U.S. Department of Labor

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

BRB No. 20-0297 BLA

KENCIL FELTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERRY COUNTY MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 08/27/2021
	)	
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 Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday (Holliday Law Offices), Hazard, Kentucky, for Claimant.

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

Sarah M. Hurley (Elena S. Goldstein, Deputy 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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Steven B. Berlin's Decision and Order Awarding Benefits (2017-BLA-05203) rendered on a subsequent claim[1] filed on August 8, 2014 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge accepted Employer's concession that Claimant has at least fifteen years of underground coal mine employment, and found the evidence established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, 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), and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He 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

[1] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant filed his initial claim for benefits on February 12, 2001. Director's Exhibit 1. Administrative Law Judge Stuart A. Levin denied his claim for failure to establish any element of entitlement. *Id*. The Benefits Review Board affirmed the denial of benefits in an August 10, 2004 Decision and Order. *Feltner v. Perry County Coal Corp*., BRB No. 04-0297 BLA (Aug. 10, 2004) (unpub.). Consequently, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(c)(3), (4).

[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.

Appointments Clause of the Constitution.[3] It also argues the removal provisions applicable to Department of Labor (DOL) administrative law judges violate the separation of powers doctrine and render his appointment unconstitutional. On the merits, Employer contends the administrative law judge erred in finding Claimant is totally disabled, and therefore, erred in invoking the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding that it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the administrative law judge had the authority to decide the case. Employer filed a combined reply, reiterating its arguments.

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 & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

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[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.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant has at least fifteen years of underground coal mine employment. Decision and Order at 2; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 4, and 8; Decision and Order at 20 n.13.

Appointments Clause

Employer requests the Board vacate the Decision and Order and remand this case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 14-22.[7] It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointments of all sitting DOL administrative law judges on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. Employer's Brief at 14-22; Employer's Reply Brief at 1-4.

[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 the 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 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.

[7] In an April 30, 2018 Motion to Place Claim in Abeyance, Employer requested the administrative law judge hold the case in abeyance pending a decision by the Supreme Court in *Lucia*. The administrative law judge denied Employer's motion in a May 2, 2018 order, asserting that *Lucia* pertained to the SEC administrative law judges and that the Secretary of Labor's ratification of DOL administrative law judges' appointments mooted any objection by Employer.

[8] 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 Berlin.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought the appointment into compliance with the Appointments Clause. Director's Brief at 3-4. We agree with the Director.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (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 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).

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

Employer contends the Secretary's ratification was not evidenced by an "open and unequivocal act" or made with "detached and considered judgement." Employer's Brief at 16-17. However, Employer has not explained how the Secretary's actions demonstrated a lack of "detached and considered judgement." *Advanced Disposal*, 820 F.3d at 603; Employer's Brief at 16. Nor does Employer assert the Secretary had no "knowledge of all the material facts." *Advanced Disposal*, 820 F.3d at 603. Employer therefore has not overcome the presumption of regularity. *Id*. at 603-04 (lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members

of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of my 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). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL administrative law judges. Employer's Brief at 18-22; Employer's Reply Brief at 5-11. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 19-20. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 18-20; Employer's Reply Brief at 7-11.

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address administrative law judges.

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL administrative law judges' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Moreover, the only circuit to squarely address the issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 (9th Cir. Aug. 16, 2021) (holding that 5 U.S.C. §7521 is constitutional as applied to DOL administrative law judges). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional.

Invocation of the Section 411(c)(4) Presumption – Total Disability

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

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relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

established total disability based on the medical opinion evidence and the evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge considered the medical opinions of Drs. Alam and Muha that Claimant is totally disabled and the opinions of Drs. Dahhan and Jarboe that he is not. Director's Exhibits 11, 17, 24; Claimant's Exhibits 2, 3; Employer's Exhibits 1, 3, 4. He found the opinions of Drs. Alam and Muha well-reasoned and documented. Decision and Order at 15-16. In contrast, he accorded diminished weight to the opinions of Drs. Dahhan and Jarboe. *Id*. at 16-17.

Employer contends the administrative law judge erred in his weighing of the medical opinions. Employer's Brief at 22-26. We disagree.

The administrative law judge summarized Dr. Muha's treatment records from Quantam Healthcare, noting he has been Claimant's treating physician since 2007, treating Claimant specifically for breathing problems since 2015 and seeing Claimant every three to six months. Decision and Order at 12; Claimant's Exhibit 3. At his deposition, Dr. Muha explained the results of Claimant's July 22, 2016 arterial blood gas study[11] demonstrate Claimant is not properly oxygenating and is not releasing carbon dioxide "as well as he should." Decision and Order at 15; Director's Exhibit 12; Claimant's Exhibit 3 at 65. He further explained that Claimant suffers from severe shortness of breath, dyspnea on exertion, and requires supplemental oxygen at night and as needed during the day, such as with exertion. Claimant's Exhibit 3 at 64-66. Based on these factors, Dr. Muha opined Claimant could not return to his usual coal mine employment,[12] which required him to consistently perform hard manual labor for eight hours a day, five days a week. *Id*. at 67.

[10] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 14-15.

[11] During Dr. Muha's deposition, Claimant's counsel referenced an arterial blood gas study the physician administered in June 2016. Claimant's Exhibit 3 at 64. In response, however, Dr. Muha described the results of the arterial blood gas study he administered on July 22, 2016. *Id*. at 64-65; Director's Exhibit 12. Thus, contrary to Employer's arguments, Dr. Muha relied on neither Dr. Dahhan's June 14, 2016 arterial blood gas study nor a study not in the record. Employer's Brief at 24.

[12] The administrative law judge found Claimant described his repairman work as requiring very heavy lifting, to include lifting big motors, transmissions, wheel and gear

Employer argues the administrative law judge's weighing of Dr. Muha's opinion based on his status as Claimant's treating physician is inconsistent with law, because the administrative law judge failed to account for the persuasive value of his opinion. Employer's Brief at 24-25. Contrary to Employer's arguments, the administrative law judge did not credit Dr. Muha's opinion based solely on his status as Claimant's treating physician. Rather, he permissibly found Dr. Muha provided a well-reasoned opinion that is supported by both his treatment records and the other evidence of record. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 16. He further permissibly found Dr. Muha's reasoning and documentation, alongside his history of treating Claimant, gave him "a superior understanding" of Claimant's respiratory condition. *See Stephens*, 298 F.3d at 522; *Napier*, 301 F.3d at 713-14; *Rowe*, 710 F.2d at 255; Decision and Order at 16.

We further reject Employer's argument that the administrative law judge erred in crediting Dr. Alam's opinion. Employer's Brief at 22-24. The administrative law judge accurately noted Dr. Alam stated the variability in Claimant's blood gas studies demonstrates hypoxemia, hypercapnia, and abnormality at the alveoli level. Decision and Order at 7, 15; Director's Exhibit 24; Claimant's Exhibit 2. Dr. Alam opined Claimant is totally disabled from returning to his usual coal mine employment based upon the variability in his arterial blood gas studies,[13] as well as his symptoms of chronic cough, sputum production, shortness of breath, and wheezing. Director's Exhibits 12, 24; Claimant's Exhibit 2. The administrative law judge permissibly found Dr. Alam's opinion – that the variability in Claimant's arterial blood gas studies demonstrates the existence of a totally disabling respiratory impairment – is well-reasoned and documented and accorded it probative weight.[14] S*ee Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 15.

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boxes, rock dust bags, and blocks. Decision and Order at 3; Director's Exhibit 25 at 16-17, 33.

[13] The administrative law judge considered four arterial blood gas studies conducted on August 21, 2014, June 14, 2016, July 22, 2016, and April 27, 2017. The August 21, 2014 and July 22, 2016 studies were qualifying at rest and no exercise study was conducted. Director's Exhibit 11, 12. The June 14, 2016 study was non-qualifying at rest and with two minutes of exercise, while the April 27, 2017 study was non-qualifying at rest. Director's Exhibit 17; Employer's Exhibit 1.

[14] We further reject Employer's argument that the administrative law judge failed to adequately explain why he credited the opinion of Dr. Alam over Dr. Dahhan as to the

Finally, Employer argues the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe for failing to address Claimant's intermittent hypoxemia and erroneously assumed the blood gas studies would continue to be intermittent. Employer's Brief at 23-24. Contrary to Employer's arguments, the administrative law judge did not assume the blood gas studies would continue to be intermittent. Instead, he permissibly found that Drs. Muha and Alam offered persuasive explanations for why these intermittent studies indicate the presence of a disabling impairment while Drs. Dahhan and Jarboe failed to adequately address the significance of the variability. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 15-17. Moreover, he also discredited the opinions of Drs. Dahhan and Jarboe because they failed to address whether Claimant's use of supplemental oxygen rendered him totally disabled from performing his usual coal mine employment. Decision and Order at 16-17. As Employer does not challenge this finding, we affirm it. S*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer's challenges to the weighing of the medical opinions amount to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17.

We further reject Employer's argument that the administrative law judge failed to explain how he determined the evidence as a whole establishes total disability. Employer's Brief at 26. The administrative law judge credited the opinions of Drs. Alam and Muha that, despite the non-qualifying pulmonary function studies and conflicting arterial blood gas studies, the evidence establishes total disability in the form of intermittent carbon dioxide retention and the use of supplemental oxygen and respiratory symptoms. Decision and Order at 15-17. Consequently, the administrative law judge adequately explained his decision. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the administrative law judge did and why she did it, the duty of explanation under the Administrative Procedure Act is satisfied); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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relevance of Dr. Dahhan's two minute exercise blood gas study. Employer's Brief at 23. While the administrative law judge noted Dr. Alam's opinion that he would not rely on Dr. Dahhan's exercise study, he neither credited nor discredited either physician on this basis. Instead, he credited Dr. Alam's opinion that the variability between the testing was disabling. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 15.

We therefore affirm the administrative law judge's finding that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), invoked the Section 411(c)(4) presumption, and established a change in a condition of entitlement. 20 C.F.R. §§725.305, 725.309(c); Decision and Order at 17.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[15] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

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."[16] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

We first reject Employer's assertion that the administrative law judge applied an incorrect legal standard when weighing the opinions of Drs. Jarboe and Dahhan on the

[15] "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[16] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 19.

issue of legal pneumoconiosis.[17] Employer's Brief at 26-31. The administrative law judge correctly stated Employer has the burden of establishing Claimant does not have a lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 19. Moreover, he properly evaluated whether Employer's experts credibly explained why coal mine dust exposure did not contribute "in part" to Claimant's impairment. *Id.* at 21-22.

Dr. Jarboe opined Claimant does not have legal pneumoconioses, but instead has a mild restrictive impairment and intermittent carbon dioxide retention due to obesity and medications, and that his chronic bronchitis is non-occupational. Employer's Exhibits 1, 4. Dr. Dahhan also opined Claimant's intermittent carbon dioxide retention is due to his obesity. Director's Exhibit 17; Employer's Exhibit 3.

The administrative law judge accurately found Dr. Jarboe relied, in part, on the lack of x-ray changes to attribute Claimant's impairment to his obesity, and permissibly discredited his opinion as inconsistent with the DOL's recognition that a miner may suffer from legal pneumoconiosis in the absence of x-ray evidence. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *See A&E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); Decision and Order at 21; Employer's Exhibits 1, 4. He further permissibly found that, although each physician explained why Claimant's carbon dioxide retention could be due to obesity, they did not adequately explain how they excluded Claimant's thirty years of coal mine employment as a cause of his impairment. *See* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 21-22.

Thus we affirm the administrative law judge's determination that Employer did not disprove that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer rebutted the presumption by establishing that "no part" of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see*

[17] The administrative law judge also considered the opinions of Drs. Muha and Alam, but accurately found they do not aid Employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 20.

Decision and Order at 22-23. He rationally discredited Drs. Jarboe's and Dahhan's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 23.

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

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge