U.S. Department of Labor

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

BRB Nos. 19-0396 BLA and
19-0523 BLA

BENJAMIN R. BEVERLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REDHAWK COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE	)	DATE ISSUED: 08/31/2020
	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits and Attorney Fee Order (2017-BLA-06203) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a Miner's claim filed on February 11, 2016.

The administrative law judge initially found Employer is the responsible operator liable for the payment of benefits. He determined Claimant established 19.82 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It further asserts the removal

[1] Employer's appeal of the administrative law judge's Decision and Order Awarding Benefits was assigned BRB No. 19-0396 BLA and its appeal of the administrative law judge's Attorney Fee Order was assigned BRB No. 19-0523 BLA. The Board consolidated these appeals for purposes of decision only. *Beverly v. Redhawk Coal Corp.*, BRB Nos. 19-0396 BLA and 19-0523 BLA (Dec. 16, 2019) (unpub. Order).

[2] Under Section 411(c)(4) of the Act, Claimant is entitled to a presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

provisions applicable to the administrative law judge rendered his appointment unconstitutional and challenges the validity of the Section 411(c)(4) presumption as part of the Affordable Care Act (ACA). On the merits, Employer asserts it is not the responsible operator and that the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted. Employer further challenges the administrative law judge's award of attorney's fees. Claimant responds in support of the award of benefits and the award of attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment, its argument that it is not the responsible operator, and its challenge of the validity of the Section 411(c)(4) presumption. Employer has filed a reply brief, reiterating its assertion the attorney's fee award must be vacated.

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.[4] 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, 362 (1965). The Board reviews an administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Appointments Clause

Employer requests the Board vacate the administrative law judge's Decision and Order and Attorney Fee Order and remand this case to be heard by a constitutionally

> [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.

[4] Claimant's most recent coal mine employment occurred in West Virginia. Decision and Order at 3; Hearing Transcript at 14, 48. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 10-14; Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 3-8.[6] Employer acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[7] but maintains it was insufficient to cure the defect in the administrative law judge's appointment as there was no prior valid appointment to ratify. *Id*.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought the appointment into compliance.

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[5] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause, which requires that they be appointed by the President or the head of a department. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) *citing Freytag v. Commissioner*, 501 U.S. 868 (1991). The Department of Labor has conceded that the Supreme Court's holding applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[6] Employer raised this issue before the administrative law judge in a Motion to Cancel the Formal Hearing and Place Claim in Abeyance. *See* Decision and Order at 2 n.5. The administrative law judge denied Employer's motion and found in his decision that he took no significant actions before the Secretary of Labor (the Secretary) ratified his appointment on December 21, 2017, having issued only a Notice of Hearing on December 5, 2017. *Id*.

[7] The Secretary 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 Temin.

Director's Brief (BRB No. 19-0396 BLA) at 7-11.[8] She also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. Director's Brief (BRB No. 19-0396 BLA) at 8. We agree with the Director's positions.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief (BRB No. 19-0396 BLA) at 7, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Thus, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

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

Under the presumption of regularity, it thus is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Temin and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Temin. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the

[8] Employer raises identical constitutional challenges to the administrative law judge's appointment in both appeals. The Director relies on her arguments set forth in her brief filed in BRB No. 19-0396 BLA. *See* Director's Brief (BRB No. 19-0523 BLA) at 2-3.

appointment of Judge Temin "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge.[9] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board retroactively ratified the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions). Employer also does not identify any pre-ratification circumstances that would be expected to color the administrative law judge's post-ratification consideration of the case, thus requiring a new hearing before a different administrative law judge.[10] *See Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020).

Unlike *Lucia*, in which the judge presided over a hearing and issued an initial decision while he was not properly appointed, the only action the administrative law judge took before he was properly appointed was issue of a Notice of Hearing. The issuance of this Notice of Hearing did not involve any consideration of the merits, nor could it be expected to color his consideration of the case. Rather, it simply reiterates the statutory and regulatory requirements governing the hearing procedures. Because it did not affect the administrative law judge's ability "to consider the matter as though he had not

[9] We also reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 11 n.2; Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 6-8. We agree with the Director's assertion that Employer's argument lacks merit because the Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. Director's Brief (BRB No. 19-0396 BLA) at 11. The Order also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999).

[10] The administrative law judge issued his Notice of Hearing on December 5, 2017 and the Secretary ratified his appointment on December 21, 2017.

adjudicated it before," *Lucia*, 138 S.Ct. at 2055, it did not taint the adjudication with an Appointments Clause violation requiring remand.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges. Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 12-13; Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 6-7. We decline to address this issue, as it is inadequately briefed and Employer did not raise the issue before the administrative law judge. *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, the Board's 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 the merits of an argument that 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 Administrative Procedure Act (APA), 5 U.S.C. §7521, and notes the United States Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 12-13, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer has not explained, however, how this holding undermines the administrative law judge's authority to hear and decide this case.[11] We agree with the Director's contention that Employer "cannot simply

[11] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 12-13. It notes that in *Free Enterprise*, the Supreme Court

point to *Free Enterprise Fund* and declare its work done." Director's Brief (BRB No. 19-0396 BLA at n. 10. Thus we decline to address this issue. *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed a miner. 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[12] Once the district director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation:

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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. *Id*. 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 that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief (BRB No. 19-0396 BLA) at 9. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Employer cites Justice Breyer's comments 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 the Board members." *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). As the Director accurately notes, "even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, Justice Breyer did not speak for the Court in *Lucia.*" Director's Brief (BRB No. 19-0396 BLA) at 10.

[12] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

> If the reasons include the most recent operator's failure to meet the conditions of § 725.494(e) [ability to pay benefits], the record shall also include a statement that the Office of Workers' Compensation Programs has searched the files it maintains . . . and that [it] has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(l) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim.

20 C.F.R. §725.495(d).

On his application for benefits, Claimant indicated that his most recent coal mine employer was Eagle Delta Coal Corporation (Eagle Delta) from 1986 to 1994, and that he was the owner-operator of it. Director's Exhibit 3. Prior to that time period, he worked as a maintenance foreman for Employer, RedHawk Corporation (RedHawk), from 1983 to 1987. Director's Exhibits 3, 6. After investigating the insurance records maintained by the Office of Workers' Compensation Programs, the district director determined that Eagle Delta was neither insured nor authorized to self-insure as of Claimant's last date of employment with that company. Director's Exhibit 32. Because Employer had an insurance policy in effect at the time of Claimant's last employment with it, the district director issued a Notice of Claim identifying Employer as a potentially liable operator/carrier. Director's Exhibits 31, 33. Employer responded on July 25, 2016, denying liability because it was not the most recent coal company to employ Claimant for at least one year. Director's Exhibit 37.

On September 29, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Employer as the responsible operator. Director's Exhibit 48. The SSAE noted that while Claimant last worked for Eagle Delta, it was uninsured at the time of his last employment. *Id.* It further noted Claimant was Eagle Delta's owner-operator, but stated that "[t]he intent of the Act is defeated if an individual who is self-employed . . . is identified as liable for the payment of his own benefits." *Id.* The SSAE gave the parties until November 28, 2016, to submit any additional documentary evidence and to identify any witnesses relevant to liability that they intended to call if the case was referred to the Office of Administrative Law Judges (OALJ). It also gave the parties until December 28, 2016, to respond to evidence submitted by another party. *Id.* at 3. The SSAE further explained the consequences if the parties did not comply with the deadlines:

> Absent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of

> the proceedings, may be admitted into the record once a case is referred to [the OALJ].

Director's Exhibit 28, *citing* 20 C.F.R. §725.456(b)(1).

Employer contested its designation as a potentially liable operator but submitted no liability evidence and did not identify any witnesses.[13] The district director issued a Proposed Decision and Order on June 29, 2017, naming Employer as the responsible operator. Director's Exhibit 60. On July 7, 2017, Employer requested a hearing and the case was transferred to the OALJ. Director's Exhibit 65.

A formal hearing was held on June 20, 2018. Claimant testified that Eagle Delta and Redhawk were at one time owned by his father and those companies performed contract mining work for Island Creek Coal Company (Island Creek) – all of the coal went to Island Creek processing plants. Hearing Transcript at 41. He inherited both Eagle Delta and Redhawk when his father died in 1989. *Id*. at 24, 28, 32. He did not "really know" why the records maintained by the Office of Workers' Compensation Programs did not reflect any black lung insurance coverage for Eagle Delta in 1994. *Id*. at 25. He knew "Island Creek required, made requirements for all their subcontractors and if you didn't meet those requirements, you weren't allowed on the property." *Id*. at 41. However, he stated he did not know the specifics of the requirements or whether it was "[black lung] insurance or workers' compensation or whatever. I don't know." *Id*. at 25. When asked if Eagle Delta carried a "workers' compensation endorsement," Claimant answered that it did. *Id*. He stopped working in the mines in 1994, after Consolidation Coal Corporation purchased Island Creek. *Id*. at 26. He testified the bank repossessed all of his mining equipment. *Id*. He assumed Island Creek paid for black lung insurance based on tonnage of coal mined. *Id*. at 44.

Employer argued to the administrative law judge that it is not the responsible operator because Claimant's testimony established Island Creek was the lessor of Eagle Delta and was required to obtain black lung insurance coverage for it. Employer's Post Hearing Brief at 25, *citing* 20 C.F.R. §725.493(b)(3)(ii). Employer maintained that because DOL "undertook no effort to enforce its insurance regulations," with regard to Eagle Delta and since the district director did not identify Island Creek as a potentially

[13] The district director granted Employer's request for an extension of time to submit additional medical evidence, but the extension did not pertain to liability evidence. Director's Exhibits 56, 57.

liable operator, liability for benefits must transfer to the Black Lung Disability Trust Fund. Employer's Post-Hearing Brief at 26-27.

The administrative law judge noted the district director investigated whether Eagle Delta should be the responsible operator and the record contains the appropriate statement required by 20 C.F.R. §725.495(d) indicating that the company was not properly insured in 1994. Decision and Order at 7, *citing* Director's Exhibit 32. He further rejected Employer's arguments because they were based entirely on Claimant's testimony and Employer had not identified Claimant as a liability witness before the district director. Decision and Order at 7-8. Because Employer did not assert Claimant worked for it for less than one year or that it was unable to pay benefits, the administrative law judge determined Employer is the responsible operator. *Id*. at 8.

Contrary to Employer's contention, we discern no abuse of discretion by the administrative law judge in excluding Claimant's testimony relevant to the responsible operator issue. *See Clark*, 12 BLR at 1-153. Because the district director must finally resolve the identification of the responsible operator or insurance carrier before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). While the claim is before the district director, "all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

As the Director notes, Employer was aware that Claimant was the owner of Eagle Delta while the case was before the district director and it had the opportunity to depose him at that time or at least conclude his testimony could be relevant to the responsible operator issue based on the findings in the SSAE. Director's Brief (BRB No. 19-0396 BLA) at 14. Employer failed to timely submit any liability evidence or identify Claimant as a liability witness before the district director. 20 C.F.R. §725.414(c). Furthermore, Employer does not argue extraordinary circumstances exist to excuse its failure to satisfy the regulatory requirement. *Id*. We therefore affirm the administrative law judge's finding

that Claimant's testimony relevant to Employer's liability is inadmissible.[14] *See Clark*, 12 BLR at 1-153; Decision and Order at 7-8. As Employer raises no challenge to the administrative law judge's determinations that it employed Claimant for a cumulative period of one year and is capable of paying benefits, we affirm the administrative law judge's finding that Employer is the responsible operator. *See* 20 C.F.R. §725.495(c).

Validity of 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 Board should hold this appeal in abeyance because the ACA, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 20-21. 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*. The Director asserts that the Board should reject Employer's contention. Director's Brief (BRB No. 19-0396 BLA) at 15.

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). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, 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 Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We, therefore, reject Employer's argument that the Section

[14] Because Employer did not identify Claimant as a liability witness, we need not address its contention that the district director erred in concluding Claimant could not be held liable for payment of his own federal black lung benefits as an owner/operator of Eagle Delta. Employer's Brief in Support of Petition for Review (BRB No. 19-0396 BLA) at 17-18.

411(c)(4) presumption is unconstitutional and inapplicable to this case and deny its request to hold this case in abeyance.

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

Because Claimant invoked the Section 411(c)(4) presumption,[15] the burden of proof shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[16] or "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.[17]

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Rosenberg and Fino to disprove legal pneumoconiosis. Each opined Claimant has chronic obstructive pulmonary disease (COPD)/emphysema caused entirely by smoking and unrelated to coal mine dust exposure. Director's Exhibit 24; Employer's Exhibit 2. The administrative law judge found their opinions were conclusory and not well reasoned, and that they expressed views inconsistent with the medical science in the preamble to the DOL's revised 2001 regulations. Decision and Order at 24.

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[15] We affirm, as unchallenged, the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

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

[17] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 21.

Employer contends the administrative law judge misused or mischaracterized the preamble in determining the credibility of its medical experts. Employer's Brief in Support of Petition for Review (19-0396 BLA) at 21-26. Employer further alleges that, the administrative law judge erroneously applied the preamble as a legislative rule, though it was not subject to notice and comment. *Id*. at 26. We disagree.

An administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). As discussed below, the administrative law judge accurately characterized the scientific evidence DOL cited when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment and he permissibly evaluated the medical opinions of record in light of the DOL's interpretation of those studies. *See Beeler*, 521 F.3d at 726, 25 BLR at 2-103.

As the administrative law judge accurately noted, Dr. Rosenberg opined that Claimant's COPD/emphysema is due to smoking because the pulmonary function studies showed a reduced FEV1/FVC ratio inconsistent with an impairment related to coal mine dust exposure. Employer's Exhibit 2 at 5-7. In accordance with holdings by the United States Court of Appeals for the Fourth Circuit, the administrative law judge permissibly discounted Dr. Rosenberg's rationale as inconsistent with DOL's recognition that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 22-23. Furthermore, he permissibly found Dr. Rosenberg did not adequately explain why Claimant's response to bronchodilators showing partial reversibility of his impairment necessarily eliminated coal mine dust exposure as a contributing factor for the *irreversible* portion of his impairment that remained even after bronchodilators were administered. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order on at 23; Employer's Exhibit 2 at 11.

With regard to Dr. Fino's opinion, the administrative law judge correctly noted he eliminated a diagnosis of legal pneumoconiosis, in part, "based on the premise that emphysema caused by coal mine dust would be typically accompanied by a positive chest

x-ray, indicating a higher coal content in the lungs." Decision and Order at 22; *see* Director's Exhibit 24 at 8-15. Dr. Fino also indicated that a miner who, like Claimant, worked for less than thirty years or after dust restrictions were implemented in coal mining is less likely to have coal content in his lungs. Director's Exhibit 24 at 10, 15. Contrary to Employer's contention, the administrative law judge permissibly found Dr. Fino's opinion unpersuasive because it is based on statistical generalities and is inconsistent with DOL's recognition that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." Decision and Order at 22, *quoting* 65 Fed. Reg. 79,920, 79,7943 (Dec. 20, 2000); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000) ("Evidence that does not establish medical pneumoconiosis, *e.g.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis."); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also permissibly found Dr. Fino's opinion speculative regarding the amount of coal content in Claimant's lungs in the absence of pathology evidence. Decision and Order at 22; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

Additionally, the administrative law judge correctly noted both Drs. Rosenberg and Fino supported their opinions by citing studies that show smoking causes greater reductions in the FEV1 per year in comparison to coal mine dust exposure. Decision and Order at 23. Director's Exhibit 24 at 12-15; Employer's Exhibit 2 at 8-9. He acted within his discretion in finding that as applied to Claimant's specific case neither physician adequately addressed the additive effects of smoking and coal mine dust exposure or explained why Claimant was not among the minority of miners who have significant decrements in pulmonary function due to coal dust. Decision and Order at 22; 65 Fed. Reg. at 79,940; *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Knizner*, 8 BLR at 1-7.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge explained his credibility findings in accordance with the APA,[18] we affirm his determination that

[18] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Employer did not disprove Claimant has legal pneumoconiosis.[19] Decision and Order at 25. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

Employer also contends the administrative law judge erred in finding it did not establish that "no part of [Claimant'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). We disagree. The administrative law judge permissibly discredited Drs. Rosenberg's and Fino's opinions on disability causation because they premised their conclusions on their beliefs that Claimant did not have legal pneumoconiosis, contrary to his finding Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding that the doctor's view on disability causation is independent of his erroneous opinion on pneumoconiosis); Decision and Order at 26; Director's Exhibit 24; Employer's Exhibit 2. We therefore affirm the administrative law judge's finding that Employer did not establish Claimant's respiratory disability is unrelated to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. Thus, we affirm the administrative law judge's award of benefits.

Attorney Fee Award

When an attorney prevails on behalf of a client, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The amount of an administrative law judge's attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 568-69 (4th Cir. 2013)*; Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010)*; Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

[19] Because the administrative law judge provided valid reasons for discrediting Drs. Rosenberg's and Fino's opinions, we need not address Employer's arguments regarding the additional reasons the administrative law judge gave for rejecting their opinions on legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 23, 24

For work performed before the administrative law judge, Claimant's counsel requested $6,525.00 in fees and $3,423.21 in costs, for a total of $9,948.21.[20] The fee petition reflected: 12.50 hours of legal services by Joseph E. Wolfe at an hourly rate of $350.00; 6.25 hours of legal services by Brad A. Austin at an hourly rate of $200.00; and 9.0 hours of services provided by legal assistants at an hourly rate of $100.00. In considering Employer's objections, the administrative law judge reduced Mr. Wolfe's hourly rate to $300.00, approved Mr. Austin's and the legal assistants' hourly rates, disallowed several hours of services, and reduced certain costs. He awarded Claimant's counsel $5,815.00 in attorney fees and $3,342.77 in costs, for a total of $9,157.77.

Employer initially contends the administrative law judge did not apply the correct standard of proof because he required Claimant's counsel to establish only the "reasonableness" of the requested hourly rates and not the prevailing market rates. Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 9. Employer asserts the hourly rates the administrative law judge awarded are not supported by prevailing market rate evidence and that he failed to explain, as required by the APA, the evidence he relied upon in determining the appropriate hourly rate. *Id*. We disagree.

The fee applicant must produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The administrative law judge properly recognized that counsel bears the burden of showing his requested fee is reasonable and based on the prevailing market rate. *Cox*, 602 F.3d at 288-90; *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 (6th Cir. 2008); Attorney Fee Order at 2-3. He also properly recognized that evidence of past fee awards is a "relevant factor in assessing attorney fees." *Cox*, 602 F.3d at 290; *see Bentley*, 522 F.3d at 663; Attorney Fee Order at 3. The administrative law judge explained that he considered the factors at 20 C.F.R. §725.366[21] and the past fee awards. Attorney

[20] Counsel initially requested $1,792.77 in costs, and subsequently requested an additional $1,630.44 in costs.

[21] The regulation states:

> Any fee approved . . . shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested.

Fee Order at 3-4. Specifically, he considered the quality of the representation, the qualifications of the representatives, the level of proceedings to which the claim was raised, and the level at which the representative entered the proceedings. *Id*. at 2-4. Moreover, he relied on the list of cases in which Mr. Wolfe was awarded an hourly rate of $300.00 or more by administrative law judges, the Board, and the United States Courts of Appeals for the Fourth and Sixth Circuits.[22] *Id*. Additionally, the administrative law judge relied on a list of over thirty-five cases in which Mr. Austin was awarded $200.00 per hour, and a list of almost fifty cases in which the legal assistants were awarded $100.00 per hour. *Id*. Because the administrative law judge acted within his discretion and explained his findings, we affirm his approval of an hourly rate of $300.00 for Mr. Wolfe, an hourly rate of $200.00 for Mr. Austin, and an hourly rate of $100.00 for the legal assistants.[23] 20 C.F.R. §725.366(b); *see Gosnell*, 724 F.3d at 575; *Bentley*, 522 F.3d at 664-66; Attorney Fee Order at 2-4.

With regard to the hours charged for legal work, we reject Employer's contention the administrative law judge should have disallowed Claimant's entire fee petition as excessive because it is based on a quarter-hour billing method. Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 11; *see Gosnell*, 724 F.3d at 576-77; *Bentley*, 522 F.3d at 666-67. We also reject Employer's contention the administrative law judge did not adequately explain why he rejected Employer's challenges to specific charges as either vague or clerical in nature. Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 12. The administrative law judge permissibly rejected Employer's objections to Mr. Wolfe's quarter-hour charge on May 10, 2018, and Mr. Austin's quarter-hour charges on June 19, 2018 and January 25, 2019

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20 C.F.R. §725.366(b).

[22] Mr. Wolfe's list of past fee awards includes twenty-two awards at an hourly rate of $300.00, three awards at $325.00 per hour, twenty awards of $350.00 per hour, one award at $400.00 per hour, and eight awards at $425.00 per hour. Fee Petition at 3-10.

[23] Employer notes that the district director approved an hourly rate of $150.00 for Mr. Austin and $75.00 for the legal assistants as "comparable to the rates of other qualified professionals within the same geographic locations with considerable experience handling black lung claims." Employer's Brief in Support of Petition for Review (BRB No. 19-0523 BLA) at 9 n.3. However, the regulations provide that a separate fee petition must be filed at each level of the proceedings and each adjudicator determines the appropriate fee. 20 C.F.R. §725.366(a), (b). Thus, the administrative law judge is not bound by the hourly rates awarded by the district director.

for case file review. He permissibly found that while more detail could have been provided for these entries, they provided "sufficient information to determine what work was being performed." *See Gosnell*, 724 F.3d at 576-78; Attorney Fee Order at 2.

With regard to Employer's remaining objections to the fee petition, we see no error in the administrative law judge's finding that it did not adequately explain why certain charges were clerical. *See Gosnell*, 724 F.3d at 568-69; *Cox*, 602 F.3d at 282; *Jones*, 21 BLR at 1-108. Employer challenged Mr. Wolfe's quarter-hour charges on December 7, 2017, December 21, 2017, April 4, 2018, and May 31, 2018 for "reviewing cover letters"; Mr. Austin's entry on December 26, 2017 for "scheduling;" and the legal assistant charges of a quarter-hour on May 8, 2018 for "reviewing an x-ray request" and 1.25 hours on June 19, 2018 for "tabbing evidence." Employer's Objections at 11 n.10. Employer's descriptions, however, do not match the actual charges listed on the fee petition.[24] Employer also did not provide specific arguments to the administrative law judge regarding why each individual charge should be disallowed.

Because Employer has not shown the administrative law judge abused his discretion in reviewing the fee petition and determining the appropriate hourly rates and compensable charges, we affirm his award of $5,815.00 in attorney fees and $3,342.77 in costs,[25] for a

[24] Contrary to Employer's characterization that Mr. Wolfe charged for "reviewing cover letters," the fee petition reflects he charged a quarter-hour charge on December 7, 2017 for reviewing the notice of hearing, a letter to the administrative law judge acknowledging receipt of the hearing notice, and a letter to the client informing him of the hearing and advising him to contact Mr. Wolfe's office for an appointment to discuss the upcoming hearing. Fee Petition at 13. Mr. Wolfe also charged a quarter-hour each on December 21, 2017 for forwarding medical records and medical releases to physicians; on April 4, 2018 for a letter filing discovery; and on May 31, 2018 for reviewing a medical summary and a letter forwarding it to the administrative law judge. *Id.* at 13, 15-16. Mr. Austin's quarter-hour charge on December 26, 2017 described by Employer as "scheduling" involved a letter to Claimant informing him of a scheduled medical examination with a physician selected by Employer. *Id*. at 13. A legal assistant's quarter-hour charge on May 8, 2018 was for "Review, dated [April 30, 2018]" along with review of an x-ray request from Employer's counsel dated March 23, 2018. *Id*. at 15. A legal assistant's charge on June 19, 2018 was not just for "tabbing evidence" as Employer described, but included preparing the file for hearing and tabbing all the evidence, making a case fact sheet and a phone call to Claimant confirming his attendance at the upcoming hearing. *Id*. at 16.

[25] We affirm, as unchallenged, the administrative law judge's award of costs in the amount of $3,342.77. *See Skrack*, 6 BLR at 1-711; Attorney Fee Order at 3-4.

total of $9,157.77. *See Gosnell*, 724 F.3d at 568-69; *Cox*, 602 F.3d at 282; *Jones*, 21 BLR at 1-108; Attorney Fee Order at 4.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge