim filed on September 9, 2009.[2]

[1] This case involves multiple requests for modification of a district director's denial of benefits. Director's Exhibits 42, 45, 61, 65, 68, 73, 74, 84, 86. In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[2] This is the Miner's fourth claim for benefits. Director's Exhibits 1, 2. On September 7, 2006, the district director denied his most recent claim, filed on April 5, 2002. Director's Exhibit 2 at 9, 65. Although the Miner established he had a totally disabling respiratory or pulmonary impairment, he established no other element of entitlement. *Id.* Where 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 "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)(1); *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). Consequently, to obtain review on the merits of the Miner's current claim, Claimant had to submit new evidence establishing he had pneumoconiosis. *Id.*

The ALJ[3] found Claimant[4] established the Miner had 19.03 years of qualifying coal mine employment. He further found Claimant established a totally disabling respiratory or pulmonary impairment,[5] 20 C.F.R. §718.204(b)(2), and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[6] 30 U.S.C. §921(c)(4) (2018). Thus, he determined Claimant established a change in applicable condition of entitlement since the prior denial and found modification would render justice under the Act. 20 C.F.R. §725.310. Finally, he found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[7] It also argues the removal provisions applicable to Department

[3] ALJ Larry A. Temin previously issued a Decision and Order Awarding Benefits in this case on July 19, 2017. Pursuant to Employer's Appointments Clause challenge, the Benefits Review Board remanded the case to ALJ Temin, instructing him to reconsider the substantive and procedural actions taken and to issue a decision accordingly, because he had taken actions in this case before his appointment was ratified on December 21, 2017. *Kendrick v. Cimaron Minerals, Inc.*, BRB No. 17-0595 BLA (Mar. 14, 2018) (Order) (unpub.). ALJ Temin subsequently issued a Decision and Order on Remand reaffirming his prior decision. Employer again appealed, and the Board again vacated his decision, this time remanding the claim for a hearing before a different, properly appointed ALJ in light of *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018); *Kendrick v. Cimaron Minerals, Inc.*, BRB No. 18-0347 BLA (Feb. 5, 2019) (unpub.). ALJ Golden was then assigned the case.

[4] The Miner died on June 23, 2015. Claimant's Exhibit 7. Claimant, his widow, is pursuing this claim on his behalf. Employer's Exhibit 22 at 6-7.

[5] The ALJ also found Claimant failed to establish complicated pneumoconiosis and thus was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. Decision and Order at 18.

[6] 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in concluding Claimant invoked the Section 411(c)(4) presumption because he incorrectly calculated the Miner's length of coal mine employment and erred in finding Claimant established a totally disabling respiratory impairment. In addition, it argues the ALJ erred in finding it failed to rebut the presumption. Finally, it challenges the ALJ's determination of the onset date for the commencement of benefits.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging rejection of Employer's constitutional challenges to the ALJ's appointment and removal protections. The Director also urges the Board to reject Employer's arguments that the ALJ erred in finding the Miner totally disabled from a respiratory impairment. Employer filed a reply brief reiterating its arguments on the issues the Director addressed.

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.[8] 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 ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*,

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> [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.

[8] We will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6, *citing* Director's Exhibits 1 at 9; 2 at 227.

585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 18; Employer's Reply at 8. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[10] but maintains the ratification was insufficient to cure the constitutional defect in ALJ Golden's prior appointment.[11] Employer's Brief at 19-22; Employer's Reply at 1-5.

The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 4-6. 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 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

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[9] *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*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[10] The Secretary of Labor (Secretary) issued a letter to ALJ Golden 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 ALJ Golden. ALJ Golden issued no orders in this case until his August 6, 2019 notice of assignment, notice of hearing, and prehearing order.

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

(D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter but rather specifically identified ALJ Golden and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Golden. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Golden "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts," but instead generally speculates he did not provide "genuine consideration" of the ALJ's qualifications when he ratified the ALJ's appointment. Employer's Brief at 21; Employer's Reply at 3. Employer therefore has not overcome the presumption of regularity.[12] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (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

[12] While Employer notes the Secretary's ratification letter was signed by a "robo-pen," Employer's Reply at 3, this does not, as Employer seems to acknowledge, 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").

"confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).[13] Consequently, we reject Employer's argument that this case should again 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 22; Employer's Reply at 5-8. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 23-25. 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 in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 22-23, 25; Employer's Reply at 6-7.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [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. In *Seila Law*, the Court held that limitations on

[13] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 25-26, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Golden's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[14] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by Administrative Patent Judges during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (*quoting Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not 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 either facially or as applied. *Pehringer*, 8 F.4th at 1137-1138.

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

Length of Coal Mine Employment

Claimant may invoke the Section 411(c)(4) presumption if she establishes the Miner had a totally disabling respiratory impairment at the time of his death and at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C.

[14] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

§921(c)(4) (2018); 20 C.F.R. §718.305. Claimant bears the burden of proof 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 computation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year . . . ." 20 C.F.R. §725.101(a)(32)(iii). Thus, "to the extent the evidence permits," the fact-finder must first attempt to ascertain "the beginning and ending dates of all periods of coal mine employment . . . ." 20 C.F.R. §725.101(a)(32)(ii). If a calendar-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner is entitled to credit for one full year of employment. *Id.*

The ALJ considered the Miner's application, the Miner's and Claimant's testimonies, the Miner's various wage and tax statements, and the Miner's Social Security Administration (SSA) earnings record. Decision and Order at 9; Director's Exhibits 1 at 761-79, 937-1097; 2 at 236; 4-5; 9; Hearing Transcript at 11-12.

Crediting the Miner's SSA earnings record as the most reliable evidence, the ALJ found the Miner was employed as a coal miner for the years 1963, 1965 to 1983, and 1986 to 1988. Decision and Order at 9-17. However, he could not determine the specific beginning and ending dates of the Miner's coal mine employment. *Id.* Therefore, for the years prior to 1978, the ALJ credited the Miner with a full quarter of employment for each quarter in which he earned more than $50.00, for a total of 11.5 years of coal mine employment for those years. Decision and Order at 10-11. For the Miner's employment from 1978 to 1987, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to credit him with an additional 7.51 years of coal mine employment. *Id.* at 17. The ALJ further credited the Miner with 0.02 year of coal mine employment in 1988 based on his testimony

that he worked for J.M.C. Coal Company for two days as a roof bolter before being injured. *Id.*

Employer contends the ALJ erred in determining the Miner had at least fifteen years of coal mine employment. Employer's Brief at 33-39. We disagree.

Initially, we reject Employer's argument that the ALJ's crediting of a quarter of employment for each quarter the Miner had greater than $50.00 in earnings in the years prior to 1978 is unreasonable and yields "absurd" results. Employer's Brief at 33-34. For income earned prior to 1978, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that 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." *Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979); *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"); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). Because it was based on a reasonable method of calculation, we affirm the ALJ's determination that Claimant established the Miner had 11.5 years of pre-1978 coal mine employment. *See Muncy*, 25 BLR at 1-27; Decision and Order at 11.

The ALJ determined the Miner's SSA earnings records establish he worked for a full calendar year in coal mine employment during 1979, 1980, 1981, and 1982, as they reflect continuous income from PTRSS & T Coal Company from 1978 to 1983. Decision and Order at 16; Director's Exhibit 9. We affirm this determination as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The ALJ then addressed whether the Miner had 125 working days within each of these years in order to be credited with a full year of coal mine work and to determine the fractional amount of a year to be credited for partial years. 20 C.F.R. §718.101(a)(32); Decision and Order at 11-17. To do so, he divided the Miner's yearly earnings, as reflected in the Miner's SSA earnings record by the average daily earnings for coal miners for each year as set forth in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual* and divided that amount by 125 days. 20 C.F.R. §725.101(a)(32)(i)(i)(i); Decision and Order at 16-17.

Using this formula, the ALJ found the Miner worked less than 125 days in 1979 and at least 125 days in 1980, 1981, and 1982. Decision and Order at 17. Because the "miner worked fewer than 125 working days" in 1979, the ALJ permissibly credited him with 0.98 years or "a fractional year based on the ratio of the actual number of days worked to 125." 20 C.F.R. §718.101(a)(32)(i); Decision and Order at 17. Moreover, he permissibly credited the Miner with three years of coal mine employment from 1980 to 1982 because he

"worked in or around coal mines at least 125 working days during a calendar year." 20 C.F.R. §718.101(a)(32)(i); Decision and Order at 17.

The ALJ's analysis of the Miner's coal mine employment from 1979 to 1982 was based upon a reasonable method of calculation. Therefore, we reject Employer's arguments that the ALJ erred in using a 125-day divisor to determine the length of the Miner's coal mine employment from 1979 to 1982, and we affirm the determination that the Miner was entitled to an additional 3.98 years of coal mine employment during those years. 20 C.F.R. §718.101(a)(32)(i); Decision and Order at 17. Consequently, we affirm the ALJ's determination that Claimant established the Miner had at least fifteen years of qualifying[15] coal mine employment.[16] Decision and Order at 17.

Total Disability

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work[17] and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Total disability can be established based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ determined Claimant established total disability by

[15] Employer does not contest the ALJ's finding that all of the Miner's coal mine employment was performed underground; thus, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18; Employer's Brief at 13.

[16] Because Claimant established the Miner had at least 15.48 years of coal mine employment based on his pre-1978 coal mine employment and his employment from 1979 to 1982, we need not address Employer's arguments that the ALJ erred in crediting the Miner with additional partial years of employment in 1978, 1983, and 1986 to 1988. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 34-39.

[17] The parties do not challenge the ALJ's finding that the Miner's usual coal mine employment was working as a roof bolter and scoop operator, positions which required heavy labor; thus, it is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 24.

arterial blood gas studies, medical opinions, and the evidence as a whole.[18] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 24, 29.

We affirm, as unchallenged on appeal, the ALJ's finding that the arterial blood gas study evidence establishes total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 24.

The ALJ considered the medical opinions of Drs. Al-Khasawneh, Forehand, Agarwal, Splan, Jarboe, and Rosenberg. Drs. Al-Khasawneh, Forehand, Agarwal, and Splan opined the Miner had a totally disabling respiratory or pulmonary impairment. Director's Exhibits 14, 44, 73; Claimant's Exhibit 1. Dr. Jarboe initially opined the Miner was not totally disabled from a pulmonary perspective, but subsequently opined that his most recent blood gas studies "show total respiratory disability." Employer's Exhibit 18 at 4. Dr. Rosenberg opined the Miner had a variable blood gas impairment, but agreed the Miner's most recent study was qualifying[19] under the disability standards. Employer's Exhibits 2, 19.

The ALJ found the opinions of Drs. Al-Khasawneh,[20] Forehand, and Splan not well-reasoned or well-documented. Decision and Order at 25-27. However, he credited Dr. Agarwal's opinion that the Miner was totally disabled as well reasoned and well documented. *Id.* at 27-28. The ALJ also gave the opinions of Drs. Jarboe and Rosenberg, that the Miner's most recent blood gas study qualifies for disability, some weight as they were consistent with the objective testing. *Id*. at 29. Weighing the medical opinion

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

[19] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[20] Employer argues the ALJ erred in refusing to strike Dr. Al- Khasawneh's report from the record because it was unable to cross-examine him. Employer's Brief at 30 n. 3. Employer has not explained how striking the report would make a difference in the outcome given that the ALJ did not credit Dr. Al-Khasawneh's report. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

evidence together, the ALJ found the medical opinion evidence establishes total disability. Decision and Order at 29.

Employer contends the ALJ erred in not considering the medical opinion evidence that the Miner's hypoxemia resulted from a non-pulmonary source before determining the Miner was totally disabled. Employer's Brief at 26-33. We disagree.

Contrary to Employer's arguments, the ALJ correctly explained that the cause of a totally disabling impairment is a separate question from whether the Miner was totally disabled. Decision and Order at 23-24. Whether a miner has a totally disabling respiratory or pulmonary impairment is considered under 20 C.F.R. §718.204(b)(2); the cause of that impairment is considered under 20 C.F.R. §718.201(a) (addressing whether the impairment is legal pneumoconiosis, i.e., it arose out of coal mine employment), 20 C.F.R. §718.204(c)(1) (addressing whether the total disabling impairment was due to pneumoconiosis.), or 20 C.F.R. 718.305(d) (rebuttal of pneumoconiosis or disability causation).

Moreover, the ALJ accurately noted that Dr. Agarwal opined the Miner had a "severe pulmonary impairment" based on "significant gas exchange abnormalities" with a "reduced diffusion capacity and significant hypoxemia." Decision and Order at 27; Claimant's Exhibit 1. Therefore, the ALJ properly considered his opinion at 20 C.F.R. §718.204(b)(2) and found the physician offered a well-reasoned and well-documented opinion that is consistent with the objective testing and an accurate understanding of the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 27. As Employer does not challenge this credibility finding, we affirm it. *Skrack*, 6 BLR at 1-711.

Similarly, the ALJ accurately noted that Dr. Jarboe initially opined the Miner was not totally disabled from a pulmonary or respiratory standpoint. Decision and Order at 27-28; Director's Exhibit 53; Employer's Exhibit 5. However, as the ALJ noted, Dr. Jarboe opined "[t]he most recently obtained arterial blood gas studies do show a total respiratory disability for [the Miner's] last coal mine work." Employer's Exhibit 18; Decision and Order at 28. He further opined that "when blood gas analysis showed a disabling *respiratory* impairment it was due to congestive heart failure and not to a coal dust inducted lung disease." Employer's Exhibit 18 (emphasis added). Consequently, the ALJ rationally found his opinion supported a diagnosis of total disability. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999); Decision and Order at 28. The ALJ did not ignore Dr. Jarboe's opinion that the Miner's respiratory impairment was due to congestive heart failure; he properly considered that opinion in addressing whether Employer rebutted legal

pneumoconiosis or disability causation at 20 C.F.R. §718.305(d). Decision and Order at 28.

Relatedly, while Dr. Rosenberg opined the Miner did not have a totally disabling respiratory impairment due to coal mine dust exposure, he further opined the Miner had whole person disorders that were causing a gas exchange abnormality. Employer's Exhibit 19 at 44. Specifically, he opined this abnormality was caused by ventilation perfusion mismatch and bronchitis caused by secretions building up in the Miner's lungs. *Id*. at 41. As stated above, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is, or was, present. While Dr. Rosenberg opined the gas exchange impairment was variable, he also opined the Miner's most recent blood gas study was "distinctly abnormal" and qualifying for total disability. Decision and Order at 29; Employer's Exhibit 19 at 40, 53, 55. As Employer does not challenge the ALJ's determination that the Miner's most recent arterial blood gas study was the most relevant study of record, the ALJ reasonably accepted Dr. Rosenberg's opinion that this most recent study meets the regulatory requirement to establish total disability and thus his opinion is supportive of total disability. *See Cochran*, 718 F.3d at 324; *Mays*, 176 F.3d at 762; Decision and Order at 28-29.

We therefore affirm the ALJ's determination that the medical opinion evidence establishes total disability. [21] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 29.

Finally, Employer argues the ALJ failed to explain why he credited the Miner's arterial blood gas study results over his pulmonary function study results, given that qualifying results under one category of objective tests "do not invoke a presumption of disability" and all evidence must be weighed together. Employer's Brief at 30-31. As Employer acknowledges, the ALJ considered both the Miner's arterial blood gas studies and pulmonary function studies and found the non-qualifying pulmonary function studies

[21] Employer also argues the ALJ failed to consider that the Miner was disabled from working as a coal miner due to a knee injury in 1988 and thus is not entitled to benefits "under the plain language of the statute." Employer's Brief at 31-32. As the Director argues, Employer appears to be advocating for the application of *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994). Director's Response at 11-12. Initially, the Fourth Circuit, whose law applies here, did not adopt *Vigna* or its reasoning. *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-267 (2003). Moreover, in claims filed after January 19, 2001, a non-pulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see Gulley v. Director, OWCP*, 397 F.3d 535, 538-39, 549 (7th Cir. 2005).

did not outweigh the qualifying arterial blood gas studies because each measure different aspects of lung function. Employer's Brief at 31 n.4, *citing* Decision and Order at 29. Therefore, contrary to Employer's argument, the ALJ explained his weighing of the objective testing, along with the medical opinion evidence, to permissibly find Claimant established the Miner was totally disabled.[22] *Rafferty*, 9 BLR at 1-232; *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (blood gas studies and pulmonary function studies measure different types of impairment); Decision and Order at 29.

We therefore affirm the ALJ's determination that Claimant established the Miner was totally disabled from a respiratory impairment and thus invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[23] 20 C.F.R. §§718.204(b)(2), 718.305; Decision and Order at 29-30.

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[24] or that "no

[22] Contrary to Employer's argument, the ALJ did not shift the burden of proof and require it to disprove that the Miner was not disabled after July 20, 2013. Employer's Brief at 28. Rather, the ALJ found the Miner's most recent arterial blood gas study, conducted on July 20, 2013, established total disability and the weight of the arterial blood gas study and medical opinion evidence establishes total disability. Decision and Order at 24, 29.

[23] If Claimant invoked the Section 411(c)(4) presumption, which was reinstated by the Affordable Care Act, Employer requested the case be held in abeyance pending the Supreme Court's ruling in the appeal of *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), addressing the constitutionality of the Affordable Care Act (ACA) which reinstated the presumption. Employer's Brief at 38 n. 8. Employer's request is now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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

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. 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 ALJ considered the opinions of Drs. Jarboe and Rosenberg that Claimant does not have legal pneumoconiosis.[25] Decision and Order at 47-49; Director's Exhibits 2, 53; Employer's Exhibits 5, 14, 18, 19. Dr. Jarboe opined the Miner did not have legal pneumoconiosis, but instead had hypoxemia due to congestive heart failure and chronic bronchitis due to smoking. Director's Exhibit 53 at 10; Employer's Exhibit 5 at 21; Employer's Exhibit 18 at 4-5. Dr. Rosenberg also opined Claimant did not have legal pneumoconiosis, but instead had a variable blood gas impairment due to congestive heart failure and noted "mild to moderate" centrilobular emphysema. Employer's Exhibit 14 at 6; Employer's Exhibit 19 at 40-41. The ALJ found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 47-49.

Employer contends the ALJ erred in his weighing of the medical opinions. Employer's Brief at 42-44. We disagree.

The ALJ accurately noted Dr. Jarboe attributed the Miner's hypoxemia to congestive heart failure and not coal mine dust exposure. Decision and Order at 47-48; Employer's Exhibit 18 at 4-5. The ALJ found the physician failed to adequately explain why the Miner's "prolonged exposure to coal mine dust" did not contribute to this impairment. Decision and Order at 48. As Employer does not challenge this credibility determination, we affirm it.[26] *Skrack*, 6 BLR at 1-711; Decision and Order at 48.

[25] The ALJ also considered the opinions of Drs. Al-Khasawneh, Forehand, Splan, and Agarwal, but accurately determined they did not assist Employer in rebutting the existence of legal pneumoconiosis. Decision and Order at 46-47.

[26] Because Employer does not challenge this finding, we need not address its argument that the ALJ erred in finding Dr. Jarboe did not adequately explain why the Miner's chronic bronchitis was unrelated to coal mine dust exposure. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 47; Employer's Brief at 42.

We further reject Employer's argument that the ALJ did not adequately address Dr. Rosenberg's opinion that the Miner did not have legal pneumoconiosis. Employer's Brief at 43-44. The ALJ accurately noted that Dr. Rosenberg opined the Miner did not have legal pneumoconiosis, but instead had emphysema unrelated to coal mine dust exposure and hypoxemia due to severe congestive heart failure, medications, morbid obesity, a major stroke, vocal cord malignancy, and surgery and radiation related to treatment of his cancer. Decision and Order at 48-49; Employer's Exhibits 2, 14, 19. The ALJ accurately noted Dr. Rosenberg opined the Miner did not have legal pneumoconiosis based in part on his belief that a miner would not develop latent and progressive legal pneumoconiosis "decades" after leaving the mines. Decision and Order at 49; Employer's Exhibit 19 at 49-50. The ALJ permissibly found this opinion inconsistent with the regulations which recognize that legal pneumoconiosis is a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); 20 C.F.R. §718.201(c); Decision and Order at 48. Employer does not challenge this credibility determination. *Skrack*, 6 BLR at 1-711.

The ALJ further discredited Dr. Rosenberg's opinion that the Miner's emphysema was unrelated to coal mine dust exposure as he offered no explanation for this determination. *See* 65 Fed. Reg. 79,920, 79,939-45 (Dec. 20, 2000) (emphysema may constitute legal pneumoconiosis if it arises out of coal mine dust exposure); Decision and Order at 48. Again, Employer does not challenge this credibility determination. *Skrack*, 6 BLR at 1-711.

Nor is there any merit to Employer's assertion that the ALJ gave "no treatment" to Dr. Rosenberg's testimony that the Miner's normal pulmonary function testing and his "waxing and waning" arterial blood gas study results would not be due to coal workers' pneumoconiosis. Employer's Brief at 43-44. Contrary to Employer's assertion, the ALJ specifically addressed this testimony, but found Dr. Rosenberg's explanation that the Miner's hypoxemia was due to each of his risk factors except his coal mine dust exposure unpersuasive. Decision and Order at 48-49. Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ permissibly discredited the only opinions supportive of Employer's burden on rebuttal, we affirm his finding Employer did not disprove legal

pneumoconiosis, thus precluding a rebuttal finding that the Miner did not have pneumoconiosis.[27] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 49.

The ALJ next considered whether Employer rebutted the presumption by establishing that "no part" of the Miner's total disability was caused by pneumoconiosis. Decision and Order at 49, *quoting* 20 C.F.R. §718.305(d)(1)(ii). He rationally discredited the opinions of Drs. Jarboe and Rosenberg because they did not diagnose pneumoconiosis, contrary to his finding that Employer failed to disprove the disease and there was "no reason" to conclude their opinions did not rest upon their disagreement with his findings regarding pneumoconiosis. Decision and Order at 51, *citing Epling*, 783 F.3d at 504-05; *Toler v. Eastern Associated Coal Co.*, 43 F.3d 10, 116 (4th Cir. 1995).

We therefore affirm the ALJ's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and thus the award of benefits.

Onset Date for the Commencement of Benefits

If a claimant is awarded benefits pursuant to a request for modification based on a change in conditions, they are payable beginning with the month of the onset of total disability due to pneumoconiosis. 20 C.F.R. §725.503(d)(2). If the evidence does not establish the month of onset, then benefits are payable from date the Miner filed the modification request. *Id.*

The ALJ found Claimant established a change in condition, finding total disability due to pneumoconiosis established after the current request for modification was filed. Decision and Order at 30. He found, however, that the record does not contain evidence establishing exactly when the Miner became totally disabled. Decision and Order at 54. Thus, he found benefits should commence in July 2012, when the Miner filed his modification request. *Id.*

Employer argues that because the ALJ found the Miner's July 20, 2013 arterial blood gas studies established total disability, benefits should commence no earlier than that date. Employer's Brief at 45. We disagree.

Qualifying studies do not establish the date of the onset of disability. Rather, the interpretations of these studies, to the extent they support a finding of total disability, are merely indicative that the Miner became totally disabled at some time prior to the date of the study. *Merashoff v. Consolidated Coal Co.*, 8 BLR 1-105, 108-109 (1985). While the

[27] Thus, we decline to address Employer's assignments of error as to the ALJ's findings regarding clinical pneumoconiosis. *Larioni*, 6 BLR at 1-1278.

ALJ found the July 20, 2013 arterial blood gas study to be the most probative blood gas study of record, he also found the evidence does not establish exactly when the Miner became totally disabled, just that he became disabled. Decision and Order at 53-54. Because the ALJ's finding is supported by substantial evidence, we affirm his finding that the onset date for the commencement of benefits should be the month the Miner filed the current modification request, July 2012. 20 C.F.R. §725.503(d)(2); *Hicks*, 138 F.3d at 528.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge