U.S. Department of Labor

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

BRB No. 20-0220 BLA

EDDIE D. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION c/o HARMAN DEVELOPMENT CORPORATION	)	
	)	
and	)	DATE ISSUED: 08/31/2021
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2017-BLA-05220) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on October 3, 2015.[1]

The administrative law judge credited Claimant with 13.82 years of coal mine employment, and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, he found Claimant established a totally disabling respiratory or pulmonary impairment, thereby establishing a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309. He further found Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). Thus he awarded benefits.

On appeal, Employer argues the administrative law judge lacked the 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 also argues the removal provisions applicable to administrative law judges rendered his appointment

[1] Claimant filed an initial claim on June 3, 2013, but the district director denied it on August 18, 2014, because Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 1. Claimant took no further action until filing his current claim. Director's Exhibit 3.

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

[3] 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.

unconstitutional. It further asserts he erred in finding it is the responsible operator. With respect to benefits, it argues he erred in admitting a supplemental medical report from Dr. Ajjarapu into the record. Finally, it argues he erred in finding Claimant established legal pneumoconiosis, total disability, and disability causation.[4]

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges to the administrative law judge's appointment and its evidentiary argument. In a reply brief, Employer reiterates its contentions.

The 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 12-16. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017, but maintains the ratification was

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 13.82 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-6.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 16-17, 19-20, 30.

[6] *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 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. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) 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.

insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[7] *Id*.

We agree with the Director's position that Employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge.[8] Director's Brief at 5. The Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). *Lucia* was decided over five months before the case was assigned to the administrative law judge, over eight months before the hearing in this case, and over one year and seven months before the administrative law judge issued his Decision and Order Awarding Benefits.

Employer, however, failed to raise its argument while the case was before the administrative law judge. At that time, he could have addressed Employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different administrative law judge. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the administrative law judge issued an adverse decision. Because Employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office

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[7] The Secretary of Labor (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.

[8] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1, U.S. (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

of Administrative Law Judges (OALJ) for a new hearing before a different administrative law judge. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Mabe*, 987 F.3d at 588; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019).

Notwithstanding Employer's forfeiture, we also conclude there is no merit to its argument that the Secretary's ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. Employer's Brief at 12-16; Employer's Reply Brief at 10-15. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time 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.

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 Judge Temin and gave "due consideration" to his appointment.[9] Secretary's

[9] While Employer notes correctly that the Secretary's ratification letter was signed with an autopen, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002)

December 21, 2017 Letter to Administrative Law Judge Temin. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Temin "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified Judge Temin's appointment. 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 thus properly ratified the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, supports its Appointments Clause argument because incumbent administrative law judges remain in the competitive civil service. Employer's Brief at 19-20; Employer's Reply Brief at 15-16. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Temin's appointment, which we have held constituted a valid exercise of his authority that brought the administrative law judge's appointment into compliance with the Appointments Clause.

Thus we reject Employer's argument that this case should be remanded to the OALJ for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges. Employer's Brief at 16-19; Employer's Reply Brief at 10-15. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 19; Employer's Reply Brief at

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(autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act"); Employer Brief at 14-15.

11-13. It also relies on the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer's Brief at 16-19; Employer's Reply Brief at 10-15. The only circuit court to squarely address this precise issue, however, has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL administrative law judges). Regardless, the removal argument is subject to similar issue preservation requirements and Employer likewise forfeited the issue by not raising it before the administrative law judge. *See, e.g., Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion; because petitioners "did not raise the dual for-cause removal provision before the agency," the court was "powerless to excuse the forfeiture"); *Mabe*, 987 F.3d at 588 ("[T]he Benefits Review Board's governing regulations require that legal questions be raised before the ALJ to be reviewable by the Board."). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Mabe*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another potentially liable operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

[10] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one working day of the employment must have occurred after December 31, 1969; and e) 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).

The administrative law judge found Employer is the potentially liable operator that most recently employed Claimant.[11] Decision and Order at 6. He determined Employer failed to establish "that a subsequent coal mine operator employed Claimant for one year and has the financial capability to pay benefits." *Id*. Thus he found Employer is the responsible operator. *Id*.

Employer argues Claimant's hearing testimony establishes Magic Mining employed him for at least one year after Employer. Employer's Brief at 7 n.2. Employer, however, does not challenge the administrative law judge's finding that it failed to establish Magic Mining is financially capable of assuming liability. 20 C.F.R. §§725.494(e), 725.495(c). We therefore affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, Employer is precluded from relying on Claimant's testimony on the responsible operator issue because he was not designated as a liability witness at any point before the district director.[12] 20 C.F.R. §§725.414(c), 456(b)(1), (2). As Employer has identified no basis to disturb the administrative law judge's responsible operator finding, we affirm it. 20 C.F.R. §§725.494, 725495(c); Decision and Order at 6.

Evidentiary Issue

We conclude Employer also forfeited its argument that the administrative law judge erred in admitting a supplemental report from Dr. Ajjarapu as it did not timely raise this argument. *Mabe*, 987 F.3d at 588; Employer's Brief at 4 n.1. When this case was initially before the OALJ, it was assigned to Administrative Law Judge Peter B. Silvain, Jr. He remanded the case to the district director to obtain a supplemental medical report from Dr. Ajjarapu, the physician who conducted the DOL-sponsored evaluation of Claimant.[13] March 14, 2018 Order of Remand at 2. He concluded her initial report from her evaluation was insufficient to meet the DOL's statutory obligation to provide Claimant with a

[11] Employer does not challenge the finding that it is a potentially liable operator. 20 C.F.R. §725.494; Decision and Order at 6. Thus we affirm it. *Skrack* 6 BLR at 1-711.

[12] Where no party provides notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not argue extraordinary circumstances before the administrative law judge, nor does it do so before the Board.

[13] The Act requires "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The purpose of a DOL-sponsored evaluation is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a).

complete pulmonary evaluation because she did not address whether Claimant's total disability is due to pneumoconiosis. *Id*. Employer did not object to Judge Silvain's Order.

Thereafter, Dr. Ajjarapu provided a supplemental report. The district director returned the case to the OALJ, which assigned it to the administrative law judge. Director's Exhibit 42. At the hearing, the administrative law judge admitted Dr. Ajjarapu's supplemental report. Director's Exhibit 41; Hearing Tr. at 7-8. No party objected either at the hearing or in a post-hearing brief. We agree with the Director's assertion that Employer forfeited this argument by failing to raise it before Judge Silvain or the administrative law judge, but instead raising it for the first time on appeal. *See* 20 C.F.R. §802.301(a) (Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case"); *Zdanok*, 370 U.S. at 535; *Mabe*, 987 F.3d at 588; Director's Response Brief at 12.

Notwithstanding Employer's forfeiture of this argument, we conclude it has not established that Judge Silvain abused his discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). The purpose of providing a miner with a complete pulmonary evaluation is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a). Consistent with that purpose, a complete pulmonary evaluation must include, among other things, "a report of physical examination" that addresses "the relevant conditions of entitlement . . . in a manner which permits resolution of the claim." 20 C.F.R. §§725.406(a), 725.456(e). Judge Silvain properly remanded the case to the district director because he reasonably found Dr. Ajjarapu's initial report did not address the issue of disability causation in a manner permitting resolution of the claim. *See Green v. King James*, 575 F.3d 628, 642 (6th Cir. 2009) (emphasis added) (distinguishing an administrative law judge's permissible rejection of a DOL examiner's opinion on credibility grounds from cases in which the miner was denied a complete pulmonary evaluation because the DOL examiner did not perform required testing or based his or her opinion on invalid testing); Director's Exhibit 9.

Entitlement to Benefits

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge found the pulmonary function study and medical opinion evidence establishes total disability.[14] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 21-26. He also found all the relevant evidence, when weighed together, establishes total disability. Decision and Order at 26. Employer challenges these findings.

The record contains five pulmonary function studies dated August 24, 2015, November 4, 2015, June 2, 2016, July 27, 2017, and August 8, 2018. Director's Exhibits 9-11; Claimant's Exhibits 5, 6. The June 2, 2016 study produced non-qualifying[15] values for total disability, but the August 24, 2015, November 4, 2015, July 27, 2017, and August 8, 2018 studies produced qualifying values.[16] *Id*.

[14] The administrative law judge found the arterial blood gas study evidence does not establish total disability and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 24.

[15] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[16] The August 24, 2015 and August 8, 2018 pulmonary function studies performed without the administration of bronchodilators produced qualifying results. Director's Exhibit 10; Claimant's Exhibit 6. The November 4, 2015 and July 27, 2017 pulmonary function studies produced qualifying results both before and after the administration of bronchodilators. Director's Exhibit 9; Claimant's Exhibit 5.

The administrative law judge found the June 2, 2016 non-qualifying study invalid but the remaining studies valid. Decision and Order at 22-24. Because all of the valid studies are qualifying, he found the preponderance of the pulmonary function testing establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 24.

Employer argues the administrative law judge erred in finding the November 4, 2015, July 27, 2017, and August 8, 2018 studies valid. Employer's Brief at 27-30.

In the absence of evidence to the contrary, compliance with the quality standards set forth in the regulations is presumed. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718. Thus, Employer has the burden to establish the results are invalid. *See Vivian v. Director, OWCP*, 7 BLR 1-360 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

Dr. Fino opined the November 4, 2015,[17] July 27, 2017, and August 8, 2018 studies are invalid because Claimant "did not blow all the air out of his lungs." Employer's Exhibits 9, 13 at 16-18. The administrative law judge permissibly found Dr. Fino's opinion unpersuasive because the doctor did not adequately explain his opinion or "point to any specific findings in the tracings to support his assertion." Decision and Order at 22-24; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Thus we affirm his finding the November 4, 2015, July 27, 2017, and August 8, 2018 qualifying studies are all valid.[18]

Employer does not challenge the administrative law judge's finding that the June 2, 2016 non-qualifying study is invalid. Decision and Order at 22-24. Thus we affirm this finding. *Skrack* 6 BLR at 1-711. Employer asserts, however, that the administrative law judge improperly disregarded this study notwithstanding that it is invalid. Employer's Brief at 29-30. It contends that "where a pulmonary function study is invalid because of

[17] Dr. Gaziano reviewed the November 4, 2015 pulmonary function study and opined the vents are acceptable. Director's Exhibit 9.

[18] Employer argues the administrative law judge erred in rejecting Dr. Jarboe's opinion that the qualifying August 24, 2015 pulmonary function study is invalid. Employer's Brief at 29-30. Dr. Jarboe reviewed the August 24, 2015 study and opined there are not three acceptable curves but the highest two FVCs and FEV1s are matching. Employer's Exhibit 12. Because Claimant established total disability based on the November 4, 2015, July 27, 2017, and August 8, 2018 studies – and discrediting the qualifying August 24 study would not undermine that finding – any error by the administrative law judge is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

poor effort, but produces non-qualifying values, it may still be considered affirmative evidence of the absence of disability." *Id*. We disagree.

The regulations state "no results of a pulmonary function study shall constitute evidence of the presence *or absence of a respiratory* or pulmonary impairment unless it is conducted and reported in accordance with" the quality standards. 20 C.F.R. §718.103(c) (emphasis added). Thus the administrative law judge did not err by disregarding the June 2, 2016 non-qualifying study. Moreover, Employer does not identify medical evidence in the record to support its contention that the invalid study still supports the conclusion that Claimant is not totally disabled. Nor does it explain how this invalid, non-qualifying test undermines the administrative law judge's finding that a preponderance of the studies establishes total disability in light of the remaining valid, qualifying studies. Thus we reject Employer's unsupported argument. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 24.

The administrative law judge next considered the medical opinions of Drs. Ajjarapu and Pagtakhan-So that Claimant is totally disabled and the opinions of Drs. Fino and Jarboe that he is not. Decision and Order at 24-25; Director's Exhibits 9, 11, 41; Claimant's Exhibits 7, 9; Employer's Exhibit 12; Employer's Exhibits 9, 13. The administrative law judge found Dr. Ajjarapu's opinion well-reasoned and documented, but rejected the opinions of Drs. Pagtakhan-So, Fino, and Jarboe as not reasoned or documented. Decision and Order at 24-26.

Employer does not challenge the administrative law judge's credibility findings with respect to Drs. Fino and Jarboe. Thus we affirm them. *Skrack* 6 BLR at 1-711.

We reject Employer's argument that the administrative law judge erred in weighing Dr. Ajjarapu's opinion. Employer's Brief at 31. Dr. Ajjarapu noted Claimant's usual coal mine employment was that of an underground miner operator. Director's Exhibit 9 at 26. She stated Claimant experiences "[d]yspnea on daily physical exertion" and that climbing inclines "causes him to be short of breath." *Id*. at 28. She noted Claimant's pulmonary function testing demonstrates a severe pulmonary impairment. *Id*. at 32. Based on this evaluation, she concluded Claimant does not "have the pulmonary capacity to do his previous coal mine employment." *Id*.

The administrative law judge found Dr. Ajjarapu "was able to physically examine Claimant and obtained an understanding of his relevant coal mine employment and medical histories." Decision and Order at 24. He found Dr. Ajjarapu's opinion "is supported by the objective test results in the record, including the [pulmonary function studies] that

produced qualifying results." *Id*. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Ajjarapu's opinion well-reasoned and documented because she "exercised reasoned medical judgment" and "her opinion is based on medically-acceptable clinical and laboratory diagnostic techniques." Decision and Order at 24; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence establishes total disability based on Dr. Ajjarapu's opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 25.

We further reject Employer's contention that the administrative law judge failed to adequately weigh all of the relevant evidence together. Employer's Brief at 31-32. The administrative law judge acknowledged the arterial blood gas studies of record are non-qualifying. Decision and Order at 25. He noted, however, that the pulmonary function studies are qualifying for total disability and Dr. Ajjarapu based her medical opinion on Claimant's pulmonary function testing. *Id*. at 24-25. He rationally found the arterial blood gas studies do not undermine the evidence supporting a finding of total disability because arterial blood gas testing and pulmonary function testing "measure different forms of impairment." Decision and Order at 25; *see Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying pulmonary function study are not called into question by a contemporaneous normal blood gas study). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 25-26. Consequently, we also affirm his finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 15.

Legal Pneumoconiosis[19]

Employer argues the administrative law judge erred in finding Claimant established legal pneumoconiosis.[20] To establish the disease, Claimant must demonstrate he has a

[19] The administrative law judge found Claimant did not establish clinical pneumoconiosis. Decision and Order at 16-18.

[20] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Drs. Ajjarapu and Pagtakhan-So diagnosed legal pneumoconiosis in the form of chronic bronchitis and a disabling respiratory impairment caused by coal mine dust exposure and cigarette smoking. Director's Exhibits 9, 41; Claimant's Exhibit 9. Dr. Jarboe opined Claimant does not have legal pneumoconiosis, but has a severe restrictive ventilatory defect caused by bronchial asthma and obesity. Claimant's Exhibit 7; Employer's Exhibit 12. Dr. Fino opined Claimant does not have legal pneumoconiosis because there are no valid pulmonary function studies demonstrating an impairment and the arterial blood gas testing does not qualify for total disability. Director's Exhibit 11; Employer's Exhibit 9.

We first reject Employer's argument that the administrative law judge erred in weighing Dr. Jarboe's opinion. Employer's Brief at 26-27. Dr. Jarboe opined that if Claimant's "restrictive lung disease [was] due to the inhalation of coal mine dust, [he] would expect the presence of a fibrotic reaction to coal mine dust in the lung parenchyma, that is, the presence of coal workers' pneumoconiosis."[21] Claimant's Exhibit 7. The administrative law judge permissibly found this reasoning unpersuasive because it is inconsistent with the 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 20, *citing* 65 Fed. Reg. 79920, 79943 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487 (6th Cir. 2012); (a miner can have legal pneumoconiosis, even in the absence of clinical pneumoconiosis); 20 C.F.R. §718.202(a)(4), (b).

Dr. Jarboe also excluded legal pneumoconiosis because "several" of Claimant's pulmonary function studies have "shown significant response to bronchodilating agents, which would not be characteristic of fixed airflow obstruction caused by coal mine dust." Employer's Exhibit 12. The administrative law judge noted, however, that the November 4, 2015 and July 27, 2017 pulmonary function studies are qualifying for total disability both before and after the administration of bronchodilators, and the remaining pulmonary function tests do not include post-bronchodilator results. Decision and Order at 8. He permissibly found Dr. Jarboe failed to adequately explain why the irreversible portion of

[21] Dr. Jarboe reviewed an x-ray dated July 27, 2017, and noted "[t]here were no parenchymal abnormalities consistent with pneumoconiosis." Claimant's Exhibit 7.

Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Consol. Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *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); Decision and Order at 20.

The administrative law judge also rationally rejected Dr. Fino's opinion because his exclusion of legal pneumoconiosis was premised on the assumption that there are no valid pulmonary function studies of record, which is contrary to the administrative law judge's finding that the November 4, 2015, July 27, 2017, and August 8, 2018 studies are all valid and demonstrate a disabling respiratory impairment. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 19-20.

We also reject Employer's argument that Dr. Ajjarapu's opinion is insufficient as a matter of law to establish legal pneumoconiosis. Employer's Brief at 22-26. Claimant can establish legal pneumoconiosis if he proves through credible medical evidence that coal mine dust exposure substantially aggravated a pulmonary or respiratory impairment caused by cigarette smoking. 20 C.F.R. §718.201(a)(2), (b). Claimant is not "required to demonstrate that coal [mine] dust was the only cause of his current respiratory problems." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *see also Swiger*, 98 F. App'x at 237-38 (same). Further, the United States Court of Appeals for the Fourth Circuit has held that a miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

Dr. Ajjarapu diagnosed chronic bronchitis based on Claimant's symptoms of shortness of breath, cough, and sputum production. Director's Exhibit 9 at 32. In attributing the chronic bronchitis to coal mine dust exposure, she explained "tobacco smoke and coal [mine] dust [both] cause airway inflammation leading to bronchospasm and [causing] excessive airway secretions and bronchitis symptoms." *Id*. Dr. Ajjarapu also opined Claimant has a "severe" pulmonary impairment based on pulmonary function testing that is "due, in part, to his work in the coal mines." *Id*. In a supplemental report, Dr. Ajjarapu summarized the findings from her examination and prior report, and reiterated Claimant has legal pneumoconiosis. Director's Exhibit 41. She stated Claimant's underground coal mine work has a "material adverse effect on his lung function" and he does not "have the pulmonary capacity to perform his previous coal mine work" as a result of the "severe" impairment demonstrated by pulmonary function testing. *Id*. She noted

Claimant reported he has "very little smoking history" and "symptoms consistent with chronic bronchitis/legal pneumoconiosis." *Id*.

Thus Dr. Ajjarapu attributed Claimant's chronic bronchitis to a combination of cigarette smoking and coal mine dust exposure. Director's Exhibit 9. She also stated his disabling pulmonary impairment is due, "in part, to his work in the mines" because coal mine dust exposure had "a material adverse effect" on his pulmonary impairment. Director's Exhibits 9 41. Each of these statements supports a finding of legal pneumoconiosis. *Cochran*, 718 F.3d at 322-23; *Consol. Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *see also Groves*, 761 F.3d at 598-99; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001); *Cornett*, 227 F.3d at 576.

In weighing this evidence, the administrative law judge found Dr. Ajjarapu based her conclusions on the totality of information from Claimant's examination, including his relevant work and social histories,[22] his symptoms,[23] physical findings, the results of

[22] The administrative law judge noted "Claimant testified that he did not smoke for more than one year and that he just tried cigarettes a long time ago." Decision and Order at 19, *citing* Hearing Tr. at 29-30; Director's Exhibit 15 at 27-28. He further noted Dr. Ajjarapu recorded a history of one-half to one pack of cigarettes per day from 1975 to 1976, and Dr. Jarboe recorded Claimant smoked a "little in high school but was never a regular smoker." Decision and Order at 19, *citing* Director's Exhibit 9; Employer's Exhibit 5. Finally, the administrative law judge acknowledged Claimant's treatment records document a one to two pack-year smoking history. Decision and Order at 19, *citing* Claimant's Exhibit 8, 9. Contrary to Employer's argument, the administrative law judge took the complete range of reported smoking histories and Claimant's testimony into account, and permissibly determined "Claimant has very little smoking history of approximately [one-half] to [one] pack per day for [one to two] years." Decision and Order at 19; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

[23] We also reject Employer's argument that Dr. Ajjarapu's reporting of Claimant's symptoms are not documented in the record. Employer's Brief at 25. First, Employer does not explain why it was improper for Dr. Ajjarapu to take Claimant's respiratory symptoms into account when rendering her diagnoses following her examination. *See, e.g.*, 20 C.F.R. §718.204(b)(2)(iv) (physician may base opinion "on medically acceptable clinical and laboratory diagnostic techniques); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physician's identification of the miner's symptoms of "shortness of breath," "acute shortness of breath," and "mild shortness of breath" with various activities constitutes a "reasoned medical opinion"). Second, both of Employer's medical experts, Drs. Fino and Jarboe, recorded symptoms consisting of shortness of breath, dyspnea, daily

objective tests, and other evidence of record. Decision and Order at 22, 24. The administrative law judge thus permissibly found Dr. Ajjarapu's opinion reasoned and documented. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 19.

Employer's additional argument that Dr. Ajjarapu did not adequately explain her opinion or set forth how Claimant's pulmonary function testing demonstrates a respiratory impairment consistent with legal pneumoconiosis is a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in crediting Dr. Ajjarapu's opinion and rejecting Drs. Jarboe's and Fino's opinions,[24] we affirm his finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 21.

Disability Causation

To prove he is totally disabled due to pneumoconiosis, Claimant must establish pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer does not challenge the administrative law judge's finding that the opinions of Drs. Fino and Jarboe are not credible on disability causation because they failed to diagnose legal pneumoconiosis. Decision and Order at 26-27. Thus we affirm this finding. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); *Skrack* 6 BLR at 1-711.

We also reject Employer's argument that Dr. Ajjarapu's opinion cannot establish disability causation. Employer's Brief at 32-33. As discussed above, Dr. Ajjarapu opined Claimant's "severe" pulmonary impairment evidenced by pulmonary function testing is due "in part to his work in the mines." Director's Exhibit 9. She indicated coal mine dust exposure had "[a] material adverse effect on his lung function and he [does not] have the

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cough, mucous production, and chest wheezes. Director's Exhibit 11; Claimant's Exhibit 7.

[24] The administrative law judge discredited Dr. Pagtakhan-So's diagnosis of legal pneumoconiosis as poorly documented. Decision and Order at 19.

pulmonary capacity to do his previous coal mine employment" as a result of that "severe" impairment. Director's Exhibit 41.

Dr. Ajjarapu's conclusion constitutes an opinion that Claimant's total disability *is legal pneumoconiosis*; thus, by definition, her opinion supports a finding that legal pneumoconiosis is a substantially contributing cause of that disability. *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where miner's chronic obstructive pulmonary disease (COPD) constituted legal pneumoconiosis and all medical experts agreed that COPD contributed to miner's death); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability."); *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's opinion that a miner has a totally disabling pulmonary impairment supports disability causation if that impairment is found to be legal pneumoconiosis); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 256 (2019). The administrative law judge permissibly found Dr. Ajjarapu's opinion well-reasoned and documented. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 24, 26.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established total disability due to pneumoconiosis. 20 C.F.R. §718.204(c).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge