U.S. Department of Labor

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

BRB No. 20-0547 BLA

TERRILL W. HAMLIN (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
and	)	
	)	
ST. PAUL'S TRAVELERS AETNA CASUALTY & SURETY COMPANY	)	DATE ISSUED: 12/29/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's[1] Decision and Order Awarding Benefits (2016-BLA-05923) rendered on a claim filed October 24, 2014,[2] pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant[3] with 14.34 years of underground coal mine employment and therefore found Claimant could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical pneumoconiosis, but established legal pneumoconiosis and a totally

[1] This claim was previously before ALJ William T. Barto, who conducted a hearing on July 26, 2017. After Employer requested reassignment to a new ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), the case was reassigned to ALJ Temin (the ALJ), who conducted a hearing on June 11, 2020. 2020 Hearing Transcript.

[2] Claimant previously filed a claim, which he subsequently withdrew. *See* Director's Exhibits 2, 23 at 6. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[3] On March 3, 2021, Claimant's counsel filed a Motion to Substitute Widow informing the Benefits Review Board that Claimant died on January 15, 2021. Motion to Substitute Widow as Claimant. By Order dated May 7, 2021, the Board updated the caption to reflect that Claimant is now deceased and advised that service of all future correspondence will be made on Claimant's widow, E. Constance Hamlin.

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

disabling respiratory or pulmonary impairment due to pneumoconiosis.[5] 20 C.F.R. §§718.202(a), 718.204(b), (c). Thus, he awarded benefits.

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 United States Constitution.[6] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. Employer further argues the ALJ erred in finding Old Ben Coal Company ("Old Ben") the responsible operator and Saint Paul's Travelers Aetna Casualty & Surety Company ("Travelers") the correct surety. It also asserts the ALJ deprived it of due process by refusing to allow it to depose a Department of Labor (DOL) official regarding the scientific bases for the preamble to the 2001 regulatory revisions while relying on the preamble to find legal pneumoconiosis established. Finally, on the merits, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[7]

[5] "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). "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).

[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 on appeal, the ALJ's findings that Claimant had 14.34 years of coal mine employment and a totally disabling respiratory or pulmonary

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging rejection of Employer's constitutional challenges to the ALJ's appointment and removal protections; its argument that the ALJ erred in finding Old Ben the responsible operator; and its contention the ALJ violated its due process rights by denying Employer's request to depose a DOL official regarding the preamble to the amended regulations. Employer filed a reply reiterating its arguments on the issues the Director addressed.

The 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

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 12-13; Employer's Reply at 2-5 (unpaginated). It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[10] but maintains the

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impairment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 26.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16.

[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*, 138 S. Ct. at 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[10] The Secretary issued a letter to ALJ Temin 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

ratification was insufficient to cure the constitutional defect in ALJ Temin's prior appointment. Employer's Brief at 13-17; Employer's Reply at 2-5 (unpaginated).

The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 6-8. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 7. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 7 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had 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 Temin and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Temin. 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.*

> Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Temin. ALJ Temin issued no orders in this case until his November 22, 2019 notice of hearing and prehearing order.

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 16-17. 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. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).[12] 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 ALJs. Employer's Brief at 17; Employer's Reply at 5-7 (unpaginated). Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 19-20; Employer's Reply at 6 (unpaginated). 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*,

[11] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 15, 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 21, 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 ALJ Temin's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 17-19; Employer's Reply at 6-7 (unpaginated).

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 (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for 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 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

[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).

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.

Protective Order

Prior to the hearing, Employer submitted a Notice of Rule 30(b)(6) Deposition to DOL indicating it intended to compel the testimony of a DOL employee "qualified and knowledgeable to testify about the medical literature cited in the preamble" to the revised regulations. The Director filed a Motion for Protective Order to prevent Employer from deposing any DOL employees. Employer responded, urging the ALJ to deny the Director's request. Employer's Opposition to Motion for a Protective Order. By Order dated April 15, 2020, the ALJ granted the Director's request. The ALJ found Employer's deposition request unnecessary because it already had access to the information it sought, as the preamble identifies the scientific literature on which its medical conclusions are based. Apr. 15, 2020 Order Granting Motion for Protective Order at 2-3. He further noted Employer was free to provide evidence through its own experts challenging the scientific bases underlying the preamble. *Id.* at 3.

Employer argues it was deprived of due process because the ALJ denied its request to depose a DOL official regarding the scientific basis for the preamble, then relied on the preamble in evaluating the medical opinion evidence. Employer's Brief at 30-31; Employer's Reply at 10-13. We disagree.

Due process requires Employer be given the opportunity to mount a meaningful defense. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 997-98 (7th Cir. 2005); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). As the ALJ concluded, the medical studies and literature that serve as the bases for the scientific findings contained in the 2001 regulatory revisions are set forth in the preamble itself. Apr. 15, 2020 Order Granting Motion for Protective Order at 2-3. Thus, Employer had access to the DOL's conclusions regarding the medical studies that it found most credible and was aware that ALJs may consult those scientific findings when analyzing medical opinion evidence. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

Moreover, as the ALJ noted, Employer was free to develop and submit evidence responding to the scientific findings in the preamble, and attempt to show they are no longer valid or not relevant to this case. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 87 (7th Cir. 2004) (providing that evidence may be offered challenging the preamble's medical conclusions but holding that the DOL's position will be credited unless the evidence is "the type and quality of medical evidence that would invalidate a regulation"); Apr. 15, 2020 Order Granting Motion for Protective Order at 3. Employer attempted to do so by submitting an opinion from Dr. Rosenberg who, citing medical literature, criticized the scientific findings in the preamble concerning the relationship of the FEV1/FVC ratio on pulmonary function testing to coal mine dust exposure and argued that the literature demonstrated cigarette smoke is more damaging to the lungs than coal mine dust. Director's Exhibit 22 at 56-59. The ALJ considered this evidence but permissibly concluded that because Dr. Rosenberg cited to no medical literature contradicting the medical principles and scientific studies in the preamble, his opinion is inadequate to invalidate the scientific findings contained in the preamble. Decision and Order at 22-23; *see Beeler*, 521 F.3d at 726.

Because Employer was afforded and took advantage of the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Williams*, 400 F.3d at 997-98; *Holdman*, 202 F.3d at 883-84.

Responsible Operator and Surety

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[14] The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator,

[14] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

On December 15, 2014, the district director issued the Notice of Claim (NOC), identifying Old Ben as a potential responsible operator and notifying Travelers of its potential interest as the surety on an indemnity bond that Old Ben obtained as a self-insured operator. Director's Exhibit 14. The NOC identified the specific bond (2S100302631) that covered Old Ben's black lung benefits liability for the time period when Old Ben employed Claimant. *Id.* Employer timely responded, arguing that Old Ben's successor, Horizon Natural Resources (Horizon), not Old Ben, should be named the responsible operator, and denying Travelers was a surety for this claim because the bond identified in the NOC was no longer valid and Travelers never held a bond for Horizon. Director's Exhibit 16. It further denied that the district director had jurisdiction to decide that Travelers carried surety coverage for the claim or that it was the correct surety. Director's Exhibit 16 at 3 n.4. The district director declined to dismiss Old Ben and designated it as the responsible operator. Director's Exhibits 17, 23. At the hearing, Employer continued to contest Travelers was the correct surety, while acknowledging the issue would have to be resolved in federal court and not by the ALJ. 2020 Hearing Transcript at 32.

The ALJ determined Old Ben was correctly named as the responsible operator. Decision and Order at 5-6. He acknowledged Employer's arguments that Travelers was not the correct surety, but concluded it was not within his jurisdiction to make a finding regarding the bond and that the Director may seek to enforce liability on the identified bond in federal district court. *Id.* at 6.

On appeal, Employer argues the ALJ erred in finding Old Ben the responsible operator because it is no longer a viable entity; rather, its successor, Horizon, should have been named. Employer's Brief at 34. It further argues Travelers was incorrectly identified as the surety, as a bond held by Frontier Insurance Company replaced the bond that the NOC identified as covering Old Ben on the last day of Claimant's employment. Employer's Brief at 34-35; Employer's Reply at 8 (unpaginated). Employer acknowledges questions concerning the validity of a surety bond must be resolved in federal court, but argues that the existence of a bond is a separate determination from its legal validity. Employer's Brief at 34; Employer's Reply at 8 (unpaginated). It contends that because the district director did not provide evidence showing Travelers holds a bond covering the claim, and as the DOL cannot now cure its errors, the Trust Fund should assume liability. Employer's Brief at 35. We disagree.

Employer does not challenge that Old Ben meets the criteria at 20 C.F.R. §725.494(a)-(d), but asserts nonetheless that Horizon should have been named as the responsible operator because it was Old Ben's successor. Employer's Brief at 34. As the Director correctly asserts, however, Horizon never employed the Miner, and when a miner is not independently employed by the successor operator, the prior operator remains liable for the claim. 20 C.F.R. §725.493(b)(1).

Moreover, "in the absence of evidence to the contrary," the regulation presumes the designated responsible operator is capable of assuming liability for the payment of benefits. 20 C.F.R. §725.495(b). The named responsible operator may be relieved of liability only if it proves either it is financially incapable of assuming liability or another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c). The ALJ found no evidence demonstrating Employer was incapable of assuming liability.[15] Decision and Order at 5-6. While Employer argues the bond that the district director identified in the NOC has been replaced, and the district director provided no evidence that the identified bond is still valid, Employer's Brief at 34-35, it is not the Director's burden to establish Employer is capable of paying benefits. 20 C.F.R. §725.495(b). Moreover, the determination of the existence of a surety bond and the continued validity of that bond are two sides of the same coin and not within the ALJ's or this Board's jurisdiction, but rather must be decided in federal court. Employer's Brief at 34-35; Director's Response at 13-15; *see Peabody Coal Co. v. Director, OWCP* [*Ayers*], 40 F.3d 906, 909-10 (7th Cir. 1994); 28 U.S.C. §§1342, 1345; 30 U.S.C. §934. We therefore decline to address Employer's arguments with regard to this issue and thus affirm the ALJ's determination that Old Ben is the responsible operator.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability).[16] 30 U.S.C. §901; 20 C.F.R.

[15] An operator is "deemed capable of assuming liability for a claim" by purchasing commercial insurance, qualifying as a self-insurer during the time period that the operator last employed the miner, or possessing sufficient assets to secure payments of benefits. 20 C.F.R. §725.494(e).

[16] The ALJ found Claimant failed to establish clinical pneumoconiosis. Decision and Order at 19. Claimant contends there is "a lot of evidence" supporting a finding of clinical pneumoconiosis. Claimant's Response at 4-6. His argument requests the Board to reweigh the evidence, which we are not empowered to do. *Poole v. Freeman United Coal*

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer contends the ALJ erred in finding the medical opinion evidence established legal pneumoconiosis. To establish legal pneumoconiosis, Claimant must prove he had a "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).

The ALJ considered the medical opinions of Drs. Istanbouly, Rosenberg, and Tuteur.[17] Decision and Order at 20-24. Dr. Istanbouly diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and cigarette smoking. Director's Exhibit 11; Employer's Exhibit 8. Dr. Rosenberg diagnosed COPD in the form of emphysema and chronic bronchitis due solely to cigarette smoking. Director's Exhibit 22; Employer's Exhibits 4, 10. Dr. Tuteur also diagnosed COPD, which he believed was due to cigarette smoking, Claimant's exposure to fossil fuel fumes as a child, and poorly-controlled gastroesophageal reflux disease. Employer's Exhibits 3, 11.

The ALJ found Dr. Istanbouly's opinion well-reasoned and well-documented, and consistent with the DOL's acceptance of the medical science set forth in the 2001 revised regulations. Decision and Order at 20-21. The ALJ gave less weight to the opinions of Drs. Rosenberg and Tuteur as inadequately reasoned, and inconsistent with the regulations and scientific principles underlying the preamble. *Id.* at 21-24.

We initially reject Employer's assertion that the ALJ shifted the burden of proof to Employer to rebut the existence of legal pneumoconiosis. Employer's Brief at 33. The ALJ correctly stated that to establish legal pneumoconiosis, Claimant must prove his pulmonary impairment was "significantly related to, or substantially aggravated by," coal

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Mining Co., 897 F.2d 888, 895 (7th Cir. 1990); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's finding that Claimant failed to establish clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1); Decision and Order at 18-19.

[17] The ALJ also considered Claimant's treatment records. Decision and Order at 24. He indicated that while the records contained diagnoses of chronic obstructive pulmonary disease (COPD), they did not attribute the COPD to any specific etiology. *Id.* Thus, the ALJ found the treatment records insufficient to support a diagnosis of legal pneumoconiosis. *Id.*

mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 19. He found the opinion of Dr. Istanbouly satisfied that burden and was entitled to more weight than the contrary opinions of Drs. Rosenberg and Tuteur. Decision and Order at 20-21, 24.

We further reject Employer's arguments that the ALJ erred in crediting Dr. Istanbouly's opinion. Employer's Brief at 21-33. As the ALJ noted, Dr. Istanbouly based his diagnosis on Claimant's history of chronic bronchitis, objective testing, and his exam demonstrating bilateral wheezing. Decision and Order at 9-11; Director's Exhibit 11; Claimant's Exhibit 4. He opined Claimant's COPD was due to a combination of cigarette smoking and coal mine dust inhalation, Director's Exhibit 11, and further specifically opined coal mine dust exposure was a "significant contributor" to Claimant's impairment. Employer's Exhibit 8 at 66. The ALJ permissibly found Dr. Istanbouly's opinion well-documented because he relied upon objective testing and an accurate understanding of Claimant's employment and smoking histories. *Poole*, 897 F.2d at 895; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 20-21. He further permissibly credited Dr. Istanbouly's opinion that both coal mine dust and smoking contributed to Claimant's obstruction because it is consistent with the DOL's acceptance in the preamble of scientific studies indicating that coal mine dust is associated with significant airways disease, and that the risks of smoking and coal mine dust exposure are additive. 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726; *Shores*, 358 F.3d at 87; *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893 (7th Cir. 2002); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 20. Contrary to Employer's argument, the ALJ did not substitute reasoning from the preamble to bolster Dr. Istanbouly's opinion, as the physician specifically opined that the damage from COPD due to smoking and coal mine dust exposure is additive.[18] Employer's Exhibit 8 at 31-35; Employer's Brief at 27-28.

Nor is there merit to Employer's argument that Dr. Istanbouly's opinion is insufficient to establish legal pneumoconiosis. Employer's Brief at 23. A medical opinion can meet Claimant's burden if the physician credibly diagnoses his disease or impairment as being "significantly related to, or substantially aggravated by dust exposure in coal mine

[18] Employer also argues that in discussing Dr. Istanbouly's opinion, the ALJ erred when he found the physician's opinion more persuasive because, according to the preamble, coal mine dust and cigarette smoke have "additive and synergistic effects." Employer's Brief at 27. Employer argues the preamble does not use the term "synergistic." *Id.* Contrary to Employer's allegation, the ALJ did not state that the effects of coal mine dust and cigarette smoke are "synergistic;" he accurately quoted the preamble as saying that the effects of the two exposures may be "additive." *See* Decision and Order. We thus reject Employer's contention.

employment." *See* 20 C.F.R. §718.201(b). Dr. Istanbouly consistently opined coal mine dust exposure was a substantially aggravating factor in Claimant's impairment. Director's Exhibit 11; Employer's Exhibit 8 at 31-32, 37, 66. The ALJ thus permissibly credited Dr. Istanbouly's opinion that Claimant has legal pneumoconiosis. *Poole*, 897 F.2d at 895; *Burns*, 855 F.2d at 501; Decision and Order at 21.

We further reject Employer's assertions that the ALJ erred in discrediting the opinions of Drs. Rosenberg and Tuteur. As the ALJ noted, Drs. Rosenberg and Tuteur supported their opinions by citing studies relating to the relative contribution of smoking to COPD in the general population, and compared it to the contribution of coal mine dust to COPD in miners. Decision and Order at 22; Director's Exhibit 22; Employer's Exhibits 3-4, 10-11. He permissibly discredited their opinions as applied to Claimant's specific case because neither physician adequately addressed the additive effects of smoking and coal mine dust exposure or why Claimant was not among the miners who have significant decrements in lung function due to coal mine dust. 65 Fed. Reg. at 79,940; *Beeler*, 521 F.3d at 726; *Stein*, 294 F.3d at 893; *see also Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 22.

The ALJ further permissibly discounted Dr. Tuteur's opinion because, while he found multiple alternative etiologies for Claimant's COPD, he did not provide any support for these assertions or explain why Claimant's condition was exacerbated or contributed to by these other exposures or etiologies, but not by his coal mine dust exposure. *See Poole*, 897 F.2d at 895; Decision and Order at 22.

Dr. Rosenberg further opined the long period between the end of Claimant's coal mine employment and the onset of his symptoms demonstrates his chronic bronchitis could not be due to his coal mine dust exposure. Director's Exhibit 22 at 52. The ALJ permissibly found this conclusion both unsupported by the record[19] and contrary to the regulations, which recognize pneumoconiosis 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 Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 999 (7th Cir. 2005); Decision and Order at 23.

[19] The ALJ found Dr. Rosenberg's opinion that Claimant developed respiratory symptoms only recently undermined by Claimant's testimony that his breathing problems began while he still worked as a coal miner, Dr. Tuteur's acknowledgment that Claimant has a long history of breathing problems, and Claimant's treatment records documenting a diagnosis of COPD as early as 2002. Decision and Order at 23, citing Hearing Transcript at 20; Employer's Exhibits 3, 6 at 5, 11.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Poole*, 897 F.2d at 895; *Burns*, 855 F.2d at 50. Employer's arguments constitute a request for the Board to reweigh the evidence, which we are not empowered to do. *Poole*, 897 F.2d at 895; *Anderson*, 12 BLR at 1-113. Because the ALJ permissibly credited Dr. Istanbouly's opinion and rejected Drs. Rosenberg's and Tuteur's opinions, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 24; *see Beeler*, 521 F.3d at 725.

As Employer raises no other specific allegations of error, we further affirm the ALJ's finding that Claimant's legal pneumoconiosis caused his totally disabling respiratory impairment. 20 C.F.R. §718.204(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27. We thus affirm the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge