U.S. Department of Labor

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

BRB No. 19-0423 BLA

RONNIE JOHNSON,	)	
	)	
v.	)	
	)	
NATS CREEK MINING COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/27/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer/Carrier.

Ann Marie Scarpino (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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits (2017-BLA-05797) rendered on a claim filed on June 30, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 15.34 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 thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] 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. It contends the administrative law judge improperly invoked the Section 411(c)(4) presumption based on erroneous findings that Claimant had at least fifteen years of coal mine employment and is totally

[1] 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.

[2] 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.

disabled, and erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the administrative law judge had authority to decide the case. Employer has filed a reply brief reiterating its arguments.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[4] Employer's Brief at 4-5. Although the Secretary of Labor (the Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[5] Employer

[3] Because Claimant's last coal mine employment occurred in Kentucky, Hearing Transcript at 32, 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).

[4] *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)).

[5] 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 Bell.

maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[6] *Id*. 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 3-4 (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 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 Bell and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Bell. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Bell "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered affirmation" when he ratified Judge Bell's appointment. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603; *see* Employer's Brief at 4-5. 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. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of

[6] On July 20, 2018, the 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.

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 at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).

Employer generally argues the Secretary's ratification "does not remedy" the actions the administrative law judge took before the ratification. Employer's Reply Brief at 2; *see* Employer's Brief at 4-5. 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 that "would not be expected to color the administrative law judge's consideration of the case" do not "taint the proceedings" with an Appointments Clause violation requiring remand. *Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020).

The administrative law judge issued a Notice of Hearing on August 25, 2017. The issuance of this Notice of Hearing alone did not involve any consideration of the merits, nor would it be expected to color the administrative law judge's consideration of this case. The Notice of Hearing simply reiterated the statutory and regulatory requirements governing the hearing procedures.[7] *Noble*, BRB No. 18-0533 BLA, slip op. at 4

Thus, unlike the situation in *Lucia*, in which the judge had presided over a hearing and had issued an initial decision while he was not properly appointed, the issuance of the Notice of Hearing in this case would not be expected to affect this administrative law judge's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand, and we decline to remand this case to the Office of

[7] The Notice of Hearing informed the parties of the date for a hearing, set time limits for completion of discovery and submission of evidence, provided general advice to parties proceeding without counsel, and addressed other routine hearing matters. *See* Aug. 25, 2017 Notice of Assignment, Notice of Hearing, and Pre-Hearing Order.

Administrative Law Judges for a new hearing before a different, properly appointed administrative law judge. *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 are unconstitutional. Employer's Brief at 4-5; Employer's Reply Brief at 2. 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).

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 generally argues the removal provisions for administrative law judges contained in the APA are unconstitutional and cites Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 4-5. But Employer has not explained how it undermines the administrative law judge's authority to hear and decide this case.[8] Therefore Employer's argument does not comply with the Board's rules of

[8] 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" the United States Supreme Court in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), interpreted the Constitution to forbid in the case of the Public Company Accounting Oversight Board. *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.*

practice and procedure. Thus we decline to address this issue. *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).

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 years of coal mine employment. Employer's Brief at 5-9.

1975 to 1977

The administrative law judge considered Claimant's Social Security Administration (SSA) earnings records and hearing testimony. Decision and Order at 4-7; Director's Exhibits 7, 8; Hearing Transcript at 33-39, 44-49. Based on the SSA records, he permissibly credited Claimant 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 1975 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"). He noted Claimant "testified that he started working in the mines in September 1975," worked for National Mines from 1975 through 1977, and there is no evidence in the record Claimant "worked anywhere else during this time." Decision and Order at 5-6. Using this method, the administrative law judge credited Claimant with nine quarters, or 2.25 years of coal mine employment, from 1975 to 1977. Decision and Order at 5-6. 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 5-6.

1978 to 1993

For the years 1978 to 1993, the administrative law judge permissibly found "the record does not clearly identify the beginning and ending dates of [Claimant's] employment with each of his various coal mine employers." Decision and Order at 6; *Shepherd*, 915 F.3d at 405-06; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th

Cir. 2002). He thus applied the method of calculation at 20 C.F.R. §725.101(a)(32)(iii)[9] for these years. Decision and Order at 5-6. He specifically calculated Claimant's coal mine employment by dividing his annual earnings 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*[10] to calculate a fraction of a year. *Id.* Where Claimant's wages exceeded the 125-day average, the administrative law judge credited him with a full year of coal mine employment. *Id*. Applying this method of calculation, he found Claimant established 13.09 years of coal mine employment for the years 1978 to 1993. *Id*. When added to the 2.25 years of coal mine employment for the years 1975 to 1977, he found claimant established a total of 15.34 years. *Id*.

We reject Employer's argument that the administrative law judge's method of calculation for the years 1978 to 1993 was impermissible.[11] Employer's Brief at 6-9, n.5. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which held in *Shepherd* that a miner need not establish a full calendar year relationship under the regulatory criteria at 20 C.F.R. §725.101(a)(32)(i)-(iii). *Shepherd*, 915 F.3d at 401-402. Rather, to be credited with a full year of coal mine employment, a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship. *Id*. Thus, if the miner had greater than 125 working days during a calendar year, he is entitled to credit for a full year of coal mine

[9] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics.

[10] 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).

[11] Employer argues the administrative law judge "ignored evidence of [specific] dates of employment" for various coal mine companies, but does not identity what evidence the administrative law judge failed to consider. Employer's Brief at 5-10; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). As discussed in n. 12, there is no record evidence of Claimant's monthly earnings. Employer has suggested annual data for certain years be considered in a particular manner. Employer's Brief at 8-10.

employment; if he had less than 125 working days, he is entitled to a fraction of the year "based on the ratio of the actual number of days worked to 125." *Id.* at 402. Thus the administrative law judge's calculation for the years 1978 to 1993 is consistent with the Sixth Circuit's holding in *Shepherd*.[12] *Id.* As the finding of 13.04 years is supported by substantial evidence, it is affirmed. *See Martin*, 400 F.3d at 305; *Muncy*, 25 BLR at 1-27; Decision and Order at 5-6.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established 15.34 years of coal mine employment. 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 4-5.

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.[13] *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 opinions. 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).

[12] Employer argues for the years 1983, 1984, and 1989, the administrative law judge should have divided Claimant's yearly earnings by his monthly earnings for various coal mine operators. Employer's Brief at 8-10. There is no evidence in the record specifically setting forth Claimant's monthly earnings with each operator for these years. Rather, it appears Employer has derived monthly figures for certain years by dividing annual earnings and assuming twelve equal monthly payments. Employer's Brief at 8-10. Contrary to Employer's assertion, this is not factual evidence the administrative law judge ignored. It is simply Employer's preferred method for calculating years of employment. As discussed above, the Sixth Circuit has approved as reasonable the administrative law judge's method of calculation applying the regulatory criteria at 20 C.F.R. §725.101(a)(32)(i)-(iii) for the years 1983, 1984, and 1989. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

[13] The administrative law judge found Claimant's usual coal mine employment as a mine foreman required heavy labor. Decision and Order at 22. This finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge found Claimant established total disability based on the medical opinions.[14] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24-26. Specifically, he credited the opinions of Drs. Silman and Green that Claimant is totally disabled over the opinions of Drs. Tuteur and Zaldivar that he is not. *Id*. He further found all the relevant evidence, when weighed together, established total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 26.

Employer argues the administrative law judge erred in finding the medical opinions established total disability. Employer's Brief at 9-18. Employer's arguments have no merit.

Dr. Tuteur opined Claimant has no oxygen transfer impairment at rest or during exercise.[15] Director's Exhibit 21 at 3. As the administrative law judge noted, however, Dr. Tuteur reviewed Dr. Silman's August 25, 2016[16] arterial blood gas study obtained after one minute and thirty seconds of exercise[17] that produced qualifying values for total disability.[18] Decision and Order at 25; Director's Exhibit 21 at 3-4. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Tuteur's opinion not well-reasoned or documented because he "failed to address the fact that this test was qualifying in his statement that Claimant did not have a gas exchange impairment on exercise." Decision and Order at 25; *see Napier*, 301 F.3d at 713-14; *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); Employer's Brief at 11.

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[14] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas 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 22-24.

[15] Dr. Tuteur also stated Claimant has no obstructive or restrictive ventilatory impairment on pulmonary function testing. Director's Exhibit 21 at 3.

[16] Dr. Tuteur's own January 23, 2017 arterial blood gas study did not include any exercise blood gas testing. Director's Exhibit 21 at 19-23.

[17] In obtaining values with exercise, Dr. Silman tested blood drawn after one minute and thirty seconds of exercise and blood drawn after two minutes and thirteen seconds of exercise. Director's Exhibit 11 at 16-19. Dr. Silman's first exercise blood gas study produced qualifying values, but the second one produced non-qualifying values. *Id*.

[18] Dr. Tuteur did not indicate he reviewed the non-qualifying study obtained after two minutes and thirteen seconds of exercise. Director's Exhibit 21.

Further, Dr. Tuteur based his opinion that Claimant is not totally disabled on a six minute walking pulse oximetry test. Director's Exhibit 21 at 3-4. The administrative law judge credited the opinions of Drs. Green and Dr. Zaldivar "that a six minute walk test would not give a complete picture of Claimant's pulmonary function." Decision and Order at 25-26, *citing* Claimant's Exhibit 4 at 35-38; Employer's Exhibit 3 at 19. Because Dr. Tuteur relied on a test that does not "provide a complete picture of Claimant's lung function," the administrative law judge found his opinion not well-reasoned or documented. *Id*. As Employer does not specifically challenge this credibility finding, it is affirmed. *Cox*, 791 F.2d at 446; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711.

Dr. Zaldivar opined Claimant is not totally disabled based, in part, on his opinion that the exercise blood gas testing Dr. Silman conducted on August 25, 2016 is invalid. Employer's Exhibit 1 at 2-4. Dr. Zaldivar invalidated this testing because he opined the results were not properly reported and the blood drawn from Claimant was not immediately put on ice. Employer's Exhibit 1 at 2-4. The administrative law judge permissibly found Dr. Zaldivar's opinion unpersuasive and insufficient to invalidate these studies. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 23-24. Specifically, he concluded any alleged reporting errors Dr. Zaldivar identified were not in the final report submitted into the record. Decision and Order at 23-24. Moreover, he found Dr. Zaldivar did not adequately support his opinion that the blood drawn from Claimant needed to be put on ice. *Id*. Insofar as Dr. Zaldivar's opinion was based on his assumption that the August 25, 2016 exercise blood gas testing Dr. Silman administered is invalid, the administrative law judge permissibly found Dr. Zaldivar's opinion is not well-reasoned and documented. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 26.

Further, Dr. Zaldivar testified that Claimant does not have a "pulmonary impairment by physiological parameters." Employer's Exhibit 3 at 23. Although he conceded Claimant's "blood gases are not normal," he explained they do not meet the DOL criteria for total disability and "clinically they really would not meet the criteria for requirement to use oxygen." *Id*. He explained "clinically it doesn't mean anything other than [Claimant] is hyperventilating." *Id*. at 23-24. He further testified the DOL has "clear-cut numbers. If the PO2 and PCO2 add up to 100 or more, the [miner] is not considered to be disabled from the standpoint of the blood gases. If it is less than 100, then" he is disabled. Employer's Exhibit 3 at 27.

As the administrative law judge noted, the regulations set forth total disability can be established with reasoned medical opinions even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 26. The administrative law judge permissibly found Dr. Zaldivar's opinion unpersuasive because he did not

address whether Claimant is totally disabled from his usual coal mine employment notwithstanding whether the objective testing is non-qualifying. *See Napier*, 301 F.3d at 713-14; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); Decision and Order at 26.

Dr. Green indicated Claimant has chronic symptoms of shortness of breath and wheezing on exertion, including dyspnea when walking one-flight of stairs. Claimant's Exhibit 3 at 1-2. Reviewing the August 25, 2016 exercise blood gas studies, he noted Dr. Silman had Claimant exercise for two minutes and thirteen seconds before stopping because Claimant had shortness of breath. *Id*. Blood gas testing performed after the first minute was significantly abnormal and reflected the "increased work of breathing and [hyperventilating] to maintain an abnormally low p02" level. *Id*. Further, blood gas testing obtained at peak exercise of two minutes and thirteen seconds, though not qualifying, still reflected "abnormal gas exchange and an increase in alveolar arterial oxygen gradient." *Id*. He also reviewed Dr. Tuteur's January 23, 2017 resting blood gas study, and stated Claimant demonstrated abnormal hyperventilation "to maintain oxygenation." *Id*. He concluded Claimant could not perform his usual coal mine employment requiring heavy labor because of his "significant degree of symptomatic hypoxemia with shortness of breath [on] exertion." *Id*.

Contrary to Employer's argument, the administrative law judge permissibly found Dr. Green's opinion reasoned and documented because he "considered all of the objective testing and the physical requirements of Claimant's coal mine employment, and relied upon" arterial blood gas testing to reach his conclusion.[19] Decision and Order at 25; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions establish total disability.[20] 20 C.F.R.

[19] We reject Employer's argument that Dr. Green's opinion cannot establish total disability because he did not address whether obesity caused Claimant's disabling blood gas exchange impairment. Employer's Brief at 12. The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether Claimant's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of Claimant's pulmonary condition concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or the issue of Employer's rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1).

[20] Because we affirm the administrative law judge's finding that Dr. Green's opinion establishes total disability, we need not address Employer's arguments that the

§718.204(b)(2)(iv); Decision and Order at 26. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability and Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 26.

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,[21] 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.

Clinical Pneumoconiosis

Employer does not challenge the administrative law judge's finding the evidence is insufficient to rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 28-29. This finding is therefore affirmed. 20 C.F.R. §718.305(d)(1)(i)(B); *See Skrack*, 6 BLR at 1-711. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we will address the issue of legal pneumoconiosis because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i).

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),

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administrative law judge erred in finding Dr. Silman's opinion reasoned and documented. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-10.

[21] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). 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).

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 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).

Dr. Tuteur opined Claimant does not have legal pneumoconiosis of "sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function or radiographic change." Director's Exhibit 21 at 5. The administrative law judge permissibly found Dr. Tuteur's opinion unpersuasive because it is "unclear as to whether he believed that Claimant could have had legal pneumoconiosis." Decision and Order at 29; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He also permissibly found the opinion is "conclusory," and Dr. Tuteur did not adequately explain whether coal mine dust exposure contributed, in part, to Claimant's gas exchange impairment evidenced by blood gas testing. Decision and Order at 29-31; *see Young*, 947 F.3d at 405; *Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Dr. Zaldivar opined Claimant's obesity caused him to hyperventilate during blood gas testing. Employer's Exhibits 1, 3 at 28-33. He acknowledged obesity did not cause the drop in p02 during exercise blood gas testing, but opined "black lung simply doesn't do that." Employer's Exhibit 3 at 30-31. The administrative law judge permissibly found Dr. Zaldivar's opinion is "conclusory" as his statement that "black lung simply doesn't do that" was provided without explanation, and he did not indicate if he was referring to clinical or legal pneumoconiosis. Decision and Order at 29-30; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He also permissibly found Dr. Zaldivar did not adequately explain whether coal mine dust exposure contributed, in part, to Claimant's gas exchange impairment. *Young*, 947 F.3d at 405; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 29-30.

In challenging the administrative law judge's findings on the issue of legal pneumoconiosis, Employer summarizes the opinions of Drs. Tuteur and Zaldivar and argues the "more persuasive weight of the medical evidence indicates that Claimant's disability, to the extent that it exists in any form, is completely unrelated to his prior coal mine employment." Employer's Brief at 19-26. It asserts "[t]hese medical opinions are [well-reasoned], provide a much more detailed analysis of and assessment of the medical data, and provide the most comprehensive consideration of the various risk factors and Claimant's health issues." *Id*. at 25.

We consider Employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 19-26. Because the administrative law judge acted within his discretion in rejecting the opinions of Drs. Tuteur and Zaldivar, we affirm his finding Employer did not disprove legal pneumoconiosis and his determination it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[22] *See* 20 C.F.R. §718.305(d)(1)(i).

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 Zaldivar because neither diagnosed legal pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease.[23] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 30-31. 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.

[22] Drs. Silman and Green diagnosed pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 3. The administrative law judge correctly found their opinions do not aid Employer on rebuttal. Decision and Order at 30.

[23] In addressing whether Claimant's disability was caused by pneumoconiosis, neither Dr. Tuteur nor Dr. Zaldivar set forth an explanation independent of their conclusions that Claimant does not have legal pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 1, 3.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge