U.S. Department of Labor

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

BRB No. 19-0489 BLA

ADRIAN L. CESSNA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH ON THE GREEN, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 02/26/2021
	)	
BITUMINOUS CASUALTY CORPORATION	)	
	)	
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

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

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

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

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jerry R. DeMaio's Decision and Order Awarding Benefits (2018-BLA-05224) rendered on a claim filed on January 4, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established fewer than fifteen years of coal mine employment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). Considering Claimant's entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge noted Employer conceded Claimant is totally disabled and found the evidence supports that concession. He further found Claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis, and therefore awarded benefits. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2); 718.204(c).

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also argues that the removal

[1] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[2] 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.

provisions applicable to administrative law judges rendered his appointment unconstitutional, asserting they violate the separation of powers doctrine. In addition, Employer contends he erred in finding Claimant established the existence of legal pneumoconiosis and disability causation. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had the authority to decide the case. Employer has filed separate replies to Claimant's and the Director's briefs, reiterating its contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-62 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[4] Employer's Brief at 13-19. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[5] and does not argue that the

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U.S. Const. Art. II, § 2, cl. 2.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 29.

[4] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge 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 administrative law judges 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)).

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

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim

administrative law judge took any action in this case prior to the ratification of his appointment, but still maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id*. at 16-19. Employer further alleges that no evidence demonstrates the Secretary engaged in a "genuine . . . thoughtful, consideration of potential candidates for these positions" or "interviewed them, or administered an oath or took any other action that suggests that these appointments were his own." *Id*. at 17-18.

The Director responds that the administrative law judge had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 2-4. He also maintains Employer failed to rebut the presumption of regularity that applies to actions of public officers such as the Secretary. *Id.* We agree with the Director.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time of the ratification of the administrative law judge's appointment, the Secretary had

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> that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, it is presumed 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 administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge DeMaio and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge DeMaio. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge DeMaio "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity.[6] *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.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge.[7] *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).

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[6] While Employer notes correctly that the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 17, 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").

[7] We also reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 18. Employer's argument has no merit. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999).

Removal Provisions

Employer also argues the administrative law judge lacked the authority to adjudicate this case because "he is still subject to the removal provisions of the Civil Service" and thus his consideration of this case violates "the separation of powers doctrine." Employer's Brief at 14-15. Employer has failed to adequately brief this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the FTC is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

Employer asserts the administrative law judge's appointment was improper in view of the removal provisions contained in the Administrative Procedure Act, 5 U.S.C. §7521. Employer's Brief at 14-15. Employer has not specified how those provisions violate the separation of powers doctrine or explained how such a holding undermines the administrative law judge's authority to preside over this case.[8] *Id*. Thus, we decline to address the issue. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[8] The majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Justice Breyer commented in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what" the United States Supreme Court in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), interpreted the Constitution to forbid in the case of the Public Company Accounting Oversight Board. *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). Even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the majority in *Lucia*.

While Employer cites the United States Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and Justice Breyer's concurrence and dissent in *Lucia*, it does not explain how either decision supports its position. Employer's Brief at 15. It notes the Supreme Court in *Free Enterprise* invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus resulted in a "constitutionally impermissible diffusion of accountability." *Id*. The Court specifically stated, however, that its holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10. Moreover, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

Entitlement Under 20 C.F.R. Part 718

Without the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability).[9] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Legal Pneumoconiosis

In order to establish legal pneumoconiosis, Claimant must establish that he has 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 United States Court of Appeals for the Sixth Circuit holds a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The administrative law judge considered five medical opinions relevant to legal pneumoconiosis. He credited the opinions of Drs. Chavda, Baker, and Sood, that Claimant's chronic obstructive pulmonary disease (COPD) is due to a combination of coal dust exposure and cigarette smoking,[10] over the contrary opinions of Drs. Tuteur and

[9] The administrative law judge found the evidence did not establish clinical pneumoconiosis. Decision and Order at 8, 11.

[10] We affirm, as unchallenged, the administrative law judge's finding that Claimant smoked for thirty years, but only on the weekends, amounting to a 4.28 pack-year smoking

Rosenberg, that Claimant's COPD is unrelated to his coal mine dust exposure. Decision and Order at 9-11; Director's Exhibit 12; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 9, 15.

Employer maintains that the administrative law judge ignored relevant evidence, improperly shifted the burden of proof, and gave impermissible reasons for discrediting the opinions of Drs. Rosenberg and Tuteur, while offering no explanation for crediting Claimant's medical experts, as the Administrative Procedure Act requires.[11] Employer's Brief at 19-22. We disagree.

The administrative law judge recognized that "Claimant bears the burden" to establish that he suffers from legal pneumoconiosis by a "preponderance of the evidence." Decision and Order at 6. He noted relevant case law explaining what constitutes a reasoned and documented medical opinion. Decision and Order at 8-9. He also noted Claimant's testimony describing his dust exposure in his coal mine employment.[12] *Id*. at 9.

Regarding Claimant's medical opinions, Dr. Chavda conducted the Department of Labor's complete pulmonary evaluation of Claimant and diagnosed COPD based on the results of a pulmonary function study. Director's Exhibit 12. The administrative law judge found Dr. Chavda had an accurate understanding of Claimant's coal mine dust exposure and opined Claimant's COPD was substantially caused or aggravated by both smoking and 14.75 years of coal mine dust exposure, supporting his rationale with citations to medical literature addressing the additive effects of smoking and coal mine dust exposure in causing COPD.[13] Decision and Order at 9, 13.

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

[11] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[12] The administrative law judge noted Claimant did not wear a mask and testified that while he often worked in an enclosed cab, he was completely covered in dust by the end of his work day, and all that was visible at the end of his shift was his eyeballs and mouth. Decision and Order at 6, *citing* Hearing Transcript at 11-12.

[13] The administrative law judge also found Dr. Chavda "actually inflated" Claimant's smoking history, but this factor did not undermine his diagnosis of legal

Similarly, the administrative law judge noted that Dr. Baker examined Claimant, had "an accurate understanding of [his] coal mine employment and smoking history," noted "'variable symptoms of cough and sputum production but not on a daily basis,' daily wheezing, and shortness of breath for the prior two to three years, which are aggravated by exertion." Decision and Order at 9, *quoting* Claimant's Exhibit 1. He further noted Dr. Baker attributed Claimant's COPD to his fourteen years of coal mine employment, while opining that Claimant's "minimal" smoking history played some role in causing his respiratory impairment. Claimant's Exhibit 1. Dr. Baker explained that coal dust exposure and smoking are both known risk factors for COPD. *Id*.

Lastly, Dr. Sood reviewed Claimant's medical records and prepared a report but did not examine Claimant. Claimant's Exhibit 6. He diagnosed emphysema/COPD caused by coal mine dust exposure and smoking. *Id*. The administrative law judge found Dr. Sood relied upon a detailed history of Claimant's exposures to smoking and coal mine dust, taking into account the duration and intensity of his dust exposure, latency, symptoms, objective testing, and physical examinations.[14] Decision and Order at 10, *citing* Claimant's Exhibit 6 at 11.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d

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pneumoconiosis because the physician "still opined" Claimant's impairment is significantly related to coal mine dust exposure. Decision and Order at 9, 13.

[14] Dr. Sood opined that Claimant has chronic obstructive pulmonary disease (COPD)/emphysema based on "consistent chronic progressive respiratory symptoms, use of medications given in the standard treatment of COPD, multiple postbronchodilator spirometry tests [that] showed airflow obstruction (FEVI/FVC ratio <70% predicted), chest radiographs dated August 16, 2017 showing emphysematous changes, lung volume measurement showing air trapping, diffusing capacity measurement showing a mildly reduced value, desaturation upon ambulation on January 24, 2017, and reduced 6 minute walk test distance on May 1, 2017." Claimant's Exhibit 6. He indicated that COPD in the right occupational setting such as Claimant's many years of coal mine employment may be considered legal pneumoconiosis. *Id*. He opined that coal mine dust exposure was a substantial contributing cause of Claimant's COPD/emphysema because it was of adequate duration (14+ years); adequate intensity (working under dusty conditions); and latency (of approximately four decades between onset of exposure and onset of disease) in the presence of consistent symptoms, examination findings, pulmonary function tests, and chest radiographs." *Id*. He further opined that Claimant's smoking history was a substantial contributing cause to his COPD as "it is not possible to scientifically apportion" between impairment caused by either coal mine dust exposure or smoking. *Id*.

477 (6th Cir. 2012); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable."). To the extent Drs. Chavda's, Baker's, and Sood's opinions are supported by relevant work and smoking histories, Claimant's symptoms, physical findings, and the results of objective tests, we affirm the administrative law judge's determination that they are credible to support a finding that Claimant has legal pneumoconiosis. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order at 9-11.

Contrary to Employer's contention, the administrative law judge also adequately explained why he discredited the opinions of its medical experts. Dr. Tuteur opined that Claimant is totally disabled due to a combination of obesity, arteriosclerotic heart disease, and a moderately severe obstructive defect and "this COPD" is "uniquely" caused by Claimant's 4.28 pack-year smoking history. Employer's Exhibit 4 at 3-5. His sole basis for completely excluding Claimant's fourteen years of coal mine dust exposure was his assessment that, statistically speaking, "never smoking" miners develop COPD less frequently than "never mining" smokers. *Id.* The administrative law judge permissibly found Dr. Tuteur's opinion unpersuasive, however, due to multiple "qualifications" the physician made. Decision and Order at 11.

Specifically, in completely excluding coal mine dust as a contributor, Dr. Tuteur initially stated Claimant was "exposed to sufficient amounts of coal mine dust to produce" legal pneumoconiosis. Employer's Exhibit 4 at 1. He further stated Claimant's "clinical picture of COPD may be due to either the inhalation of coal mine dust or cigarette smoke" because the clinical picture of COPD, regardless of either cause, is "generally similar." *Id.* at 2. After summarizing studies purporting to support his statistical analysis – including one he acknowledged "doesn't imply coal dust never causes COPD" – he concluded by stating that, while his opinion was rendered with a reasonable degree of medical certainty, it was "possible but highly unlikely that coal mine dust influenced" Claimant's COPD. *Id.* at 5. The administrative law judge permissibly construed Dr. Tuteur's statements as an opinion that "the specific cause of [Claimant's] COPD is unknown" and found his reliance solely on statistics unpersuasive given his repeated acknowledgment that coal dust inhalation could have caused Claimant's COPD. Decision and Order at 11. The administrative law judge also accurately noted that Dr. Sood explained why Claimant's respiratory impairment could not be related solely to the factors Dr. Tuteur identified.[15]

[15] As the administrative law judge noted, Dr. Sood opined that while Claimant's coronary artery disease substantially contributed to his "whole person impairment," it did not explain his "severely reduced FEV1 or gas exchange impairment" on his pulmonary function and blood gas testing since Claimant had undergone coronary artery bypass grafting prior to the pulmonary function testing. Decision and Order at 13, *quoting*

Decision and Order at 13. We therefore affirm the administrative law judge's finding that Dr. Tuteur's opinion is entitled to less weight. *Id.* at 11.

Dr. Rosenberg opined that Claimant's respiratory impairment "likely" is related to "a combination of his obesity coupled with a degree of hyperreactive airways and his long smoking history." Employer's Exhibit 9 at 6. The administrative law judge permissibly rejected Dr. Rosenberg's opinion on legal pneumoconiosis because he relied on a smoking history of fifty years, "which is inconsistent with the other medical experts" and the administrative law judge's finding that Claimant smoked thirty years but only on the weekends, amounting to only a 4.28 pack-year smoking history. Decision and Order at 11; *see Rowe*, 710 F.2d at 255; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (the administrative law judge may reject medical opinions that rely on an inaccurate smoking history); Employer's Exhibit 9.[16]

Employer's arguments on appeal are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. As substantial evidence supports the administrative law judge's finding that Claimant established legal pneumoconiosis, it is affirmed.[17] 20 C.F.R. §718.202(a)(4); Decision and Order at 11.

Claimant's Exhibit 6 at 14. Dr. Sood also stated that "severe and progressive spirometric impairment" is not indicative of coronary artery disease. *Id*. He further stated that while Claimant's "nonmorbid obesity" substantially contributed to his "whole person impairment," it does "not explain away his severely reduced FEV1, reduced diffusing capacity, and desaturation upon ambulation on January 24, 2017." *Id*.

[16] Because the administrative law judge gave a valid reason for discrediting Dr. Rosenberg's opinion, we need not address Employer's additional arguments concerning the administrative law judge's weighing of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378- 1-382 n.4 (1983).

[17] Citing *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988), Employer contends the administrative law judge erred in not addressing Claimant's treatment records because they constitute contrary probative evidence that he does not have legal pneumoconiosis. Employer's Brief at 20. However, Employer's reliance on *Burns* is misplaced. The United States Court of Appeals for the Seventh Circuit held in *Burns* that "[f]aced with a complete report of the miner's physical condition which contained no diagnosis of lung disease nor any evidence supporting such a diagnosis, [an] administrative law judge reasonably inferred that lung disease was not present." *Burns*, 855 F.2d at 502. Unlike *Burns*, the treatment records in this case establish Claimant has a lung disease because they include diagnoses of COPD. We consider the administrative law judge's failure to discuss the treatment records harmless, as they do not address the etiology of Claimant's COPD and

Disability Causation

To establish that his total disability is due to pneumoconiosis, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The administrative law judge found Drs. Chavda's, Baker's, and Sood's opinions sufficient to establish that Claimant's total respiratory or pulmonary disability was materially worsened by his coal mine employment. Decision and Order at 13. Although the administrative law judge misstated the legal standard, which is whether Claimant's *pneumoconiosis* was a substantial contributing cause of his total disability, the error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Drs. Chavda, Baker, and Sood opined Claimant's COPD substantially contributed to his respiratory disability. As we have affirmed the administrative law judge's finding that Claimant's COPD constitutes legal pneumoconiosis, we see no error in his logical determination that their opinions also support a finding that Claimant is totally disabled due to legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts "agreed that [the miner's] pulmonary problems were a significant cause of his total disability, the only question remaining was whether coal mine employment caused the pulmonary problems" and the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability."); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 256 (2019).[18]

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thus do not directly contradict the medical opinions diagnosing legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibits 10-14.

[18] We disagree with our dissenting colleague that the record does not bear out that Claimant's COPD – which the administrative law judge found constitutes legal pneumoconiosis – substantially contributed to his disabling respiratory or pulmonary impairment. The evidence is overwhelming. Dr. Chavda specifically opined that Claimant's coal mine dust exposure was a substantial contributor to his COPD and his COPD was a substantially contributing cause of his total respiratory disability. Director's Exhibit 12 at 10. Dr. Baker opined Claimant is "totally and permanently disabled due to his COPD due significantly in part to his coal mine dust exposure." Claimant's Exhibit 1 at 3. Dr. Sood diagnosed Claimant with a disabling respiratory impairment from COPD/legal pneumoconiosis. Claimant's Exhibit 6 at 10. Dr. Tuteur opined Claimant is

Further, for the reasons the administrative law judge gave for rejecting Drs. Tuteur's and Rosenberg's opinions on legal pneumoconiosis, we affirm his finding that they are not credible on the issue of disability causation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 12-13. We therefore affirm the administrative law judge's determination that Claimant established he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 13.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

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totally disabled due to "exercise intolerance associated with reasonably well controlled hypertension, coronary artery disease requiring aggressive medical management and coronary artery bypass graft, *as well as moderately severe obstructive ventilatory defect* [*COPD*] *treated only with Advair and prn albuterol*." Employer's Exhibit 4 at 3 (emphasis added). Dr. Rosenberg testified that Claimant is totally disabled from COPD. Employer's Exhibit 15 at 10-11, 48-49.

Moreover, contrary to our dissenting colleague's suggestion, Dr. Chavda did not diagnose COPD and legal pneumoconiosis as separate, unrelated diseases. He specifically stated Claimant's disabling COPD from smoking was "substantially caused, contributed and aggravated by 14.75 years of coal mine employment" and thus *is legal pneumoconiosis*. Director's Exhibit 12 at 10; *see* 20 C.F.R. §718.201(b). Nor does she explain how Dr. Tuteur's statement that Claimant is totally disabled "due to a combination of . . . COPD and arteriosclerotic heart disease," Employer's Exhibit 4 at 5, undermines the clear link all five physicians drew between Claimant's COPD and his total disability.

BOGGS, Chief Administrative Appeals Judge (concurring in part and dissenting in part):

I concur in the majority opinion that the Secretary of Labor's ratification of the administrative law judge's appointment is valid. I also concur with respect to their determination relating to Employer's argument on removal of Department of Labor administrative law judges. I respectfully dissent, however, from my colleagues' affirmance of the award of benefits because I agree with Employer that the administrative law judge committed multiple errors in finding Claimant established legal pneumoconiosis that require remand. 20 C.F.R. §§718.204(a)(2); 718.204(c).

Initially, Employer correctly points out that the administrative law judge did not address hundreds of medical records submitted by the parties relevant to Claimant's treatment for a respiratory or pulmonary disease. Employer's Brief at 20; Employer's Exhibits 10-14; *see McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Employer also correctly asserts that while the administrative law judge gave reasons for discrediting Employer's experts, Drs. Rosenberg and Tuteur, "he offered no explanation for why he decided to credit the opinions of Drs. Chavda, Baker and Sood" that Claimant has legal pneumoconiosis. Employer's Brief at 21 *citing* Decision and Order at 11. The Administrative Procedure Act, requires the administrative law judge to explain not only why he discredits the evidence in the record but why he credits the evidence. 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); Employer's Brief at 21. The administrative law judge's error is not harmless because Claimant has the burden of proof to establish legal pneumoconiosis and, thus, the administrative law judge must specifically address whether the medical opinions Claimant relies on to satisfy that burden are reasoned and documented. *See generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988). By focusing solely on the credibility of Employer's medical opinions, without a comparable analysis of whether Claimant's medical opinions are adequately reasoned and documented, the administrative law judge selectively considered the evidence and improperly shifted the burden of proof. *Ondecko*, 512 U.S. at 281; *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 276 (7th Cir. 1983).

Moreover, I disagree with my colleagues that the administrative law judge permissibly rejected Dr. Tuteur's opinion on legal pneumoconiosis. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (acknowledging the inherent uncertainty in medical opinions). The administrative law judge discredited Dr. Tuteur's opinion because he found Dr. Tuteur "qualifies his opinion multiple times" and "explains that the specific cause of [Claimant's] [chronic obstructive pulmonary disease (COPD)] is unknown." Decision and Order at 11. Although the administrative law judge is correct that Dr. Tuteur opined one generally cannot distinguish between clinical symptoms of COPD related to

smoking versus coal mine dust exposure, he also explains that physicians regularly employ risk assessment as a tool to determine the cause of an individual's disease for the purposes of patient care and management. Employer's Exhibit 4 at 4. Citing medical studies and statistics to support his opinion, Dr. Tuteur unequivocally concluded "with reasonable medical certainty" that Claimant's COPD is due to his history of cigarette smoking and is "in no way related to, aggravated by or caused by the inhalation of coal mine dust." *Id.* at 4-5; *see Perry*, 469 F.3d at 366; *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983) (not even a "reasonable degree of medical certainty" is required as a physician's opinion regarding the cause of a miner's impairment is sufficient if it constitutes a reasoned medical judgment). The administrative law judge selectively analyzed Dr. Tuteur's statements as qualifications of his overall opinion, and erred in failing to consider and analyze the entirety of his explanation as to why Claimant's COPD is unrelated to coal mine dust exposure. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the adjudicator misconstrues either the quality or the quantity of relevant evidence, i.e., if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant); Employer's Brief at 22-23.

An administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion evidence. 30 U.S.C. §923(b); *see Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). Because the administrative law judge did not consider all the relevant evidence, failed to assess whether each medical opinion was adequately reasoned and documented, and did not rationally explain how he resolved the conflict in the evidence, I would vacate his finding that Claimant established the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Rowe*, 710 F.2d at 254-55 (when "administrative law judge fails to make important and necessary factual findings, the proper course for the Board is to remand the case to the administrative law judge pursuant to 33 U.S.C. §921(b)(4) rather than attempting to fill the gaps in the administrative law judge's opinion"); *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

As the administrative law judge erred in determining Claimant established legal pneumoconiosis, his findings on disability causation must also be vacated.[19] 20 C.F.R.

[19] The administrative law judge also repeated his error in selectively analyzing Dr. Tuteur's opinion on the cause of Claimant's total respiratory disability. The administrative law judge rejected Dr. Tuteur's opinion on disability causation as equivocal because Dr. Tuteur stated that the "clinical picture of COPD may be due to either inhalation of coal mine dust or cigarette smoke" and "in an individual person, one cannot use available characteristics to differentiate between these two etiologies." Employer's Exhibit 4 at 3; *see* Decision and Order at 10. Dr. Tuteur, however, unequivocally opined that Claimant's total disability was due to smoking history, arteriosclerotic heart disease, and his

§718.204(c). However, the administrative law judge also incorrectly stated the legal standard for disability causation. Decision and Order at 13.

To establish that his total disability is due to pneumoconiosis, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). The administrative law judge erred in finding Claimant proved that his total disability was materially worsened by his coal mine employment and not pneumoconiosis as the regulation requires.[20] *Id.*; *see* Decision and Order at 13.

Thus, I would vacate the award of benefits and remand the claim for further consideration of the medical opinions and treatment records relevant to whether Claimant established legal pneumoconiosis and disability causation, applying the correct legal standards. 20 C.F.R. §§718.202(a)(4), 718.204(c). The administrative law judge should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255-56. Further, I would instruct the administrative law judge on remand to explain the bases for all of his credibility determinations, setting forth in detail how he resolves the conflict in the evidence, as the Administrative Procedure Act requires. *See Wojtowicz*, 12 BLR at 1-165.

For these reasons I respectfully concur in part and dissent in part from the opinion of the majority.

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overweight status and was unrelated to legal pneumoconiosis and "[t]hese conditions are in no way related to, aggravated by or caused by the inhalation of coal mine dust or the development of a pneumoconiosis." Employer's Exhibit 4 at 5.

[20] My colleagues submit that all the physicians found Claimant's totally disabling impairment was COPD and consequently the administrative law judge's error is harmless; however, on its face the evidence does not bear them out and the administrative law judge conducted no analysis to that effect. Dr. Chavda, for example, diagnosed COPD and legal pneumoconiosis as separate conditions and Dr. Tuteur attributed Claimant's disability to COPD and arteriosclerotic heart disease. Director's Exhibit 12; Employer's Exhibit 4.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge