U.S. Department of Labor

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

BRB No. 20-0361 BLA

CARL McINTOSH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METEC, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/31/2021
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice, and Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Feldman, Deputy Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2017-BLA-05035) 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 subsequent claim filed on May 26, 2015.[2]

In his May 27, 2020 decision, the administrative law judge determined Employer is the properly designated responsible operator. He credited Claimant with 14.336 years of coal mine employment and therefore found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering his entitlement under 20 C.F.R. Part 718, the administrative law judge found he established the existence of legal, but not clinical, pneumoconiosis[4] and therefore a change in an applicable condition of entitlement, as well

[1] This claim was previously before Administrative Law Judge Peter B. Silvain, Jr., who conducted a hearing on November 7, 2017. Director's Exhibit 55. After the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018) (holding that, similar to Special Trial Judges at the United States Tax Court, Securities and Exchange Commission administrative law judges are "inferior officers" subject to the Appointments Clause), the case was reassigned to Judge Golden (the administrative law judge), who conducted a new hearing on October 23, 2019. Hearing Transcript; Notice of Assignment, May 21, 2019; Order Issuing General Order, Oct. 19, 2018.

[2] This is Claimant's second claim for benefits. The Benefits Review Board denied his prior claim on March 24, 2005, affirming the finding that Claimant failed to establish total disability. Director's Exhibit 1 at 6.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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.

[4] "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).

as total disability due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), 725.309(c). Accordingly, the administrative law judge awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[5] and that the removal provisions applicable to the administrative law judge render his appointment unconstitutional. It further asserts it is not the responsible operator. On the merits, Employer argues the administrative law judge erred in finding Claimant established legal pneumoconiosis, total disability, and total disability causation. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject Employer's constitutional challenges to the administrative law judge's appointment. The Director also urges the Board to reject Employer's assertion that it is not the properly designated responsible operator. Employer replied 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

[5] 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.

[6] 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); Hearing Transcript at 13-14.

Appointments Clause

Employer argues the administrative law judge, as an "inferior officer," was not properly appointed and the Secretary's ratification of his appointment on December 21, 2017,[7] as well as the August 31, 2018 Executive Order providing new procedures for the appointment of administrative law judges, was inadequate to remedy his improper appointment.[8] Employer's Brief at 9-13, 16; Reply Brief at 2-4. Employer thus urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).

Appointments Clause issues are "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"); *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).

Although *Lucia* was decided over one year before the administrative law judge's hearing in this matter, Employer did not raise any challenge to his authority to decide the case while the matter was before the administrative law judge; instead, it raises this argument for the first time on appeal. Had Employer timely raised its Appointments Clause challenge to the administrative law judge, he could have considered the issue and, if appropriate, provided the relief Employer is requesting. Having failed to do so, Employer

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[7] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Golden.

[8] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

has forfeited its argument. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (employer forfeited its Appointments Clause challenge by failing to raise it to the administrative law judge); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019).

Furthermore, Employer has not identified any basis for excusing its forfeiture. *See Zdanok*, 370 U.S. at 535; *Kiyuna*, 53 BRBS at 11 (Appointments Clause argument is an "as-applied" challenge that the administrative law judge can address and thus can be waived or forfeited); *see also* 20 C.F.R. §802.301(a) (Board cannot engage in "unrestricted review of a case" but must limit its review to "the findings of fact and conclusions of law on which the decision or order appealed from was based"). We therefore see no reason to entertain its forfeited arguments. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Davis*, 937 F.3d at 591-92; *Powell*, 53 BRBS at 15; *Kiyuna*, 53 BRBS at 11.

Removal Provision

Employer also asserts the removal protections afforded administrative law judges 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 13-17; Reply Brief 4-8. 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. , 2021 WL 2519433 (U.S. June 21, 2021). *Id.*

Like the Appointments Clause issue, Employer's removal argument is subject to issue preservation requirements, and Employer similarly forfeited it 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 Section 7521 removal provisions are subject to issue exhaustion and, because petitioners "did not raise the dual for-cause removal provision before the agency," court was "powerless to excuse the forfeiture"). Regardless, Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787, at *10 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL administrative law judges).

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 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.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 2021 WL 2519433, at *11. 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"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787, at *10.

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

Responsible Operator – Coal Mine Employment

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 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 another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer argued to the administrative law judge that it is not the responsible operator because Metec Incorporated (Metec) is not a coal mine operator and Claimant did not work for it as a "miner."[11] Employer's Post-Hearing Brief at 14; Decision and Order at 4. The administrative law judge found Claimant's work satisfied the function and situs tests for qualifying as a miner and Metec was an operator because it was an independent contractor providing services essential to the extraction of coal.[12] Decision and Order at 4-5, 9-10 (citing 20 C.F.R. §725.491(a)(1); *Etzweiler v. Cleveland Bros. Equipment, Inc.*, 16 BLR 1-38, 1-41 (1992); Director's Exhibits 1 at 430, 55; Hearing Transcript at 13, 20).

[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 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).

[11] The Act's definition of a miner is comprised of a "situs" requirement (claimant must have worked in or around a coal mine or coal preparation facility) and a "function" requirement (claimant must have worked in the extraction or preparation of coal). 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a); *see Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989).

[12] The administrative law judge noted Metec leased mining equipment and credited Claimant's testimony that he traveled to the mine sites on a daily basis to repair machines.

Because the administrative law judge further found Employer satisfied all the criteria for a responsible operator, he concluded it was liable for benefits.

Employer does not challenge the administrative law judge's findings that Metec qualifies as an operator or that Claimant worked as a miner for it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, it asserts for the first time on appeal that because Claimant allegedly performed the same type of work for Brandeis Machinery & Supply LLC (Brandeis) and Komatsu America Corporation (Komatsu)[13] for at least one year after he stopped working for Metec, either company should be found to be the responsible operator.[14] Because Employer did not make this argument to the administrative law judge, we will not address it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). We therefore affirm the administrative law judge's finding that Employer is the responsible operator liable for benefits.

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease causation (it 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

[13] Claimant's Social Security Administration earnings record indicates Brandeis employed Claimant in 1993 and 1994, and Komatsu employed him from 1994 through 2000. Director's Exhibit 1 at 392. Claimant testified he worked for Brandeis for one year and "Komatsu bought [Brandeis] out and they kept us on." Director's Exhibits 1 at 121, 55 at 26; Hearing Transcript at 24.

[14] Employer states in its reply brief that it challenged its designation as the responsible operator because Claimant had alleged working in coal mine employment for another operator for more than one year after he stopped working for it. This argument, however, was not presented to the administrative law judge in Employer's post-hearing brief, in which it asserted it was not an operator and Claimant did not work for it as a miner. The administrative law judge considered Claimant's work with Brandeis and Komatsu in the context of determining the length of his coal mine employment and not the responsible operator issue, as Employer had not argued either company should be held liable for benefits. Unlike Claimant's employment with Metec, the administrative law judge found Claimant's work for these companies did not satisfy the situs test for work as a miner and thus his work for them did not constitute qualifying coal mine employment.

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).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit holds that 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." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The administrative law judge considered the opinions of Drs. Ajjarapu, Rosenberg, and Tuteur. Decision and Order at 19-22. Dr. Ajjarapu diagnosed legal pneumoconiosis in the form of disabling chronic bronchitis caused by a combination of coal mine dust exposure and cigarette smoking. Director's Exhibit 8. Drs. Rosenberg and Tuteur opined Claimant has a significant obstructive impairment not related to, or aggravated by, coal dust exposure.[15] Director's Exhibit 16; Employer's Exhibits 2, 4, 5, 6. The administrative law judge credited Dr. Ajjarapu's opinion as well-reasoned and consistent with the record and the preamble to the 2001 regulatory revisions, and discredited the opinions of Drs. Rosenberg and Tuteur as insufficiently reasoned. He therefore found the medical opinions established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 19, 20-22.

We initially reject Employer's assertion that the administrative law judge misapplied the preamble to "effectively presume[] entitlement and eliminate[] any burden on the [C]laimant to establish a substantial relationship between his coal mine employment and later respiratory disease or disability." Employer's Brief at 22. The administrative law judge correctly recognized that a claimant must "prove that his impairment was 'significantly related to, or aggravated by, exposure to coal dust' by showing that his disease was caused 'in part' by coal mine employment." Decision and Order at 18-19 (quoting *Groves*, 761. F.3d at 598-99, 20 C.F.R. §718.201(b)). He found Dr. Ajjarapu's opinion satisfies that burden, and permissibly found it entitled to greater weight than the

[15] Dr. Rosenberg did not state an opinion as to the etiology of Claimant's obstruction; however, Dr. Tuteur attributed it to cigarette smoking only. Director's Exhibit 16; Employer's Exhibits 2, 4, 5, 6.

contrary opinions of Drs. Rosenberg and Tuteur. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

As the administrative law judge noted, Dr. Ajjarapu took relevant histories, examined Claimant, and conducted objective studies. Decision and Order at 19. She diagnosed legal pneumoconiosis in the form of chronic bronchitis based on Claimant's "'respiratory symptoms,' including 'daily cough with sputum production,'" the qualifying pulmonary function study obtained in conjunction with her examination,[16] and her accurate understanding of both Claimant's coal mine employment and smoking histories.[17] *Id.* (quoting Director's Exhibit 8 at 36-38). The administrative law judge permissibly found Dr. Ajjarapu's opinion adequately reasoned as she explained that "[b]oth tobacco smoke and [c]oal dust cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms." Decision and Order at 19, 22; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He also permissibly found her opinion consistent with DOL's recognition that the risks of smoking and coal dust exposure "may be additive to each other." Decision and Order at 19, 22; *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012).

Further, contrary to Employer's assertion, the administrative law judge did not summarily dismiss the opinions of Drs. Rosenberg and Tuteur as contrary to the preamble. Employer's Brief at 20-22. Rather, he explained why he considered their opinions unpersuasive based on the rationales they provided. The administrative law judge observed Dr. Rosenberg relied on Claimant's partial response to bronchodilators to exclude coal mine dust exposure as a cause of his chronic obstructive pulmonary disease (COPD). Decision and Order at 20; Employer's Exhibit 5. He permissibly found Dr. Rosenberg's rationale that "this simply does not relate to past coal mine dust exposure" insufficient to explain why the irreversible portion of Claimant's COPD is not significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 20 (referencing Employer's Exhibits 2 at 7, 10, 5 at 3); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Barrett*, 478 F.3d at 356.

The administrative law judge accurately observed Dr. Tuteur stated Claimant was "exposed to sufficient amounts of coal mine dust to produce" legal pneumoconiosis.

[16] 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. 20 C.F.R. §718.204(b)(2)(i).

[17] Contrary to Employer's contention, Dr. Ajjarapu did not opine "obstructive lung disease is always caused by coal [mine] dust exposure." Employer's Brief at 19.

Decision and Order at 20; Employer's Exhibit 2 at 1. However, based on his review of various medical studies, Dr. Tuteur concluded Claimant's COPD is due solely to cigarette smoking because statistics show the risk for a nonsmoking coal miner to develop lung disease was less than three percent, supporting "the infrequency with which coal mine dust produces COPD." Decision and Order at 21, quoting Employer's Exhibit 2 at 4-5. The administrative law judge permissibly discounted Dr. Tuteur's opinion as unpersuasive because it is based on statistical generalities rather than Claimant's specific condition. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013) (an administrative law judge may reject an opinion that relies on general statistics); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 21-22. Moreover, the administrative law judge permissibly found Dr. Tuteur did not explain why he completely eliminated Claimant's coal mine dust exposure as a causative factor, while concluding Claimant's remote exposure to a wood-burning fireplace in childhood did contribute to his COPD. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 21.

Employer's arguments regarding legal pneumoconiosis amount to a request that we reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the administrative law judge acted within his discretion in rendering his credibility findings, and they are supported by substantial evidence, we affirm his determination that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 22.

Total Disability

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

medical opinions, and his weighing of the evidence as a whole.[18] Decision and Order at 21-31; 20 C.F.R. §718.204(b)(2).

Pulmonary Function Studies

The administrative law judge considered five pulmonary function studies.[19] He found Dr. Rosenberg's January 20, 2016 study invalid[20] and the remaining studies valid. Decision and Order at 23-28; Director's Exhibits 8, 16; Claimant's Exhibits 3, 5; Employer's Exhibit 2. Dr. Ajjarapu's June 17, 2015 study was qualifying before and after bronchodilators were administered. Director's Exhibits 8; 16. Dr. Tuteur's December 12, 2016 study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Employer's Exhibit 2. Studies dated July 9, 2018 and July 10, 2019, contained in Claimant's treatment records, had qualifying values and no bronchodilators were administered. Claimant's Exhibits 3, 5. Relying on the valid and qualifying pre-bronchodilator tests, the administrative law judge found the pulmonary function study evidence established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 28.

Employer contends the administrative law judge erred in rejecting the opinions of Drs. Vuskovich, Tuteur, and Rosenberg that Dr. Ajjarapu's qualifying June 17, 2015 pulmonary function study is invalid. Employer's Brief at 6, 23-24. 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. A party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). Thus, Employer has the burden to establish the study's results are invalid.

[18] The administrative law judge found the blood gas studies were non-qualifying and no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 23, 29.

[19] The administrative law judge noted each administering technician measured Claimant as 70 inches tall. Decision and Order at 24. He correctly applied the values associated with the closest greater height of 70.1 inches. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008).

[20] The administrative law judge found the January 20, 2016 study to be invalid based on Drs. Rosenberg's and Vuskovich's opinions, and as supported by the administering technician's comments. Decision and Order at 26; Director's Exhibit 16; Employer's Exhibit 7.

Dr. Ajjarapu conducted the June 17, 2015 study as part of DOL's complete pulmonary evaluation of Claimant. Director's Exhibit 8. The administering technician observed Claimant gave "good" cooperation and effort, and Dr. Gaziano indicated the study is valid. *Id.* at 9, 13-17. Dr. Vuskovich reviewed the tracings of the study and summarily concluded the FVC, FEV_1, and MVV values are unacceptable, and "[Claimant] did not put forth the effort required to generate valid spirometry results." Director's Exhibit 11 at 2. Dr. Tuteur, in summarizing the pulmonary function study evidence in his consultative report, merely wrote "no" with regard to the test's validity, without any explanation. Employer's Exhibits 2 at 4, 4 at 2. Dr. Rosenberg noted the conflict in the opinions of Dr. Gaziano and Vuskovich with regard to the study's validity and summarily accepted Dr. Vuskovich's invalidation. Director's Exhibit 16 at 4.

Because the administrative law judge permissibly found Drs. Vuskovich, Tuteur, and Rosenberg did not adequately explain their opinions, we affirm his rejection of them. Decision and Order at 25; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); *Vivian*, 7 BLR at 1-361. Moreover, the administrative law judge permissibly gave more weight to the administering technician's observation, supported by Dr. Ajjarapu's signed report, that Claimant gave "good effort" and Dr. Gaziano's opinion validating the study. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (administrative law judge may rely on the opinion of the physician who administered a ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994); *see also Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-149 (1990) (administrative law judge must provide a rationale to credit consultant's opinion over physician or technician who observed the test); Decision and Order at 25. We therefore affirm the administrative law judge's findings that the June 17, 2015 study is valid and the pulmonary function studies establish total disability.[21] 20 C.F.R. §718.204(b)(2)(i).

We also reject Employer's argument that the administrative law judge selectively reviewed the pulmonary function study evidence and erred in rejecting the non-qualifying post-bronchodilator values. Employer's Brief at 22, 26. The administrative law judge permissibly found the pre-bronchodilator tests more probative as to whether Claimant

[21] Employer contends the administrative law judge erred in automatically giving the first-hand observations of the technician who conducted the study controlling weight. Employer's Brief at 24 (referencing Decision and Order at 25 n.92). Contrary to Employer's characterization, the administrative law judge assessed the credibility of the reviewing physicians' opinions in conjunction with the technician's observations and Dr. Gaziano's opinion, and acted within his discretion in resolving the conflict in the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

could perform his usual coal mine work without the aid of medication.[22] *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The DOL has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; Decision and Order at 24, 31.

Medical Opinions

The administrative law judge credited Dr. Ajjarapu's opinion that Claimant is totally disabled over the contrary opinions of Drs. Tuteur and Rosenberg. 20 C.F.R. §718.204(b)(2)(iv). Employer contends the administrative law judge did not provide credible reasons for the weight he accorded to the conflicting medical opinions. We disagree.

Contrary to Employer's contention, we see no error in the administrative law judge's finding that Dr. Ajjarapu offered a reasoned and documented opinion that Claimant is totally disabled from performing his usual coal mine employment, based on her consideration of Claimant's symptoms and her reference to the pulmonary function study she obtained. *Rowe*, 710 F.2d at 255; Decision and Order at 29; Claimant's Exhibit 8 at 31, 37-38. Moreover, although Dr. Ajjarapu did not specifically discuss the exertional requirements of Claimnat's usual coal mine work, the administrative law judge had discretion to find her opinion supportive of a finding of total disability because it is consistent with the weight of the qualifying pulmonary function evidence, which proves a totally disabling respiratory or pulmonary impairment "without regard to the heavy

[22] The administrative law judge used a height of 70.1 inches to assess whether Claimant's pulmonary function studies are qualifying. Decision and Order at 24. He accurately observed Claimant was sixty-six years old at the time of the June 17, 2015 pulmonary function study and that it yielded post-bronchodilator FEV_1 and MVV values of 1.94 and 37.34, respectively. Decision and Order at 23-24; Director's Exhibit 8 at 13. As the applicable table values in Appendix B of Part 718 indicate that an FEV_1 equal to or less than 1.96 and an MVV equal to or less than 79 qualify for total disability, the administrative law judge erroneously determined the June 17, 2015 post-bronchodilator study was non-qualifying. Decision and Order at 23; Director's Exhibit 8 at 13. This error is harmless as he permissibly credited the pre-bronchodilator pulmonary function studies as more probative. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 24.

exertion required by his last coal mine work."[23] Decision and Order at 29, 31; *see* 20 C.FR. §718.204(b)(2)(i); *Crisp*, 866 F.2d 179, 185.

With regard to Employer's experts, the administrative law judge accurately observed that Drs. Rosenberg and Tuteur relied on non-qualifying post-bronchodilator pulmonary function study results to support their conclusions that Claimant does not have a disabling obstructive impairment. Having permissibly credited the pre-bronchodilator values in finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge acted within his discretion in rejecting the opinions of Drs. Rosenberg and Tuteur because they did not adequately explain why Claimant could perform his usual coal mine work in view of the qualifying pulmonary function study evidence.[24] *See Rowe*, 710 F.2d at 255; Decision and Order at 30-31; Employer's Exhibits 4 at 2, 5 at 3, 6 at 1. We therefore affirm the adminsitrative law judge's finding that Claimant established total disability based on Dr. Ajjarapu's opinion at 20 C.F.R. §718.204(b), as it is supported by substantial evidence.

[23] Employer asserts Dr. Ajjarapu did not adequately explain the basis for her conclusion that Claimant is totally disabled. Employer's Brief at 25. Even if we were to agree with Employer that Dr. Ajjarapu's opinion is not adequately explained, it does not alter our conclusion that substantial evidence supports the administrative law judge's overall finding that Claimant is totally disabled. *See Larioni*, 6 BLR at 1-1278. As explained below, the administrative law judge found Claimant totally disabled based on the qualifying pulmonary studies and explained why the contrary evidence did not outweigh those studies.

[24] The administrative law judge credited Claimant's description that his job as a mechanic and welder required him to lift fifty pounds three or four times per shift and to lift fifty to seventy pounds ten to twenty times per shift. Decision and Order at 10 (referencing Director's Exhibit 5 at 2 (Description of Coal Mine Work Form CM-913)). The administrative law judge further found Dr. Rosenberg did not explain how Claimant could perform the "heavy" lifting demands of his usual coal mine employment despite his qualifying pre-bronchodilator pulmonary function studies, and Dr. Tuteur did not discuss the exertional requirements of Claimant's usual work. Decision and Order at 29-30. Employer asserts the administrative law judge characterized Claimant's work as heavy without reference to any regulation or definition. Employer's Brief at 24 n.5. However, the administrative law judge notified the parties that he would take official notice of the occupational exertion requirements described in DOL's *Dictionary of Occupational Titles* (DOT) if necessary. Notice of Intent to Take Official Notice, May 21, 2019. Employer does not explain why the administrative law judge erred in relying on the DOT or why Claimant's job duties do not satisfy the definition of heavy labor contained in the DOT.

Weighing the Evidence as a Whole

Employer also contends the administrative law judge erred in finding total disability established based on his consideration of the evidence as a whole. We disagree. The administrative law judge permissibly found the non-qualifying blood gas studies do not contradict the qualifying pulmonary function studies because those tests measure different types of lung function. Decision and Order at 31 (citing *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993). As Dr. Ajjarapu opined Claimant is totally disabled, and the administrative law judge permissibly rejected the contrary opinions of Drs. Tuteur and Rosenberg, we see no error in the administrative law judge's overall finding that Claimant is totally disabled. *See Rowe*, 710 F.2d at 255. Thus, we affirm the administrative law judge's finding that Claimant established total disability at 20 C.F.R. §718.204(b). *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 31.

Total Disability Causation

The administrative law judge correctly observed Claimant must establish that pneumoconiosis is a "substantially contributing cause" of his "totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); Decision and Order at 31 (citing *Groves*, 761 F.3d at 599). He further recognized pneumoconiosis is a "substantially contributing cause" of disability if it: "(i) has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) materially 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); Decision and Order at 31-32.

Because we have affirmed the administrative law judge's finding that Dr. Ajjarapu's opinion establishes Claimant's disabling COPD (chronic bronchitis) constitutes legal pneumoconiosis, we see no error in his logical determination that her opinion also establishes Claimant is totally disabled due to pneumoconiosis. *See Brandywine Explosives & Supply v. Kennard*, 790 F.3d 657, 668-69 (6th Cir. 2015) ("no need for the [administrative law judge] to analyze the opinions a second time" at disability causation where the employer failed to establish that the impairment was not legal pneumoconiosis); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 32. The administrative law judge also permissibly discredited Drs. Rosenberg's and Tuteur's opinions on disability causation because they did not diagnose legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 32. We therefore affirm the administrative law judge's finding that Claimant established his

total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 33.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge