U.S. Department of Labor

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

BRB Nos. 19-0191 BLA
and 19-0372 BLA

WILLIAM C. POTTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION, c/o NATIONAL STEEL CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 08/12/2020
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Attorney Fee Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for Employer/Carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, 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 the Decision and Order Awarding Benefits (2017-BLA-05413) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[1] filed on June 8, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). Employer also appeals the administrative law judge's April 16, 2019 Attorney Fee Order (2017-BLA-05413) granting Claimant's counsel a fee and expenses.[2]

The administrative law judge credited Claimant with at least twenty-one years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits. The administrative law judge thereafter issued an Order granting Claimant's counsel a fee of $6,150.00 and expenses of $3,555.10.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the

[1] Claimant filed an initial claim on June 18, 1990. Director's Exhibit 1. The district director denied that claim because Claimant failed to establish any element of entitlement. *Id*.

[2] Employer's appeal of the administrative law judge's award of benefits was assigned BRB No. 19-0191 BLA and its appeal of the administrative law judge's award of an attorney's fee was assigned BRB No. 19-0372 BLA. The Board consolidated these appeals for purposes of decision only. *Potter v. National Mines Corp.*, BRB Nos. 19-0191 BLA and 19-0372 BLA (Aug. 29, 2019) (unpub. Order).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also asserts the provisions in the Administrative Procedure Act (APA) for removing administrative law judges, 5 U.S.C. §7521, rendered his appointment unconstitutional. In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, but nevertheless contends the administrative law judge improperly invoked the presumption based on erroneous findings that Claimant had at least fifteen years of coal mine employment and is totally disabled. Employer further argues he erred in finding it did not rebut the presumption. Employer also contests the award of attorney's fees and expenses.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the administrative law judge had authority to decide the case and that the Section 411(c)(4) presumption is constitutionally valid. Employer filed a reply brief, reiterating its arguments.

The Benefits Review Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and the Attorney Fee Order and remand the case to be heard by a different, constitutionally appointed

[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.

[5] Because Claimant's last coal mine employment occurred in Kentucky, Hearing Transcript at 9-10, 20, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer's Brief at 11-17. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[7] Employer maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[8] *Id*. at 14-17. We reject Employer's argument, as the Secretary's ratification was a valid exercise of his authority, bringing 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." Director's Brief at 7 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification 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 Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to

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[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. 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)).

[7] 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 Sellers.

[8] On July 20, 2018, the Department of Labor (DOL) expressly conceded 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.

demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint administrative law judges 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 administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Sellers and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Sellers. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Sellers "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts" and generally argues, without support, that he did not make a "detached and considered judgement" when he ratified Judge Sellers's appointment. Employer's Reply Brief at 2-3. Employer 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 properly ratified the administrative law judge's appointment.[9] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).[10]

[9] While Employer notes correctly that the Secretary's ratification letter was signed by an "autopen," Employer's Brief at 16-17, 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").

[10] 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 16-17; Employer's Reply Brief at 4. The Executive Order does not state the prior appointment procedures were impermissible or violated the Appointments Clause. It also

Employer generally argues the Secretary's ratification "does not excuse the fact that the [administrative law judge] adjudicated this case prior to that ratification." Employer's Reply Brief at 3. Employer does not, however, identify any pre-ratification actions the administrative law judge took that 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 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).

The record reflects the only action the administrative law judge took before his appointment was ratified was the issuance of a Notice of Hearing. The issuance of a Notice of Hearing alone does not involve any consideration of the merits of a case, nor would it be expected to color the administrative law judge's consideration of the case. The Notice of Hearing simply reiterates the statutory and regulatory requirements governing the hearing procedures. *Noble*, BRB No. 18-0533 BLA, slip op. at 4.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting they violate the separation of powers doctrine. Employer's Brief at 11-14; Employer's Reply Brief at 3-4. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

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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). Employer points to the fact that the Executive Order "notes that *Lucia* may raise questions about the method of appointing . . . [administrative law judges] using the competitive selection process." Employer's Reply Brief at 4. Employer, however, has not explained how the Executive Order undermines the Secretary's ratification of Judge Sellers, which we have held constituted a valid exercise of his authority, thereby bringing the administrative law judge's appointment into compliance with the Appointments Clause.

Before the Board will consider the merits of an appeal, its procedural rules impose threshold requirements for alleging specific error. 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 merely "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 argument the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Employer refers to the removal provisions for administrative law judges contained in the APA and cites the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer's Brief at 13-14; Employer's Reply Brief at 3-4. But Employer has not explained how it undermines the administrative law judge's authority to hear and decide this case.[11] We therefore agree with the Director's position that Employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 5. Thus we decline to address this issue.

[11] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 13-14; Employer's Reply Brief at 3-4. In *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court expressly stated its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 5. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Justice Breyer commented in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of Board members." *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). Even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the Court in *Lucia*.

Cox, 791 F.2d at 446; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 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, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 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*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

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*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *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 in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and 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). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or in "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 he 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 administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

We reject Employer's argument the administrative law judge erred in calculating Claimant's coal mine employment. Employer's Brief at 18-20. The administrative law judge considered Claimant's Social Security Administration (SSA) earnings records, employment history forms, and hearing testimony. Decision and Order at 4-6; Director's Exhibits 1 at 138-140, 3, 4; Hearing Transcript at 12-16. Based on Claimant's SSA records, the administrative law judge permissibly credited him with a full quarter of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators for the years from 1956 to 1977. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019) (administrative law judge may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"). Using this method, the administrative law judge credited Claimant with forty-two quarters, or 10.5 years of coal mine employment, from 1956 to 1977.[12] Decision and Order at 4-5. As this finding is supported by substantial evidence, it is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Muncy*, 25 BLR at 1-27; Decision and Order at 4-5.

Considering Claimant's post-1977 coal mine employment, for the years in which he found Claimant worked a full calendar year for the same employer, the administrative law judge divided his earnings for each year 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*.[13] Decision and Order at 5-6. Where Claimant's wages exceeded the 125-day average, the administrative law judge credited him with a full year of coal mine employment. *Id*. The administrative law judge found Claimant's testimony

[12] Employer specifically challenges the administrative law judge's decision to credit Claimant with three quarters of coal mine employment in 1956, one quarter in 1959, one quarter in 1965, and one quarter in 1971. Employer's Brief at 18-20. It also argues the administrative law judge erred in crediting Claimant with the second quarter in 1962 and two quarters instead of one in 1963. *Id*. Thus Employer only specifically disputes eight quarters of coal mine employment, or two years. *Id*. As reducing the administrative law judge's calculation by two years would not change his finding Claimant established more than fifteen years of coal mine employment, Employer has not explained how the "error[s] to which [it] points could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). We also note with respect to 1963, Employer misstates that Claimant had income from coal mine employment only in the fourth quarter; his SSA earnings records also reflect income from W & C Coal Co. in the second quarter. Director's Exhibit 6.

[13] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and yearly earnings for those who worked 125 days during a year and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

credibly established he was "continuously" employed from 1978-1987, and his wages for each year during this time exceeded the yearly average wage for 125 days. *Id*. Employer does not specifically challenge the administrative law judge's calculation of ten years coal mine employment from 1978 to 1987.[14] *See* 20 C.F.R. §802.211; *Shepherd*, 915 F.3d at 406-07 (if a miner was employed by a coal mining company for 365 days and worked for at least 125 days in or around a coal mine, he clearly established one year of coal mine employment); *Cox*, 791 F.2d at 446; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus this calculation is affirmed.[15] *Muncy*, 25 BLR at 1-27.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established at least twenty-one years of coal mine employment.[16] Further, because it is unchallenged on appeal, we affirm his finding that all of Claimant's employment occurred in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical

[14] The administrative law judge credited Claimant with an additional seven months of coal mine employment in 1989 based on his testimony that he returned to work for National Mines that year, but he stopped working on August 3, 1989, due to an injury. Decision and Order at 6; Hearing Transcript at 19; Director's Exhibit 1 at 189. This finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[15] The administrative law judge found Claimant was employed "continuously" from 1972-1977, and his wages for each year during this time exceeded the yearly average wage for 125 days. Decision and Order at 4-6. Thus even if the administrative law judge did not apply the *Tackett* method for the years 1972-1977, as discussed above, Claimant would still establish six years of coal mine employment for these years. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 406-07 (6th Cir. 2019).

[16] Although the administrative law judge credited Claimant with a fractional year of coal mine employment in 1988 based on his testimony, Decision and Order at 5-6, he did not calculate how long Claimant worked that year. Because the administrative law judge found Claimant established more than fifteen years of coal mine employment, this error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

opinions.[17] 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).

Usual Coal Mine Employment

The administrative law judge found Claimant's usual coal mine work was as a roof bolter. Decision and Order at 8. This finding is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711. The administrative law judge summarized Claimant's testimony that he "installed bolts in the rooftop, carried a dust blasting rescuer, lifted bundles of bolts that weighed forty to fifty pounds each, and lifted bags of rock dust that weighed fifty pounds each." Decision and Order at 8, *citing* Hearing Transcript at 14-15. Moreover, Claimant "had to bend the roof bolts with his hands in order to get them up in the top" of the mine and "then [had to] straighten them back out." *Id*. *citing* Hearing Transcript at 15. Claimant also shoveled belts as needed. *Id*., *citing* Hearing Transcript at 18. The administrative law judge also noted Claimant told "Drs. Raj, Green, and Copley that he had to lift fifty to 100 pounds at any given time during the course of his employment." *Id.* at 8, *citing* Director's Exhibit 11; Claimant's Exhibits 1, 2. Finally, the administrative law judge acknowledged Claimant's statements on his work history forms that he "lifted fifty-pound bags of rock dust and twenty-five pound bundles of roof bolts," and did the roof bolter job on his knees and while crawling. *Id*., *citing* Director's Exhibit 5. Contrary to Employer's argument, the administrative law judge permissibly found this work required very heavy manual labor. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); Decision and Order at 8; Employer's Brief at 22.

Arterial Blood Gas Studies

The administrative law judge considered four arterial blood gas studies conducted on June 27, 2015, December 9, 2015, March 11, 2017, and May 20, 2017. Decision and Order at 8-10; Director's Exhibits 11, 16; Claimant's Exhibits 1, 2. He found "none of the resting arterial blood gas studies is qualifying," but "all of the studies taken during exercise

[17] 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 8-11.

are qualifying."[18] *Id*. at 9. Contrary to Employer's argument, he permissibly assigned greater weight to the qualifying exercise studies because he found they "are a better predictor of [Claimant's] ability to perform his last coal mine job as a roof bolter." *Id*.; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Employer's Brief at 22. Thus we affirm the administrative law judge's finding the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 8-10.

Medical Opinions

The administrative law judge then weighed the opinions of Drs. Copley, Raj, and Green that Claimant is totally disabled and the opinions of Drs. Tuteur and Jarboe that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12-18. He found Dr. Tuteur did not address "all of the evidence available to him" and did not explain his conclusions. He found Dr. Jarboe's opinion is vague, did not address the most recent testing and relied on evidence not admitted in the record. Decision and Order at 16-18; Employer's Exhibit 4. As they are not challenged by Employer, we affirm the administrative law judge's credibility findings rejecting the opinions of Drs. Tuteur and Jarboe. *See Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229, 1-240 (2007) (en banc); *Skrack*, 6 BLR at 1-711.

We further reject Employer's arguments the administrative law judge erred in crediting the opinions of Drs. Copley, Raj, and Green. Employer's Brief at 22-23. The administrative law judge permissibly credited Dr. Copley's opinion because the doctor "had a comprehensive understanding of the exertional requirements of [the Claimant's] usual coal mine work," relied on qualifying exercise blood gas testing and Claimant's "poor exercise tolerance," and persuasively explained why she relied on the results of her own exercise blood gas testing rather than the oxygen saturation reported on the walk test Dr. Tuteur conducted.[19] Decision and Order at 12-13; *see Napier*, 301 F.3d at 713-714;

[18] Dr. Tuteur performed the December 9, 2015 study. He reported an oxygen saturation between 93 and 97 percent after a six-minute walk-test. As the administrative law judge found, however, Dr. Tuteur did not report any PO2 or PCO2 values required for an exercise blood gas test. *See* 20 C.F.R. §718.105; Appendix C to Part 718; Director's Exhibit 16; Decision and Order at 9.

[19] Contrary to Employer's argument, the administrative law judge correctly found non-qualifying pulmonary function studies do not call into question valid and qualifying arterial blood gas studies because they measure different types of impairment. *See Tussey*

Crisp, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. The administrative law judge also permissibly found Dr. Raj's opinion well-reasoned and documented because he relied on qualifying exercise blood gas testing "showing severe hypoxemia and pulmonary function tests showing a moderate obstructive defect" and considered "employment histories, a physical examination, and recent objective test results." Decision and Order at 13-14; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Finally, he permissibly credited Dr. Green's opinion because the doctor's diagnosis is "consistent with the evidence Dr. Green considered and the weight of the evidence as a whole." Decision and Order at 14-15; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Because there is no evidence undermining the qualifying exercise blood gas tests and medical opinions diagnosing total disability, 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; Decision and Order at 18. We also affirm his determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[20] or that "no 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 administrative law judge found Employer failed to establish rebuttal by either method.

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v. Island Creek Coal Co., 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order at 11; Employer's Brief at 23-24.

[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). 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).

Clinical Pneumoconiosis

Employer does not challenge the administrative law judge's finding the x-ray evidence is positive and thus insufficient to rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 21. This finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

The administrative law judge discredited Dr. Tuteur's opinion that Claimant does not have clinical pneumoconiosis because the doctor relied in part on his own negative x-ray interpretation of a June 27, 2015 x-ray that neither party designated as affirmative or rebuttal evidence. Decision and Order at 21-23. Further, the administrative law judge found Dr. Tuteur's reliance on this negative x-ray interpretation inconsistent with the weight of the x-ray evidence that is positive for pneumoconiosis. *Id*. As Employer does not specifically challenge these credibility findings, they are affirmed.[21] *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Keener*, 23 BLR at 1-240; *Skrack*, 6 BLR at 1-711. Thus we affirm the administrative law judge's finding Employer failed to rebut the presumed existence of clinical pneumoconiosis.[22] 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 23.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The Sixth Circuit holds this standard requires Employer to "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

[21] Because the administrative law judge provided valid reasons for discrediting Dr. Tuteur's opinion on the issue of clinical pneumoconiosis, we need not address Employer's argument he also erred in finding his opinion speculative. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 22; Employer's Brief at 23-24.

[22] Employer does not challenge the administrative law judge's findings that the opinions of Drs. Jarboe, Copley, Raj, and Green diagnosing clinical pneumoconiosis are reasoned and documented, and entitled to the most weight. Decision and Order at 23. Thus these findings are affirmed. *See Skrack*, 6 BLR at 1-711.

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).

Both Dr. Tuteur and Dr. Jarboe diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking[23] and unrelated to coal mine dust exposure. Director's Exhibit 16; Employer's Exhibits 4, 7. The administrative law judge found Dr. Tuteur excluded legal pneumoconiosis based on studies showing "coal mine dust infrequently produces COPD" and "cigarette smoke causes COPD more frequently" by comparison. Decision and Order at 24-25. He found Dr. Jarboe similarly excluded legal pneumoconiosis because the doctor "emphasized that cigarette smoking was 'much more likely to cause' a pulmonary impairment than coal mine dust inhalation" based on studies setting out the likelihood of both exposures causing the disease. *Id*. at 26-27, *quoting* Employer's Exhibit 4. Contrary to Employer's argument, the administrative law judge permissibly found these opinions unpersuasive because both doctors "focused on generalities and statistics rather than on [Claimant's] specific condition." Decision and Order at 24-25, 27; *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 correctly noted the preamble to the 2001 revised regulations cites studies the DOL found credible, which conclude the risks of smoking and coal mine dust exposure may be additive. 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 24-25. In light of this medical science, he permissibly found Dr. Tuteur did not adequately explain why Claimant's coal mine dust exposure was not a contributing or additive factor, along with his cigarette smoking, to his pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 24-25. The administrative law judge also rationally found Dr. Tuteur did not adequately address whether Claimant's "impairment in oxygen transfer" evidenced by his blood gas testing is significantly related to, or substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; Decision and Order at 23.

The administrative law judge found Dr. Jarboe also excluded legal pneumoconiosis because "Claimant's FVC was preserved and FEV1 was 'disproportionately reduced,' which he described as an impairment typically observed in those with a heavy cigarette

[23] Dr. Tuteur also opined Claimant's COPD was aggravated by his childhood exposure to fumes from fossil fuel combustion. Director's Exhibit 16; Employer's Exhibit 7.

smoking history or asthma." Decision and Order at 25, *quoting* Employer's Exhibit 4 at 5. Dr. Jarboe indicated an impairment caused by coal mine dust exposure causes proportional reductions in FVC and FEV1. *Id*. The administrative law judge permissibly discredited this rationale as conflicting with the DOL's recognition that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 25-26. Further, the administrative law judge permissibly found Dr. Jarboe did not adequately explain why Claimant's smoking-related COPD was not "aggravated by his lengthy exposure to coal dust." Decision and Order at 27; *see* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Barrett*, 478 F.3d at 356. Thus we affirm the administrative law judge's determination that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 28-29.

Disability Causation

The administrative law judge next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the disability causation opinions of Drs. Tuteur and Dr. Jarboe because neither diagnosed legal pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 29-30. We therefore affirm the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

Attorney Fee Order

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with applicable law. *See Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998) (en banc).

Claimant's counsel filed an itemized statement requesting an attorney's fee for services performed before the Office of Administrative Law Judges pursuant to 20 C.F.R. §725.366. Claimant's counsel requested a fee of $6,150.00, representing 12.5 hours of legal services by Joseph E. Wolfe at an hourly rate of $350; 2.75 hours of legal services by Brad A. Austin at an hourly rate of $200; 3.5 hours of legal services by Rachel Wolfe at an hourly rate of $150; 7 hours of services by legal assistants at an hourly rate of $100; and expenses of $3,568.44. The administrative law judge awarded the fees requested, but disallowed as overhead expenses costs totaling $13.34.

We reject Employer's argument the administrative law judge erred in determining the hourly rates. Employer's Fee Petition Brief at 3, 7-9. In determining the amount to be awarded under a fee-shifting statute, a court must determine the number of hours reasonably expended and multiply them by a reasonable rate. *See Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). A reasonable hourly rate is calculated according to the prevailing market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886 (1984). The fee applicant has the burden to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by persons of comparable skill, experience, and reputation. *Id.* at 896 n.11; *see Maggard v. Int'l Coal Group*, 24 BLR 1-172, 1-173 (2010) (Order); *Bowman v. Bowman Coal Co*., 24 BLR 1-167, 1-168 (2010) (Order).

Employer contends Claimant's counsel failed to support the hourly rates requested with market evidence, i.e., what fee-paying clients pay counsel or similarly-qualified attorneys charge by the hour in comparable cases, and that a "description of past fee awards does not satisfy a [Claimant's counsel's] burden." Employer's Brief at 9. Employer asserts the administrative law judge's reliance on counsel's past fee awards contravenes the APA, 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a), because he failed to explain his finding that Mr. Wolfe is entitled to an hourly rate of $350, Mr. Austin an hourly rate of $200, Ms. Wolfe an hourly rate of $150, and legal assistants an hourly rate of $100.

Contrary to Employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664 (6th Cir. 2008); *see also E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 572 (4th Cir. 2013); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290 (4th Cir. 2010). Noting Mr. Wolfe is a highly qualified attorney who has practiced black lung litigation for more than thirty-eight years, the administrative law judge considered the cited fee awards from administrative law judges, the Board, and the United States Courts of Appeals as market rate evidence and found they support an hourly rate of $350. Attorney Fee Order at 2-3. Further, he found Mr. Austin has been practicing black lung litigation since 2013 and has been awarded an hourly rate of at least $200 in every case Claimant's counsel cited. *Id.* He determined Ms. Wolfe has been awarded an hourly rate of at least $150 in every case Claimant's counsel cited. *Id.* Finally, the administrative law judge found the prior fee awards also support an hourly rate of $100 for legal assistants. *Id.* The administrative law judge's decision does not violate the APA as he stated the evidentiary basis for his conclusion, and Employer has failed to establish he abused his discretion. *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). Therefore, we affirm the hourly rates awarded for the services of Mr. Wolfe, Mr. Austin, Ms. Wolfe, and legal assistants. *Bentley*, 522 F.3d at 666.

Employer also challenges counsel's use of quarter-hour minimum billing increments as an unreasonable method of calculating the amount of time necessary to perform the identified tasks. Contrary to Employer's contention, the administrative law judge properly found he has the discretion to award a fee based on quarter-hour minimum increments. *See Bentley*, 522 F.3d at 666; Attorney Fee Order at 3-4. In addition, the administrative law judge appropriately evaluated each quarter-hour entry to determine whether the amount billed was reasonable. *Bentley*, 522 F.3d at 666-67; Attorney Fee Order at 4-5. Because Employer has identified no abuse of discretion, we affirm the attorney's fee award in all respects. *See Bentley*, 522 F.3d at 666-667; *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Attorney Fee Order are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge