U.S. Department of Labor

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

BRB Nos. 20-0495 BLA
and 20-0498 BLA

BARBARA SHEPHERD (o/b/o and Widow of DAMON G. DEROSSETT)	)	
Claimant-Respondent	)	
v.	)	
NATIONAL MINES CORPORATION	)	
and	)	DATE ISSUED: 12/29/2021
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

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

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2019-BLA-05224 and 2019-BLA-05167) on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves a subsequent miner's claim filed on August 26, 2016,[1] and a survivor's claim filed on July 19, 2018.[2]

In the miner's claim, the ALJ credited the Miner with at least eighteen years of qualifying coal mine employment based on Employer's stipulation and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c).

[1] This is the Miner's fourth claim for benefits. The district director denied the Miner's prior claim, filed on December 3, 2002, because he did not establish any element of entitlement. Director's Exhibit 3.

[2] Claimant is the widow of the Miner, who died on June 22, 2018. Director's Exhibits 52, 54. She is pursuing the Miner's claim on his behalf, along with her own survivor's claim.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was 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); *see* 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he 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; *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner's prior claim was denied for failure to establish any element of entitlement, Claimant had to

He further found Employer did not rebut the presumption and awarded benefits. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[5]

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[6] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. It further asserts the ALJ erred in finding it failed to rebut the presumption.[7] Claimant responds, urging affirmance of the ALJ's award of benefits in both claims. Employer filed a reply brief, reiterating its arguments. The Director, Office of Workers' Compensation Programs, has not filed a response brief in either appeal.

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establish at least one element of entitlement to obtain review of the merits of the current miner's claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 3.

[5] Under Section 422(*l*) of the Act, the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

[6] 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.

[7] We affirm, as unchallenged, the ALJ's finding that the Miner had at least eighteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 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 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 9-13; Employer's Reply at 2-3. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[10] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 9-13; Employer's Reply at 2-3.

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

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[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibits 6, 8.

[9] *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 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)).

[10] The Secretary of Labor issued a letter to the ALJ 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 Sellers.

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 the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint 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 single letter but rather specifically identified ALJ Sellers and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Sellers. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of the ALJ "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," but instead generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified the ALJ's appointment. Employer's Brief at 13. Employer therefore has not overcome the presumption of regularity.[11] *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 thus properly ratified the ALJ's appointment.[12] *See Edmond v. United States*, 520 U.S. 651, 654-66

[11] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 12, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

[12] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 18, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of the ALJ's appointment, which we held

(1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper). 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 ALJs. Employer's Brief at 13-18; Employer's Reply at 3. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, relying on Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 14; Employer's Reply at 3. It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 14, 17-18.

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, 1136 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCOAB) 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." *Free Enter. Fund*, 561 U.S. 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. 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,

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constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[13] 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.

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 1136.

Invocation of the Section 411(c)(4) Presumption: 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[14] 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting

[13] 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).

[14] The ALJ accurately noted there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 5; *see* 20 C.F.R. §718.204(b)(2)(iii).

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 medical opinions and his weighing of the evidence as a whole.[15]

Employer contends the ALJ erred in finding the medical opinion evidence establishes total disability.[16] Employer's Brief at 19-22. Its arguments have no merit.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 4-5. He noted the Miner reported his job required standing for seven hours per day and lifting and carrying up to one-hundred pounds. Decision and Order at 4; Director's Exhibit 7 at 2. Furthermore, he noted Drs. Green and Rosenberg reported the Miner's usual coal mine

[15] The ALJ considered the results of two pulmonary function studies dated November 19, 2016, and March 3, 2017. Decision and Order at 5-7. The November 19, 2016 study produced qualifying values pre-bronchodilator but non-qualifying results post-bronchodilator, whereas the March 3, 2017 study produced non-qualifying values pre- and post-bronchodilator. Director's Exhibits 13, 15. The ALJ gave the pre-bronchodilator results greater weight as better reflecting the Miner's ability to perform his job. Decision and Order at 7. Finding the two pre-bronchodilator studies "essentially contemporaneous and equally persuasive," he thus determined the pulmonary function study evidence is inconclusive and does not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.* He further noted all of the blood gas studies produced non-qualifying values, and thus Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 5, 7-8.

[16] Employer also asserts the ALJ erred in finding the November 19, 2016 pulmonary function study valid. Employer's Brief at 18-19. As the ALJ noted, Dr. Vuskovich checked a box indicating the MVV results were unacceptable, but he did not offer any further explanation or state why the test was invalid. Decision and Order at 6; Director's Exhibit 14 at 6. Contrary to Employer's argument, the ALJ did not rely solely on the notations of the technician who administered the study; instead, the ALJ permissibly found Dr. Vuskovich did not adequately explain why his interpretation of the study is entitled to more weight than "the technician, who was present while the Miner performed it, or Dr. Gaziano, who independently reviewed it for validity." Decision and Order at 6-7; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *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); Director's Exhibits 12-13; Employer's Exhibit 4.

employment required lifting fifty to one-hundred pounds. Decision and Order at 4-5; Director's Exhibits 13 at 23; 15 at 3. Thus, he determined the Miner's usual coal mine work involved heavy manual labor.[17] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Decision and Order at 5.

The ALJ considered the medical opinions of Drs. Green and Rosenberg. Decision and Order at 8-11. Dr. Green opined the Miner had a totally disabling respiratory or pulmonary impairment, whereas Dr. Rosenberg opined he did not. Director's Exhibits 13, 15, 19. Crediting Dr. Green's opinion over Dr. Rosenberg's, the ALJ found the medical opinion evidence established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11.

Employer contends the ALJ did not adequately explain his rationale for crediting Dr. Green's opinion over Dr. Rosenberg's. We disagree. The ALJ noted Dr. Green had the benefit of reviewing the testing from his own exam as well as from Dr. Rosenberg's. Decision and Order at 8-9. He further observed Dr. Green explained that, though the later pulmonary function study was non-qualifying, the pulmonary function evidence demonstrated a persistent and chronic impairment, significant restriction, and chronic obstructive pulmonary disease. *Id.*; Director's Exhibit 19 at 2-3. The ALJ additionally noted Dr. Green's belief that the Miner could not meet the exertional demands of his usual coal mine employment and was totally disabled from a pulmonary standpoint. Decision and Order at 9; Director's Exhibits 13 at 25; 19 at 2-3. He also noted Dr. Green had an accurate understanding of the exertional requirements of the Miner's usual coal mine work. Decision and Order at 9-10. Thus, the ALJ permissibly credited Dr. Green's opinion as well-documented, well-reasoned, and entitled to substantial weight.[18] *See Tennessee*

[17] Employer further contends the ALJ did not consider a report from one of the Miner's prior claims in which he reported lifting and carrying only thirty to fifty pounds. Employer's Brief at 19-20; Director's Exhibit 3 at 100-01. Employer has not demonstrated how the error it alleges could have made a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Employer asserts only that the ALJ did not explain his findings in light of the conflicting description, Employer's Brief at 19, but the ALJ explained the Miner's report of lifting and carrying one-hundred pounds was consistent with his statements to Drs. Green and Rosenberg. Decision and Order at 4-5; Director's Exhibits 7, 13, 15. We thus reject Employer's assertion of error.

[18] We reject Employer's argument that Dr. Green's opinion cannot establish total disability because he did not address whether obesity or other conditions caused the Miner's disabling restrictive impairment, and he diagnosed chronic obstructive pulmonary disease despite opining the Miner had a restrictive impairment. Employer's Brief at 20. The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the Miner's respiratory

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); Decision and Order at 9-10.

In contrast, the ALJ permissibly found Dr. Rosenberg's opinion less probative because he did not review the qualifying pulmonary function study from Dr. Green's exam and therefore had an incomplete picture of the Miner's condition. *See Rowe*, 710 F.2d at 255; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (ALJ may assign less weight to a physician's opinion which reflects an incomplete picture of a miner's health); Decision and Order at 11. The ALJ further noted Dr. Rosenberg conceded his exam and objective testing demonstrated the existence of some degree of impairment, but he opined the Miner was not disabled "from a strictly objective assessment," based on the Department of Labor's criteria. Decision and Order at 10; Director's Exhibit 15 at 3. Moreover, the ALJ highlighted that Dr. Rosenberg failed to compare the level of the Miner's impairment with the exertional requirements of his usual coal mine work. Director's Exhibit 15 at 3; Decision and Order at 9-10. Thus, the ALJ permissibly discredited Dr. Rosenberg's opinion because he did not explain how the non-qualifying objective evidence which did show some impairment demonstrated the Miner could perform his usual coal mine work. *See Cornett*, 227 F.3d at 587 (physician is entitled to base a reasoned opinion of total disability on non-qualifying test results); 20 C.F.R. §718.204(b)(2)(iv).

The ALJ's function is to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). Employer's arguments amount to a request to reweigh the evidence. However, the ALJ's finding is supported by substantial evidence, and the Board is not empowered to reweigh the evidence *de novo* or substitute its judgement for that of the ALJ, even if our conclusion would have been different. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, because it is supported by substantial evidence, we affirm the ALJ's finding the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11.

We further affirm, as supported by substantial evidence, the ALJ's finding the weight of the evidence established total pulmonary disability at 20 C.F.R.

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or pulmonary condition precludes the performance of his usual coal mine work. The etiology of the Miner's pulmonary impairment concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or the issue of Employer's rebuttal of the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1).

§718.204(b)(2).[19] *See Shedlock*, 9 BLR at 1-198; Decision and Order at 11. In addition, we affirm his finding that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Decision and Order at 11-12, 19.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[20] 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 did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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. The United States Court of Appeals for the Sixth Circuit holds that a claimant can establish a miner's 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

[19] Contrary to Employer's contention, the ALJ did not rely on Dr. Green's opinion that the Miner was totally disabled without considering the contrary evidence. Employer's Brief at 22. Rather, the ALJ permissibly explained he credited Dr. Green's opinion in spite of the non-qualifying pulmonary function and blood gas studies because it established the Miner was unable to perform his usual coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); Decision and Order at 9-11.

[20] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses 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).

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.'").

Employer relies on the opinion of Dr. Rosenberg to disprove legal pneumoconiosis. As the ALJ observed, Dr. Rosenberg noted the Miner had a mild to moderate restrictive impairment, mildly reduced partial oxygen, reduced diffusing capacity, shortness of breath, cough, sputum production, and wheezing, but opined the Miner did not have legal pneumoconiosis. Decision and Order at 17-18; Director's Exhibit 15 at 3-4. The ALJ found his opinion inadequately reasoned and documented, and therefore insufficient to satisfy Employer's burden of proof. Decision and Order at 18.

Employer contends the ALJ erred in requiring Dr. Rosenberg to "rule out" coal mine dust exposure as a causative factor for the Miner's impairment in order to disprove legal pneumoconiosis. Employer's Brief at 23-24. We disagree the ALJ imposed such a requirement. He set forth the correct standard when he observed Employer must prove the Miner's pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 18. Moreover, contrary to Employer's argument, the ALJ did not discredit Dr. Rosenberg for failing to "rule out" pneumoconiosis. Rather, the ALJ permissibly discredited Dr. Rosenberg's opinion because, though he acknowledged the Miner had some degree of respiratory or pulmonary impairment, Director's Exhibit 15 at 4, he did not adequately explain why that impairment was unrelated to coal mine dust exposure or expressly attribute the impairment to an alternate cause. *Young*, 947 F.3d at 403-07*; Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 18.

As the ALJ permissibly discredited the only medical opinion supportive of a determination that the Miner did not have legal pneumoconiosis, we affirm his finding Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis.[21] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In order to disprove disability causation, Employer must establish "no part of the [M]iner'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). Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we

[21] In light of our affirmance of the ALJ's finding Employer failed to disprove legal pneumoconiosis, we need not address Employer's challenges to his finding it also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 14-17; Employer's Brief at 23.

affirm his determination that Employer failed to establish no part of the Miner's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19. We thus affirm the award of benefits in the Miner's claim.

Survivor's Claim

The ALJ found that Claimant satisfied the eligibility requirements for derivative survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018); Decision and Order at 21. Because we have affirmed the ALJ's award of benefits in the Miner's claim and Employer raises no specific challenge to his award of benefits in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge