U.S. Department of Labor

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

BRB No. 20-0132 BLA

LEROY WORKMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING COMPANY	)	DATE ISSUED: 8/15/2022
	)	
and	)	
	)	
SELF-INSURED THROUGH ARCH RESOURCES	)	
	)	
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 and Order Denying Motion for Reconsideration of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2018-BLA-05365) rendered on a subsequent claim filed on August 5, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Hobet Mining, Incorporated (Hobet) is the responsible operator and Arch Coal Company, now Arch Resources (Arch), is the responsible carrier. She further found Claimant established 29.5 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. She therefore concluded Claimant invoked the rebuttable 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).[3] The ALJ further found Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's third claim for benefits. Director's Exhibits 1, 3, 4. He filed two claims which were withdrawn and therefore are considered not to have been filed. 20 C.F.R. §725.306(b). Director's Exhibits 2, 5. Claimant's most recent prior claim was filed on April 27, 2012, and the district director denied it on November 5, 2012 because Claimant did not establish any element of entitlement. Director's Exhibit 4. Claimant took no further action on his denied claim.

[2] Section 411(c)(4) 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless she finds "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

On appeal, Employer argues ALJ Appetta (the ALJ), and the prior ALJ, Richard A. Morgan,[4] lacked the authority to decide the case because they were not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. It asserts the removal provisions applicable to ALJs render their appointments unconstitutional. It further contends the ALJ erred in finding Arch Coal is the liable insurance carrier.[5] On the merits, Employer contends the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption and, alternatively, in finding it did not rebut the presumption.[6] Claimant responds urging affirmance of the ALJ's constitutional findings, responsible operator designation, and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJs' appointments. He further urges the Board to affirm the ALJ's determination that Hobet is the responsible operator and Arch is liable for the payment of benefits and to reject Employer's argument that because Claimant had a heart attack prior to developing disabling pneumoconiosis, he is precluded from receiving benefits. Employer filed reply briefs, reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are rational, supported by substantial evidence, and in

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"those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's prior claim was denied for failure to establish any element of entitlement, Claimant had to establish one element to obtain review of the merits of his claim. *See White*, 23 BLR at 1-3; Director's Exhibit 4.

[4] This case was initially assigned to ALJ Richard A. Morgan but was reassigned to ALJ Appetta after he retired. Decision and Order at 3, 7 n.10; Order Denying Motion for Reconsideration at 8.

[5] Employer also contends this case should be held in abeyance pending a determination on the constitutionality of the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010. Employer's Brief at 41 n.14. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021); *see also Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018).

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 29.5 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §725.309(c); Decision and Order at 5.

accordance with applicable law.[7] 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).

Appointments Clause

Employer requests the Board vacate the ALJ's decision and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 16-20; Employer's Reply to Claimant at 1-4; Employer's Reply to Director at 15-18. It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the

[7] 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 West Virginia. *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 65.

[8] *Lucia* involved a challenge to the appointment of an ALJ 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 ALJs 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 has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary issued separate letters to ALJ Appetta and ALJ Morgan 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 ALJ Appetta. The Secretary also issued a letter to ALJ Morgan 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

constitutional defect in the ALJs' prior appointments. Employer's Reply to Director at 17-18.[10] We disagree.

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 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 ALJs 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 ALJs in a

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> a District Chief 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 ALJ Morgan.

[10] In its initial brief to the Board, Employer raised issues only with the removal provisions applicable to ALJs, asserting they render ALJ Appetta's and ALJ Morgan's appointments unconstitutional and stated it did not make a "'ratification-based' challenge on appeal." Employer's Brief at 16-20; Employer's Reply to Claimant at 1. However, in its reply to the Director's brief, Employer cites *Lucia* and argues "[t]he Secretary did not appoint ALJs Appetta and Morgan, rather, he 'ratified' someone else's choice without meaningful consideration. But ratification of an unlawful act itself is unlawful . . . ." Employer's Reply to Director at 17.

single letter. Rather, he specifically identified ALJs Appetta and Morgan and gave "due consideration" to their appointments. Secretary's December 21, 2017 Letters to ALJs Appetta and Morgan. The Secretary further stated he was acting in his "capacity as head of [DOL]" when ratifying the appointment of ALJ Appetta "as an Administrative Law Judge" and ALJ Morgan "as a District Chief Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," but generally speculates he made a "choice without meaningful consideration" when he ratified the ALJs' appointments. Employer's Reply to Director at 17. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the ALJs' appointments. *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" 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" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs, generally asserting the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing to Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 16-20; Employer's Reply to Claimant at 1-4; Employer's Reply to Director at 15-18. It 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). *Id*.

The removal argument is subject to issue preservation requirements, however, and Employer forfeited its argument by not raising it before the ALJ. *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 requirements). 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*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in rejecting a similar argument regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise*[11] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, F.4th. , No. 20-4303, 2022 WL 2081430 at *13 (6th Cir. June 10, 2022), *citing Free Enter. Fund*, 561 U.S. at 507 n.10. The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Calcutt*, 2022 WL 2081430 at *13-17. Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Id*. Employer in this case has not alleged any harm whatsoever.

Nor do *Seila Law* or *Arthrex* support Employer's argument. 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."[12] 140 S. Ct. at 2201. It did not address ALJs. Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. 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.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

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[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 [ALJs]" 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 ALJs. *Lucia*, 138 S. Ct. at 2050 n.1.

[12] 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).

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ'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. Fla. 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 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*, 8 F.4th at 1137-38.

Responsible Insurance Carrier

Claimant last worked in coal mine employment from 1996 to 2000 for Hobet, which was self-insured through Arch on Claimant's last day of employment. Director's Exhibits 11, 33; Hearing Transcript at 38, 53. In 2005, Hobet was sold to Magnum Coal Company (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Exhibit 25; Employer's Brief at 24 n.7. In 2015, Patriot went bankrupt. *Id.*

Employer does not dispute that Hobet is the correct responsible operator and was self-insured through Arch on the last day Hobet employed Claimant. Employer's Brief at 24.[13] Rather, it asserts Arch's authority to self-ensure, and therefore its liability as a self-insurer, ended on December 31, 2005. *Id.* at 21-39; Employer's Reply to Director at 5-14. Employer maintains the ALJ erred by treating Arch as an operator or commercial insurance carrier rather than a self-insurer. Employer's Brief at 21-27; Employer's Reply to Director at 9-12. It also argues the sale of Hobet to Magnum released Arch from liability for the claims of miners who worked for Hobet, and the DOL endorsed this shift of liability. Employer's Brief at 27-28; Employer's Reply to Director at 8-9, 12-13. Employer further argues the DOL's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 16-01[14]

[13] Arch asserts "[t]here can be no reasonable dispute that Hobet, which ceased to exist on January 1, 2006 is financially unable to pay benefits" but does not similarly assert that Arch is incapable of assuming liability. Employer's Brief at 24 n.7.

[14] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum issued by the Department of Labor on November 12, 2015, to "provide guidance for district

reflects a change in policy, by which the DOL is retroactively imposing new liability on self-insured mine operators, bypassing traditional rulemaking. Employer's Brief at 29-39; Employer's Reply to Director at 5-8. Employer additionally contends the ALJ abused her discretion in denying its request for discovery relating to BLBA Bulletin No. 16-01. *Id.*

Claimant responds that the ALJ properly identified Hobet, self-insured through Arch, as the proper responsible operator. Claimant's Brief at 6-7. He also asserts the ALJ correctly determined that Arch is not entitled to further discovery concerning BLBA Bulletin No. 16-01. *Id*. at 7-9. The Director responds that the ALJ did not err in finding Hobet, self-insured through Arch, is the responsible operator and carrier. Director's Brief at 6-10. The Director also states that contrary to Employer's contention, the ALJ did not consider Arch to be a responsible operator or commercial insurance carrier. *Id*. At 7-8. The Director further contends that the ALJ did not abuse her discretion in denying Employer's untimely discovery relating to liability. *Id*. at 10-12. Finally, the Director argues the Board need not address Employer's challenges to BLBA Bulletin No. 16-01. *Id*. at 12-15. Employer replied separately to Claimant's brief and to the Director's brief reiterating and expanding on its original arguments. Employer's Reply to Claimant at 8-9; Employer's Reply to Director at 5-14.

District Director Proceedings

Following receipt of Claimant's claim on August 5, 2015, the district director identified Hobet, self-insured through Patriot, as the "potentially liable operator" in a September 10, 2015 Notice of Claim. Director's Exhibits 7, 26. Hobet/Patriot responded on September 22, 2015, stating "Hobet Mining/Patriot Coal is in agreement that it should be a party in interest to all future proceedings in this matter" but reserved the right to contest liability. Director's Exhibit 30. The district director subsequently identified Hobet, self-insured through Arch, as the "potentially liable operator" in an April 15, 2016 Notice of Claim. Director's Exhibit 27. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id*.

In response, Arch contested Hobet's designation as the responsible operator because Hobet is no longer in existence and may not have been Claimant's last coal mine employer for one year. Director's Exhibit 25. It also asserted it was incorrectly designated as the "carrier" because it "is not an insurance carrier as defined by [the Department of Labor]'s

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office staff in adjudicating claims" affected by Patriot's bankruptcy. In certain claims involving Patriot subsidiaries "that were, at one time, under the self-insurance authority of Arch Coal, Inc.," it instructs claims examiners to "determine whether the claim is covered" by Arch's self-insurance or a commercial insurance policy.

regulations." *Id*. It further requested its dismissal from the claim on the bases that Patriot acquired Hobet's assets and liabilities when it purchased Magnum and Patriot cannot cover any liabilities because it filed for bankruptcy; therefore, the Trust Fund is liable for benefits because it approved Patriot as a self-insurer. *Id*.

On March 1, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Hobet as the responsible operator, self-insured through Arch. Director's Exhibit 31. The district director informed Hobet and Arch that they had until April 30, 2017, to submit additional documentary evidence relevant to liability and identify any liability witnesses they intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on April 24, 2017, and contested liability. Director's Exhibit 32. It identified Claimant as a potential witness concerning the properly designated responsible operator but did not submit any documentary evidence to the district director to support its controversion of liability or identify any additional liability witnesses.[15] *Id*.

The district director issued a Proposed Decision and Order (PDO) on August 22, 2017, awarding benefits and designating Hobet as the responsible operator and Arch as the responsible carrier. Director's Exhibit 33. In a September 15, 2017 response to the PDO, Employer denied liability and requested a hearing. Director's Exhibit 38.

ALJ Proceedings

After the case was transferred to the OALJ, Employer attempted to develop documentary evidence pertaining to its liability. On March 14, 2018, it requested subpoenas for deposition testimony and documents from DOL employees Michael Chance and Kim Kasmeier concerning liability issues, including information about BLBA Bulletin No. 16-01, to which the Director objected. On April 3, 2018, ALJ Morgan issued an Order Denying Employer's Subpoena Request because Employer failed to present any liability

[15] On May 16, 2018, the DOL sent ALJ Morgan Director's Exhibits 42 and 43, which were inadvertently excluded from the Director's initial exhibits. Director's Exhibit 42 is an April 26, 2017 letter from Arch requesting additional time to submit evidence in response to the SSAE and Director's Exhibit 43 is the district director's May 12, 2017 letter extending the deadline to submit evidence until July 1, 2017.

evidence or identify these witnesses before the district director and did not argue extraordinary circumstances existed for its failure to do so. Employer filed a motion for reconsideration of its subpoena requests, to which the Director objected, and, on May 18, 2018, ALJ Morgan affirmed his previous denial. *See* ALJ's May 18, 2018 Order Affirming Denial of Employer's Subpoena; Employer's April 27, 2018 Motion for Reconsideration; Director's May 11, 2018 Opposition to Arch Coal's Motion for Reconsideration. Employer appealed the denial of the subpoenas to the Board but it dismissed Employer's appeal as interlocutory. *Workman v. Hobet Mining, Inc.*, BRB No. 18-0422 BLA (Nov. 30, 2018) (unpub. Order).

While the interlocutory appeal was pending before the Board, ALJ Morgan retired, and the case was reassigned to ALJ Appetta. She scheduled a March 27, 2019 hearing, and Employer filed a motion to cancel the hearing due to the pending Board appeal and its assertion that her and ALJ Morgan's appointments violated the Appointments Clause. Employer's November 7, 2018 Motion to Cancel Hearing. On January 8, 2019, the ALJ denied the motion.[16] ALJ's Order Denying Motion to Cancel Hearing.

Following the Board's dismissal of Employer's interlocutory appeal, Employer filed a second motion for reconsideration of ALJ Morgan's denial of its subpoena request. Employer's January 10, 2019 Request for Reconsideration of ALJ Morgan's prior rulings denying its subpoena requests. ALJ Appetta denied the motion as untimely and gave the same reasons ALJ Morgan relied upon in his prior denials. ALJ Appetta's January 30, 2019 Order Denying Employer's Motion for Reconsideration; *see* ALJ Morgan's April 3, 2018 and May 18, 2018 Orders. Employer also served the Director with interrogatories and requests for production concerning liability, including matters relating to Arch's and Patriot's self-insurance and BLBA Bulletin No. 16-01, to which the Director filed a Motion for Protective Order. *See* Arch Coal's January 9, 2019 Requests to DOL for the Production of Training Materials; Arch Coal's January 9, 2019 Interrogatories and Requests for Admissions and Documents Regarding the Preamble; Director's March 12, 2019 Motion for Protective Order; *see also* Arch Coal's March 25, 2019 Opposition to the Solicitor's Motion for a Protective Order.

At the March 27, 2019 hearing, Employer submitted Employer's Exhibits 8 through 17 and 21 relating to Arch's liability or status as a party in this case. The ALJ ultimately excluded these exhibits because Employer did not submit this evidence to the district director, timely identify these liability witnesses, or establish extraordinary circumstances

[16] In response to Employer's motion to cancel the hearing, the ALJ issued an Order Directed to Claimant and the Director to Show Cause Why Hearing should not be Cancelled. Both parties timely responded.

for failing to do so. *See* 20 C.F.R. §725.456(b)(1); Decision and Order at 7-8 n.10; Hearing Transcript at 22-24; ALJ's Aug. 14, 2019 Order Denying Arch's Opposed Motion to Strike. The ALJ also addressed Employer's Exhibit 20, identified as Arch Coal's Discovery Requests Regarding the Preamble and OALJ Training Materials and DOL's Responses and the Director's Motion for Protective Order in response to those requests. *See* Hearing Transcript at 29-35. The ALJ noted Employer "requested discovery, but . . . did nothing to compel any kind of response until [its] prehearing [report], which is not a Motion to Compel" and did not otherwise timely indicate to the ALJ that the Director failed to respond to its discovery request. *Id*. at 32. She determined that because Employer did not pursue discovery during the discovery period, the Director's Motion for Protective Order is moot and excluded Exhibit 20. *Id*. at 31-35.

In her Decision and Order, the ALJ found Claimant entitled to benefits. She determined Employer satisfied the responsible operator criteria at 20 C.F.R. §725.494, and it had not shown its self-insurer, Arch, was incapable of paying benefits pursuant to Sections 725.494(e) and 725.495(b). Decision and Order at 6-11. Specifically, she noted Employer did not present any evidence, or argue, that it is financially incapable of paying benefits. *Id*. at 6-7, 10. She also rejected Employer's argument that Arch was released from liability because it sold Hobet to Magnum and the Director authorized Patriot to self-insure Hobet's liabilities. *Id*. at 8-9. She further rejected Employer's argument concerning the validity of BLBA Bulletin No. 16-01, finding it was an "enforcement policy" rather than a "legislative rule" and therefore "does not 'alter the rights or interests of parties.'" *Id*. at 11, *quoting Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 501 (D.C. Cir. 2018). The ALJ did not rely on BLBA Bulletin No. 16-01 when making her liability findings because she found the Act and regulations support that Hobet, self-insured through Arch, is the properly designated responsible operator. *Id*. Employer subsequently filed a motion for reconsideration concerning the liability and Appointments Clause issues, which the ALJ denied on December 9, 2019.[17]

Exclusion of Evidence

Employer contends the ALJ's failure to compel discovery violated its due process rights. Employer's Brief at 30-37. The Director responds that the ALJ did not abuse her discretion in finding Employer did not establish extraordinary circumstances for its failure to designate witnesses and submit documentary evidence while the case was before the district director. Director's Brief at 10-12. Employer replies that it was not required to

[17] Employer appealed to the Board and filed a January 21, 2020 motion to consolidate this case with two other cases, which the Board denied on December 21, 2020. *Workman v. Hobet Mining, Inc.*, BRB No. 20-0132 BLA (Dec. 21, 2020) (unpub. Order).

make such designations and submissions before the district director because the evidence it was seeking relates not to the facts underpinning its liability but to whether the Director improperly changed its liability policy through the issuance of BLBA Bulletin No. 16-01. Employer's Reply at 5-8. We agree with the Director's argument.

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of such issues must establish the ALJ's action represented an "abuse of . . . discretion." *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The ALJ acknowledged Employer's argument that its discovery request pertained to whether the DOL's issuance of a liability policy violated the APA, and not to the underlying facts giving rise to its liability. Decision and Order at 7-8, n.10, 11; ALJ's January 30, 2019 Order Denying Employer's Motion for Reconsideration at 2-4; *see* ALJ Morgan's May 18, 2018 Order Affirming Denial of Employer's Subpoena Request at 3-4. However, the ALJ found Employer's defense is relevant only to the issue of whether the designated responsible operator is liable, regardless of how Employer characterized its arguments. *Id*. Thus, because the district director must identify the responsible operator or carrier before a case is referred to the OALJ, the ALJ properly found the regulations requiring timely submission of liability evidence and identification of witnesses to the district director apply to Employer's discovery requests regarding BLBA Bulletin No. 16-01.[18] Decision and Order at 10; 20 C.F.R. §§725.414(c), 725.456(b)(1). We see no abuse of discretion in the ALJ's findings. *Blake*, 24 BLR at 1-113. Moreover, as Employer does not challenge the finding that it did not establish extraordinary circumstances for its failure to timely submit the evidence or designate its witnesses, we affirm the ALJ's denial of Employer's discovery requests.[19] *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[18] A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations therefore specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952.

[19] Employer states that subjecting the development of liability evidence to time constraints renders "the district director an inferior officer in violation of *Lucia*." Employer's Brief at 36 n.10. As Employer has offered no explanation or argument to

Responsible Self Insurer

Employer contends the ALJ erred in treating Arch as the responsible operator or a commercial insurance carrier rather than as a self-insurer.[20] Employer's Brief at 21-27. Employer asserts that because Arch was not identified as a responsible operator before the district director and does not meet the regulatory definition of an operator, it should be dismissed from the claim. Employer's Brief at 22-24. Similarly, Employer argues that the ALJ's identification of Arch as an insurance carrier was erroneous because "[t]he obligations of commercial insurance carriers are not the same as those borne by self-insurers." Employer's Brief at 24; Employer's Reply to Director at 9-10. The Director urges the Board to reject Employer's arguments because the ALJ properly considered Arch's liability as a self-insurer and not, as Employer contends, a responsible operator or commercial insurer. Director's Brief at 7-8. We agree with the Director's argument.

Contrary to Employer's assertions, the ALJ determined that Hobet was Claimant's last coal mine employer, it was financially capable of assuming of liability based on its self-insurance through Arch, and "Hobet, self-insured through Arch" is the properly designated responsible operator. Decision and Order at 6-7; Order Denying Motion for Reconsideration at 2. Although the ALJ at times referred to "Hobet/Arch" in her decision, she used it collectively, or as an abbreviation for, "Hobet, self-insured through Arch," and not to indicate that she believed Arch was also an operator as defined by the regulations.[21] Decision and Order at 6. While the ALJ generally referred to Arch as a "carrier" at times, there is no indication she considered Arch a commercial insurance carrier. Decision and Order at 6, 8. On reconsideration, the ALJ specifically rejected Employer's argument and stated that Arch is not a commercial insurance carrier but rather was the self-insurer of

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support this assertion, we decline to address this issue, as it is inadequately briefed. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

[20] Employer cites to portions of the Decision and Order where the ALJ refers to Hobet and Arch collectively as "Hobet/Arch" and refers to Arch interchangeably as a carrier or self-insurer. Employer's Brief at 21-22.

[21] The ALJ stated that Arch would not be relieved of liability based on the successor-operator regulations 20 C.F.R. §725.492 even if Employer's assertions were true that Hobet was transferred to Magnum and then later to Patriot. Decision and Order at 9. As the Director notes, "these regulations do not strictly apply to the situation here;" however, any error by the ALJ is harmless as she based Arch's liability on the fact Claimant was last employed by Hobet when it was self-insured through Arch. Director's Brief at 8 n.2; *see Larioni v. Director*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 6-7.

Hobet. Order Denying Motion for Reconsideration at 4-5. Consequently, we find no merit to Employer's argument that the ALJ mistakenly believed it was a responsible operator or commercial insurance carrier and therefore it should be relieved of liability.

Arch's Liability

Employer argues the ALJ erred in finding Arch is the responsible carrier. Employer's Brief at 24-28, 38; Employer's Reply to Director at 8-14. It contends the Trust Fund is liable because Patriot should be considered liable as Hobet's parent company that was authorized to self-insure Hobet's liabilities when Claimant filed his current claim. *Id*. The Director responds that the ALJ properly found that Hobet, as self-insured through Arch, is the correctly designated responsible operator and carrier. Director's Response at 8-10. We agree with the Director's position.

The ALJ properly found Employer met the requirements for liability under the Act. Hobet, a coal mine operator, employed Claimant as a miner for one year or more; Claimant was not employed by any other coal mine operator after Hobet; and Hobet was self-insured through Arch during Claimant's employment with it, including at his last day. 20 C.F.R. §725.494(a)-(e); Decision and Order at 11. Employer identifies no error in these findings. 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). The ALJ also correctly found Employer did not present any evidence that Arch is unable to assume liability if Claimant is found eligible for benefits. 20 C.F.R. §§725.494(e), 725.495(a)(3); Decision and Order at 11.

Nor has Employer cited any authority for its argument that, while commercial insurance liability is triggered by the date of the miner's last coal mine employment, self-insurance liability is triggered by the date the claim is filed. Employer's Brief at 24-28. Employer instead points to the fact that Patriot, and not Arch, was initially named the responsible carrier in this case, and to three other cases in which it alleges DOL "imposed liability on self-insured parent companies based on which parent had assumed the liability when the claim was filed, not based on the miner's last day of work." *Id.* at 26-27, 30, 31-32. However, as the Director argues, in the cases Employer cites liability was imposed on the parent companies at a time when they owned the subsidiaries and were capable of assuming liability. Director's Brief at 14; *see Massey v. Apogee Coal*, 2019-BLA-05144; *Creech v. Apogee Coal*, xxx-xx-6408; *Allen v. Hobet Mining*, 2019-BLA-06231. This claim involves the determination of liability under different circumstances – after Patriot's bankruptcy when it was no longer financially capable of paying benefits.

Employer's argument also incorrectly presumes that the DOL's decision to allow Patriot to insure claims by miners who were employed by Arch subsidiaries before Patriot acquired them also relieved Arch, as the self-insurer during the miners' employment, of

any liability under the Act. However, there is no evidence in the record to support Employer's suggestion that the DOL completely relieved Arch of such liability by endorsing Arch's sale of Hobet to Magnum. Employer's Brief at 27-28; Employer's Reply to Director at 12-13. The ALJ excluded all of Employer's liability evidence as untimely. Decision and Order at 7-8 n.10; Hearing Transcript at 21-24. Thus, she accurately found the documents Hobet and/or Arch rely on in support of their assertions are not in evidence and it presented no evidence that Hobet did not last employ Claimant or that Arch is incapable of paying benefits. Decision and Order at 7-8, 10-11. As the Director argues, "Patriot is now incapable of assuming liability, but the responsible operator, Hobet, is still capable of paying benefits through Arch Coal's self-insurance." Director's Brief at 14. Therefore, we affirm the ALJ's finding that Hobet, as self-insured through Arch, is liable for the payment of benefits. 20 C.F.R. §725.494; Decision and Order at 11.

BLBA Bulletin No. 16-01

Employer argues the DOL's issuance of BLBA Bulletin No. 16-01 is a new "rule" retroactively imposing new liability on self-insured mine operators, bypassing rulemaking in violation of the APA. Employer's Brief at 29-32, 39; Employer's Reply to Director at 5-8. The Director responds that Employer's argument is irrelevant under the facts of this case. Director's Response at 12-15. We agree with the Director's argument.

As discussed above, the ALJ permissibly found Employer meets all the requirements of a potentially liable operator: Claimant's total disability arose at least in part out of his coal mine work for Hobet; Hobet was an operator after June 30, 1973; Claimant worked for Hobet for a cumulative period of not less than one year; Claimant's employment with Hobet included at least one working day after December 31, 1969; and Hobet is financially capable of paying benefits through Arch. 20 C.F.R. §725.494; Decision and Order at 6, 11. Employer has not challenged any of these findings. *Skrack*, 6 BLR at 1-711.

Moreover, the United States Court of Appeals for the D.C. Circuit has rejected Employer's argument that the Bulletin is a substantive rule that affects Arch's rights and interests or governs its liabilities in any given case. *Arch Coal, Inc. v. Acosta*, 888 F.3d 393, 500-01 (D.C. Cir. 2018). As the ALJ found, Arch's liability is established under the Act and regulations. 20 C.F.R. §§725.494-495; Decision and Order at 11. We therefore reject Employer's challenges to its liability based on BLBA Bulletin No. 16-01.

Invocation of the Section 411(c)(4) Presumption – 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). 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 ALJ 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 ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and evidence as a whole.[22] Decision and Order at 25.

Employer does not challenge the ALJ's findings that a preponderance of the pulmonary function studies is qualifying.[23] Nor does it allege the ALJ erred in crediting Drs. Raj's, Nader's and Green's opinions that Claimant has a totally disabling respiratory impairment that would preclude the performance of his usual coal mine work. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23-25; Director's Exhibits 18, 23; Claimant's Exhibits 1, 2; Employer's Exhibit 19. Rather Employer raises two arguments regarding the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption.

Citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), a decision interpreting a prior definition of total disability at 20 C.F.R. § 718.204, Employer argues that because the Claimant suffered from a "career-ending heart attack" that forced him to retire from his usual coal mine employment, he cannot be awarded benefits. Employer's Brief at 39-43; Employer's Reply to Director at 19-21. However, DOL explicitly rejected the premise that a non-pulmonary disability precludes entitlement when promulgating the 2001 revised regulations. 20 C.F.R. § 718.204(a) ("any non-pulmonary or non-respiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]"); *see* Director's Brief at 20-21. Moreover, the United States Court of Appeals for the Fourth Circuit, whose law applies here, did not adopt *Vigna* or its reasoning. *See Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-267 (2003). Additionally, Employer provides no support for its

[22] The ALJ found Claimant did not establish total disability based on the blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 15 n.18, 18.

[23] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

general assertion that the 2010 reinstatement of the section 411(c)(4) presumption, 30 U.S.C. § 921(c)(4), effectively invalidated the regulation at 20 C.F.R. §718.204; *see* Employer's Brief at 40-41.

Employer also contends the ALJ failed to properly consider the opinions of its medical experts that Claimant's qualifying pulmonary function study results were attributable to non-respiratory conditions, prior to finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer's Brief at 42-43. However, Employer conflates the issues of total disability and causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See* 20 C.F.R. §718.204(b), (c); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984).

As Employer raises no further arguments, we affirm, as supported by substantial evidence, the ALJ's conclusion Claimant established he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and he therefore invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[24] 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). The ALJ found Employer failed to establish

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

rebuttal under either method. Employer challenges the ALJ's finding that it did not disprove legal pneumoconiosis.[25]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

Employer relies on Drs. Rosenberg's and Tuteur's opinions that Claimant did not have legal pneumoconiosis. Employer's Exhibits 2, 3. The ALJ found their opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 30-31. Employer argues the ALJ did not give permissible reasons for discrediting their opinions. We disagree.

In his initial November 3, 2017 report, Dr. Rosenberg diagnosed Claimant with a restrictive impairment based on the qualifying pulmonary function study testing, which he attributed to Claimant's previous heart bypass surgery and obesity. Employer's Exhibit 2 at 22. In his subsequent January 22, 2019 report, based on a review of additional evidence, Dr. Rosenberg noted that Claimant's pulmonary function studies are overall qualifying but found "[h]e is not disabled directly from a pulmonary perspective." *Id*. at 32-33. He again attributed Claimant's restrictive impairment to obesity and his shortness of breath to "poor conditioning coupled with his cardiac dysfunction with severe left ventricular compromise." *Id*. While he acknowledged coal workers' pneumoconiosis can be latent and progressive, Dr. Rosenberg stated "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the exposure." *Id*. Because Claimant's spirometry was normal in 2012, twelve years after he left coal mine employment, Dr. Rosenberg concluded his respiratory impairment was not due to his "remote coal dust exposure." *Id*. at 33.

Contrary to Employer's contention, the ALJ permissibly found Dr. Rosenberg's reasoning inconsistent with the regulations, which state that pneumoconiosis "is

[25] We affirm, as unchallenged, the ALJ's finding that Employer failed to establish Claimant does not have clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(1)(i)(B); *Skrack*, 6 BLR at 1-711; Decision and Order at 29, 33. Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), we still address Employer's contentions on legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A) because the ALJ's findings are relevant to the second rebuttal method. 20 C.F.R. §718.305(d)(1)(i).

recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *see also* 65 Fed. Reg. 79.920, 79,971 (Dec 20, 2000) ("it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period"); Decision and Order at 30; Employer's Brief at 43-44. Moreover, the ALJ found that Dr. Rosenberg excluded a diagnosis of legal pneumoconiosis because Claimant has a restrictive, but not obstructive impairment, and his opinion therefore is inconsistent with the regulatory definition of legal pneumoconiosis, which encompasses restrictive or obstructive impairments, or both.[26] 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 30. As Employer does not challenge that finding, we affirm it. *Skrack*, 6 BLR at 1-711.

Although Dr. Tuteur acknowledged Claimant has sufficient coal mine dust exposure to cause a respiratory or pulmonary impairment, he diagnosed "metabolic syndrome," which he described as "a combination of slowly progressive chronic entities dominated by obesity, poorly controlled diabetes, [and] severe coronary artery disease." Decision and Order at 21 *quoting* Employer's Exhibit 3. Addressing Claimant's pulmonary function study results, he diagnosed an obstructive impairment due to congestive heart failure and a restrictive impairment due to obesity and congestive heart failure. Employer's Exhibit 3. He found "no convincing evidence to indicate the presence of any primary pulmonary process of any kind." *Id.*

The ALJ found Dr. Tuteur's opinion unpersuasive in view of Claimant's 29.5 years of coal mine dust exposure and Dr. Raj's opinion. Decision and Order at 31. She gave Dr. Raj's opinion that Claimant has legal pneumoconiosis "significant weight" because he "addressed each of the [C]laimant's comorbid conditions" and set forth his rationale as to "why [they] do not explain the whole of [C]laimant's pulmonary problems" as Dr. Tuteur suggests. Decision and Order at 30; *see* Director's Exhibits 18, 23; Employer's Exhibit 19. Employer does not directly challenge the ALJ's finding that Dr. Raj's opinion is well reasoned and states only that she improperly credited "physicians who reviewed less proof than Drs. Rosenberg and Tuteur." Employer's Brief at 44. Because we see no error in the ALJ's rationale for relying on Dr. Raj's opinion over Dr. Tuteur's opinion, we affirm it. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

[26] The ALJ cited Dr. Rosenberg's statement that Claimant "does not have airflow obstruction for consideration of legal [coal workers' pneumoconiosis]." Employer's Exhibit 2 at 22.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Looney*, 678 F.3d at 316-17. Employer's arguments amount to a request to reweigh the evidence which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly found the opinions of Drs. Rosenberg and Tuteur unpersuasive and not adequately reasoned, we affirm her finding that they are insufficient to satisfy Employer's burden to disprove legal pneumoconiosis. 20 C.F.R. §718.305(a); *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); Decision and Order at 33.

Disability Causation

The ALJ next considered whether Employer established "no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 33. The ALJ found that Drs. Rosenberg's and Tuteur's opinions are insufficient to rebut total disability causation. Decision and Order at 33-35.

Employer asserts that the ALJ applied an incorrect legal standard by requiring it to "rule out" pneumoconiosis as a contributing factor of Claimant's totally disabling respiratory impairment. Employer's Brief at 44-45. The Fourth Circuit rejected this argument in *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137-43 (4th Cir. 2015) and we therefore reject Employer's contentions in this case on the same basis. In addition, although Employer cites to *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) to support its assertion, *Young* held that rebuttal of legal pneumoconiosis can be shown by establishing that coal dust exposure had only a de minimis impact on the miner's respiratory impairment; it did not alter the rule out standard for rebutting total disability causation. Similarly, we reject Employer's reliance on *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1008 (7th Cir. 1995), because it concerned a different disability causation standard at 20 C.F.R. §727.203(b)(3) that is no longer in effect, and not the 20 C.F.R. §718.305(d)(1)(ii) standard applicable to this case. *See* Employer's Brief at 44.

Employer also contends the ALJ "confuse[d] two inquires" when he discredited Dr. Rosenberg's opinion on the cause of Claimant's total disability because Dr. Rosenberg had not diagnosed Claimant with a totally disabling respiratory or pulmonary impairment. Employer's Brief at 44. We disagree. The Fourth Circuit has specifically held that an ALJ who finds a claimant has both pneumoconiosis and total disability "may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain." *Toler v. E. Assoc. Coal Corp.*, 43 F.3d

109, 116 (4th Cir. 1995). We see no error in the ALJ's permissible finding that Dr. Rosenberg's opinion is unpersuasive to rule out pneumoconiosis as a causative factor for Claimant's total disability. *Looney*, 678 F.3d at 310; Decision and Order at 34.

Employer raises no other challenge to the ALJ's rebuttal finding, apart from alleging Claimant does not have legal pneumoconiosis which we have rejected. We therefore affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34-35.

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge