U.S. Department of Labor

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

BRB No. 21-0052 BLA

CLIFFORD AXELSEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN COAL COMPANY	)	
	)	DATE ISSUED: 12/14/2021
Employer-Petitioner	)	
	)	
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 Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

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

Scott A. White (White & Risse, L.L.C.), Arnold, Missouri, for Employer.

Jeffrey S. Goldberg (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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits (2018-BLA-06159) rendered on a claim filed pursuant to the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 7, 2012.[1]

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. It further challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it asserts the ALJ erred in finding Claimant's coal mine employment is qualifying and that Claimant established total disability, and thus erred in invoking the Section 411(c)(4) presumption. It finally argues the ALJ erred in finding it did not rebut the presumption.

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[1] Claimant filed two prior claims. Director's Exhibits 1, 2. He filed his most recent prior claim on May 16, 2007. Director's Exhibit 2. Administrative Law Judge (ALJ) Richard K. Malamphy denied it on March 22, 2011, because Claimant failed to establish total disability. 20 C.F.R. §718.204(b)(2).

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument that Claimant's coal mine employment is not qualifying. In a combined reply brief, Employer reiterates its contentions.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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).[5] Employer's Brief at 14-20; Combined Reply Brief at 2-3. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6] Employer maintains the ratification was

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant performed his coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[5] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. 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)).

[6] 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 Nordby.

insufficient to cure the constitutional defect in the ALJ's prior appointment.[7] *Id.* We reject Employer's argument, as the Secretary's ratification was a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification 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 Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *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 on the challenger to demonstrate 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 single letter. Rather, he specifically identified Judge Nordby and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Judge Nordby. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Nordby "as an [ALJ]." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates he "did not appear to carefully consider potential candidates." Combined Reply Brief at 2. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the ALJ's appointment.[8] *See Edmond v. United*

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

[8] While Employer correctly notes the Secretary's ratification letter was signed by an "autopen," Combined Reply Brief at 2, 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.

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 592, 604-05 (National Labor Relations Board's retroactive ratification 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 challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 14-20; Combined Reply Brief at 3-4. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 14-20; Combined Reply Brief at 3-4. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). Employer's Brief at 14-20; Combined Reply Brief at 3-4.

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).

Further, 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

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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").

"independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address ALJs.

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. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1136.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Combined Reply Brief at 1. 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).

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

Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer does not challenge the ALJ's findings that Claimant established fifteen years of underground coal mine employment. Thus we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer argues that because Claimant's work took place aboveground at an underground mine, Claimant was still required to establish he was regularly exposed to coal mine dust. Employer's Brief at 29; Combined Reply Brief at 1. It argues the ALJ erred by failing to address whether Claimant was regularly exposed to coal mine dust. *Id*. Contrary to Employer's argument, the ALJ correctly held that the type of mine (underground or surface), rather than the location of the particular worker (below ground or aboveground), determines whether a miner is required to show comparability of conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011); Decision and Order at 7. Thus, a miner who worked aboveground at an underground mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine.[10] *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29. We therefore affirm the ALJ's finding that Claimant established fifteen years of qualifying coal mine employment.

Total Disability

To invoke the Section 411(c)(4) presumption, a claimant must also establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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.[11] 20

[10] We reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid because it "eliminate[s] the distinction between underground and surface mines" and is contrary to the Act. Employer's Brief at 29. The United States Courts of Appeals for the Tenth Circuit, within whose appellate jurisdiction this case arises, has rejected similar arguments and upheld the validity of 20 C.F.R. §718.305(b)(2). *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014); *see also Zurich American Insurance Group v. Duncan*, 889 F.3d 293 (6th Cir. 2018).

[11] The ALJ found Claimant's usual coal mine employment as a "surface equipment operator" required a moderate amount of physical labor because "Claimant was required to lift and carry weights of [forty to sixty] pounds for short distances (up to [thirty] feet) at least occasionally." Decision and Order at 8. He found this work met the definition of medium exertion under the Dictionary of Occupational Titles. *Id*. We affirm this finding

C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 opinion evidence.[12] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12-22. He specifically found Drs. Gottschall, Krefft, Farney, and Rosenberg all opined Claimant has a totally disabling respiratory or pulmonary impairment and all of their opinions are well-reasoned and documented. *Id.*

Employer argues the ALJ erred in crediting the opinions of Drs. Gottschall and Krefft. Employer's Brief at 22-23. We disagree.

Dr. Gottschall opined Claimant's June 12, 2013 pulmonary function study evidences chronic obstructive pulmonary disease (COPD) "with a mildly decreased FEV1" and his arterial blood gas study "shows hypoxemia with a [six]-minute walk." Director's Exhibit 12. She noted prior objective testing evidences "gas exchange abnormalities with development of hypoxemia with exercise." *Id.* She opined Claimant is totally disabled based on these impairments. *Id.* After reviewing objective testing that Dr. Farney conducted on December 11, 2013, Dr. Gottschall reiterated that Claimant is totally disabled. Director's Exhibit 21.

Dr. Krefft acknowledged Claimant's objective testing is non-qualifying,[13] but opined Claimant is totally disabled based on his "severe COPD and exertional hypoxemia," along with the "requirement for supplemental oxygen with exertion." Claimant's Exhibit

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as Employer does not challenge it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 9-12.

[13] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

1 at 13-14. He explained Claimant is "unable to carry out the job duties in his most recent coal mine employment" which required "heavy lifting and strenuous labor and climbing into and out of vehicles." *Id.*

Employer's argument that the ALJ erred in crediting the opinions of Drs. Gottschall and Krefft in light of his finding that the pulmonary function and arterial blood gas studies do not establish total disability, Employer's Brief at 22, has no merit. A physician may conclude a miner is disabled even if the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); 20 C.F.R. §718.204(b)(2)(iv). Moreover, as the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993). The ALJ found the opinions of Drs. Gottschall and Krefft well-reasoned and documented. Decision and Order at 19-22. Employer has not identified any specific error in the ALJ's finding beyond its incorrect allegation that the ALJ was required to discredit their opinions based on the objective testing results, and we therefore affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

Further, Employer does not specifically challenge the ALJ's finding that the opinions of Drs. Farney and Rosenberg support a finding that Claimant is totally disabled,[14]

[14] Substantial evidence supports the ALJ's finding that Drs. Farney and Rosenberg opined Claimant is totally disabled by a respiratory impairment. When asked if Claimant is totally disabled, Dr. Farney opined he has "a host of medical conditions that have a negative impact on his exercise capacity and respiratory function; however none of these are associated with or due to coal dust exposure (obesity, cardiac disease, obstructive sleep apnea/obesity hypoventilation syndrome and possible pulmonary hypertension)." Director's Exhibit 16. He further opined Claimant "suffers from hypoxemia complicated by anemia, mild hypercapnia and mild obstructive airway disease. He is totally disabled from performing his work in the coal mine due to hypoxemia, deconditioning, probably cardiac disease and arthritis." *Id.* The relevant inquiry for the ALJ at 20 C.F.R. §718.204(b)(2) was whether a totally disabling respiratory or pulmonary impairment exists; the cause of the totally disabling impairment is a separate issue. *See* 20 C.F.R. §§718.204(a), 718.305(d); *see also Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Dr. Rosenberg opined Claimant has "worsening gas exchange in association with exercise, with the measured levels being below disability standards." Employer's Exhibit 1 at 10-11. He thus concluded Claimant is disabled from a pulmonary

and that their opinions are well-reasoned and documented. Decision and Order at 19-22. Thus we affirm this finding. *Cox*, 791 F.2d at 446-47; *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability[15] based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[16] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement.[17] 20 C.F.R. §§718.305, 725.309.

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perspective because this gas exchange abnormality prevents him from performing his usual coal mine employment that is associated with "sedentary exertional demands." *Id*. During his deposition, Dr. Rosenberg acknowledged the most recent arterial blood gas studies did not establish total disability, but stated that he still opined Claimant is totally disabled. Employer's Exhibit 5 at 18-21.

[15] Citing *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), Employer argues Claimant is not entitled to benefits if his disability stemmed from pre-existing or co-existing non-respiratory impairments. Employer's Brief at 2. As noted above, we must apply the law of the Tenth Circuit, which did not adopt the standard of *Foster* and *Vigna*. *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-267 (2003). Moreover, in claims filed after January 19, 2001, a non-pulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see Gulley v. Director, OWCP*, 397 F.3d 535, 538-39, 549 (7th Cir. 2005).

[16] The ALJ also summarized Claimant's treatment records and found they are "quite consistent with a conclusion that the Claimant has a total respiratory disability." Decision and Order at 22-26. This finding is affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

[17] Employer argues that, after finding a change in an applicable condition of entitlement, the ALJ failed to weigh the old and new evidence together on the issue of total disability. Employer's Brief at 3-4, 29. Contrary to Employer's argument, the ALJ permissibly assigned "more weight to the evidence submitted in conjunction with the current claim than to the evidence submitted in conjunction with Claimant's prior claim" because "more recent evidence is more likely to reflect [Claimant's] current respiratory condition." Decision and Order at 26 n.38; *see Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th

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,[18] 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). The ALJ found that Employer failed to establish rebuttal by either method.[19]

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Farney and Rosenberg that Claimant does not have legal pneumoconiosis. Decision and Order at 30-40. Dr. Farney diagnosed COPD due to cigarette smoking and hypoxemia due to "obesity hypoventilation syndrome complicated by elevation, anemia, poor cardiovascular reserve and opioids." Director's Exhibit 16. He opined these conditions are unrelated to coal mine dust exposure. *Id.* Dr. Rosenberg diagnosed COPD in the form of emphysema due to cigarette smoking and hypoxemia due to obesity and congestive heart failure. Employer's Exhibit 1. He also opined these conditions are unrelated to coal mine dust exposure. *Id.* The ALJ found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 37-40.

Cir. 2015); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); Employer's Brief at 3-4, 29.

[18] "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).

[19] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 28-30.

We reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Farney and Rosenberg. Employer's Brief at 22-28.

The ALJ found Dr. Farney and Dr. Rosenberg excluded legal pneumoconiosis because "Claimant's coal mine employment history was rather remote, ending in 1991." Decision and Order at 39, *citing* Director's Exhibit 16; Employer's Exhibit 1. The ALJ rationally found this reasoning unpersuasive because both doctors attributed Claimant's COPD to cigarette smoking, but failed to discuss "that Claimant stopped smoking before he stopped mining" and stopped smoking twenty-years "prior to most of the evaluations they conducted or reviewed." Decision and Order at 39; *see Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370.

Further, the ALJ correctly noted the preamble to the 2001 revised regulations cites studies, which the DOL found credible, concluding the risks of smoking and coal mine dust exposure may be additive.[20] 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 39. In light of this medical science, he permissibly found Drs. Farney and Rosenberg did not adequately explain why Claimant's coal mine dust exposure was not a contributing or additive factor, along with his cigarette smoking, to the diagnosed lung diseases or impairments. *See Pickup*, 100 F.3d at 873; *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017); 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 24-25.

The ALJ also correctly determined that Dr. Farney excluded legal pneumoconiosis because Claimant's work took place aboveground at the underground mine site. Decision and Order at 37; Director's Exhibit 12. Specifically, Dr. Farney explained Claimant worked on the surface for fifteen years, and the "degree of accumulative coal [mine] dust exposure . . . that one receives [aboveground] is substantially less compared to underground miners . . . ." Director's Exhibit 12 at 9. As the ALJ accurately recognized, however, miners who work aboveground at an underground mine site have established qualifying

[20] Contrary to Employer's argument, an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1125-28 (9th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Employer's Brief at 20-22.

coal mine employment for purposes of invoking the Section 411(c)(4) presumption. Decision and Order at 37-38. Moreover, the ALJ found Claimant credibly testified that "his coal mine dust exposure was quite heavy, with no protection from dust because he worked in an open-cab machine," and this testimony is uncontradicted. Decision and Order at 37, *citing* Hearing Tr. at 16-17. Finally, the ALJ found Dr. Farney based his rationale on his general knowledge of the working conditions of miners who work aboveground rather than Claimant's specific working conditions. Decision and Order at 37-38. Thus the ALJ rationally found Dr. Farney's explanation for excluding legal pneumoconiosis unpersuasive. *Pickup*, 100 F.3d at 873; *Ramage*, 737 F.3d at 1058-59; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Muncy*, 25 BLR at 1-29.

Finally, the ALJ noted Dr. Rosenberg explained the presence of air trapping and reduced diffusion capacity on objective testing indicates Claimant has diffuse emphysema, which is a form of emphysema caused by cigarette smoking and not coal mine dust exposure. Decision and Order at 39, *citing* Employer's Exhibit 1. The ALJ rationally found this reasoning unpersuasive because Dr. Rosenberg failed to address "Dr. Farney's conclusion that Claimant's diffusion capacity [is] normal (when corrected for the Claimant's anemia)." Decision and Order at 39, *citing* Director's Exhibit 16; *see Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370.

Because the ALJ permissibly discredited the opinions of Drs. Farney and Rosenberg, the only opinions supportive of Employer's burden, we need not address Employer's arguments regarding Drs. Gottschall's and Krefft's opinions that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 22-28. We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited the opinions of Drs. Farney and Rosenberg regarding the cause of Claimant's disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 42-44. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge