U.S. Department of Labor

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

BRB No. 20-0072 BLA

RAYMOND L. HAYDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENERGY COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE	)	DATE ISSUED: 02/24/2021
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (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: ROLFE, GRESH, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2019-BLA-05036) 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 miner's claim filed on August 3, 2016.

The administrative law judge credited Claimant with 14.64 years of coal mine employment and therefore found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found the evidence did not establish clinical pneumoconiosis. However, he found the medical opinion evidence establishes legal pneumoconiosis. 20 C.F.R. §718.202(a)(4). He further found the evidence establishes Claimant is totally disabled due to legal pneumoconiosis, 20 C.F.R. §718.204(b), (c), and awarded benefits.

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, and that the removal provisions applicable to the administrative law judge render his appointment unconstitutional.[2] It

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis where the evidence 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) (2012); 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.

further asserts it is not the properly designated responsible operator. On the merits, Employer argues the administrative law judge erred in finding Claimant established legal pneumoconiosis, total disability, and total 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, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment. The Director also disagrees with Employer's assertion that it is not the properly designated responsible operator but concedes remand is required because the administrative law judge did not adequately explain his findings. Employer filed a reply brief in response to Claimant's brief, and a second reply brief in response to the Director, and reiterates its arguments in both.

The Benefit Review Board's scope of review is defined by statute. We must affirm the administrative law judge's 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, 362 (1965).

Appointments Clause

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 11-17; Employer's First Reply Brief at 2; Employer's Second Reply Brief at 1-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (Department)

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 33.

[4] *Lucia* involved a 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. Commissioner*, 501 U.S. 868 (1991)).

administrative law judges on December 21, 2017,[5] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. Employer's Brief at 12-15; Employer's Second Reply Brief at 2-3.

The Director argues 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. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* at 3. We agree with the Director's positions.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Id.* at 2, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, 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). Ratification 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). Moreover, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the

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[5] The Secretary 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 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 Sellers.

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 administrative law judges in a single letter. Rather, he specifically identified Judge Sellers and gave "due consideration" to his appointment.[6] Secretary's December 21, 2017 Letter to Administrative Law Judge Sellers. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Sellers "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified Judge Seller's appointment. 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 thus properly ratified the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relation Board properly ratified appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" earlier invalid actions). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different administrative law judge.

We further reject employer's argument that in Executive Order 13843, which removes administrative law judges from the competitive civil service, the President recognized that administrative law judge appointments made through the competitive service violate the Appointments Clause. Employer's Second Reply Brief at 8-9. 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). Thus, we reject Employer's argument that this case should be

[6] While Employer notes correctly that the Secretary's ratification letter was signed with "an autopen," Employer's Brief at 14, 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").

remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting they are unconstitutional. Employer's Brief at 11-13; Employer's First Reply Brief at 2; Employer's Second Reply Brief at 3-9. Employer generally argues the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA), 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 15-16; Employer's First Reply Brief at 2; Employer's Second Reply Brief at 3-9. Employer also relies on the United States Supreme Court's invalidation of a similar statutory scheme in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *Id.* But Employer has not explained how these legal authorities undermine the administrative law judge's ability to hear and decide this case.[7] 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 argument the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

As the Director correctly notes, the Supreme Court expressly stated its holding in *Free Enterprise Fund* "does not address that subset of independent agency employees who serve as administrative law judges." 561 U.S. at 507 n.10; *see* Director's Brief at 4. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Accordingly, we agree with the Director's argument that Employer has not met its burden to establish that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied.

[7] 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*.

Entitlement - 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[8] and (c)(4) presumptions, in order to be entitled to benefits 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). 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 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that 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, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

On this issue, the administrative law judge considered the opinions of Drs. Green, Raj, Dahhan, and Jarboe.[9] Decision and Order at 12-19. Drs. Green and Raj diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and hypoxemia due in part to coal mine dust exposure. Director's Exhibit 9; Claimant's Exhibits 1, 2. Dr. Dahhan opined Claimant did not have a pulmonary impairment or disability related to or aggravated by coal dust exposure and therefore does not have legal pneumoconiosis. Director's Exhibit 17 at 5. Dr. Jarboe opined that while Claimant had hypoxemia, he did not have legal pneumoconiosis, as coal dust inhalation was not the cause of the Claimant's hypoxemia. Employer's Exhibit 4 at 7. Dr. Jarboe noted Claimant was obese and had obstructive sleep apnea, which he indicated could have caused his hypoxemia. *Id*.

[8] The administrative law judge determined there was no evidence of complicated pneumoconiosis. Decision and Order at 20.

[9] The administrative law judge determined Claimant did not establish clinical pneumoconiosis. Decision and Order at 12.

The administrative law judge found the opinions of Drs. Green and Raj well-reasoned and entitled to probative weight because they considered Claimant's specific exposures and because their opinions are consistent with the preamble to the 2001 regulatory revisions. Decision and Order at 13-16. The administrative law judge gave less weight to Dr. Dahhan's opinion because he did not consider the more recent objective studies and less weight to Dr. Jarboe's opinion because he did not credibly explain how he determined Claimant's years of coal mine dust exposure did not contribute to, or aggravate, his pulmonary disease. *Id*. at 17-19. The administrative law judge therefore gave more weight to the opinions of Drs. Green and Raj and found Claimant established legal pneumoconiosis. *Id*. at 14-16, 19.

We initially reject Employer's assertion that the administrative law judge applied an improper burden of proof, because he did not require Drs. Green and Raj to "rule in" Claimant's coal mine dust exposure as a cause of his respiratory or pulmonary impairment, and applied a presumption of disease causation. Employer's Brief at 20. The administrative law judge correctly recognized that a claimant seeking to establish legal pneumoconiosis must "prove that his impairment was 'significantly related to, or aggravated by, exposure to coal dust' by showing that his disease was caused 'in part' by coal mine employment."[10] Decision and Order at 13, *quoting Groves*, 761. F.3d at 598-99, 20 C.F.R. §718.201(a)(2), (b). He found the opinions of Drs. Green and Raj satisfied that burden, and he permissibly found their opinions entitled to more weight than the contrary opinions of Drs. Green and Raj.

We reject Employer's argument that the administrative law judge erred in weighing their opinions. Employer's Brief at 19-23. As the administrative law judge noted, both Drs. Green and Raj examined Claimant and conducted pulmonary function studies, blood gas studies, and electrocardiograms. Decision and Order at 13-16; Director's Exhibit 9; Claimant's Exhibits 1, 2. They based their legal pneumoconiosis diagnosis on Claimant's history of chronic cough, wheeze, and shortness of breath, as well as his nearly fifteen years of coal mine employment. Director's Exhibit 9; Claimant's Exhibits 1, 2. As the administrative law judge observed, Drs. Raj and Green stated it was not possible to distinguish the relative contribution of smoking and coal mine dust exposure, but also specifically opined, contrary to Employer's assertion, that Claimant's coal mine dust exposure is a significant contributing and aggravating factor for the diagnosis of his COPD

[10] Likewise, we reject Employer's argument that the administrative law judge erred in discrediting Dr. Jarboe for failing to "exclude coal dust as a contributing cause." Employer's Brief at 23. As explained above, the administrative law judge applied the proper standard in attributing diminished weight to Dr. Jarboe's opinion because he found it was not well-reasoned. *See* Decision and Order at 18-19.

and hypoxemia/hypoxia.[11] Decision and Order at 14-15; Director's Exhibit 9; Claimant's Exhibits 1, 2. Further, the administrative law judge permissibly found their opinions consistent with the Department of Labor's recognition that the risks of smoking and coal dust exposure are additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 14-15.

We further reject Employer's assertion that the opinions of Drs. Green and Raj are insufficient because they could not apportion the contribution from coal dust to Claimant's impairment. Employer's Brief at 19. A physician need not apportion a specific percentage of a miner's lung disease to coal mine dust as opposed to cigarette smoke or other factors in order to establish the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them); *see also Groves*, 761 F.3d at 598-99. Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination to assign "probative weight" to their opinions.[12] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866

[11] In his 2018 supplemental report, Dr. Green diagnosed COPD based on Claimant's pulmonary function study results, and hypoxemia and hypercarbia based on his blood gas study results. Claimant's Exhibit 1. He stated Claimant's "[thirteen] year occupational history of exposure to respirable coal and rock dust is a significant, contributing and aggravating factor for the diagnosis of . . . chronic obstructive pulmonary disease." *Id.* Concerning Claimant's hypoxemia, he observed, Dr. Green indicated it was multifactorial in origin with contributions from Claimant's obesity and cigarette smoking history and that Claimant's coal dust exposure history "contribut[ed] at least in part." *Id.* Dr. Raj also diagnosed COPD based on Claimant's pulmonary function study results and explained "it is not possible to state individual contribution of each but [Claimant's thirteen] year history of exposure to respirable coal/rock dust exposure has [a] substantial and significant role in patient's diagnosis of . . . COPD." Claimant's Exhibit 2.

[12] Because the administrative law judge provided valid reasons for crediting the opinions of Drs. Green and Raj on the issue of legal pneumoconiosis and they are supported by substantial evidence, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 19-23.

F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 14, 16.

Employer next asserts the administrative law judge erred in discrediting Dr. Dahhan because "he examined [Claimant] in 2017 whereas Drs. Green and Raj examined [Claimant] in 2018."[13] Employer's Brief at 21-22. As the administrative law judge observed, pneumoconiosis is a "progressive and irreversible disease" and, therefore, more recent medical reports may be accorded greater weight as they are likely to contain a more accurate evaluation of the miner's current physical condition. Decision and Order at 17, citing *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Thus, contrary to Employer's contention that the administrative law judge "mechanical[ly] reli[ed] on 'later is better,'" he qualitatively evaluated the opinions and found Dr. Dahhan did not have "the benefit of reviewing medical records generated after his examination," which the administrative law judge determined more accurately reflect Claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 17.

Employer further argues the administrative law judge impermissibly discredited Dr. Jarboe's opinion because he did not examine Claimant. Employer's Brief at 22; Employer's Exhibit 4. An administrative law judge cannot discredit a medical opinion solely because the physician did not examine a miner, but must consider the reliability and reasoning underlying the opinion. *See Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). Here, however, the administrative law judge did not discredit Dr. Jarboe's opinion solely on this basis. *See* Decision and Order at 18-19 (assigning less weight because Dr. Jarboe relied on the absence of clinical pneumoconiosis to eliminate coal dust as a cause of Claimant's oxygen transfer impairment). Moreover, the administrative law judge observed Dr. Jarboe's failure to examine the Claimant prevented him from evaluating Dr. Jarboe's opinion that Claimant's treatment and hospitalization records demonstrated his shortness of breath and wheezing were temporary. *Id.*; *see* Employer's Exhibit 4. The administrative law judge stated he gave less weight to this portion of Dr. Jarboe's opinion because it conflicts with the opinions of Drs. Green, Raj, and Dahhan, who had the opportunity to observe Claimant and noted he had been experiencing shortness of breath and wheezing

[13] Dr. Dahhan examined Claimant on May 17, 2017. Director's Exhibit 17. Dr. Green initially examined Claimant on October 17, 2016, and subsequently examined him on January 8, 2018. Director's Exhibit 9; Claimant's Exhibit 1. Dr. Raj examined Claimant on March 5, 2018. Claimant's Exhibit 2.

for up to twenty years.[14] Decision and Order at 18; Director's Exhibits 9, 17; Claimant's Exhibit 1, 2.

In addition, we reject Employer's general assertion that the administrative law judge erred in relying on the preamble to the 2001 revised regulations to discredit Dr. Jarboe's opinion. Employer's Brief at 23. The administrative law judge stated Dr. Jarboe failed to adequately explain his opinion that coal dust exposure could not also have contributed to the respiratory impairment he diagnosed. Decision and Order at 18. The administrative law judge found "the only certain reason" he provided for why coal dust could not have contributed to Claimant's hypoxemia is the lack of "dust burden in his lungs" based on the lack of coal workers' pneumoconiosis on the chest x-rays.[15] *Id*. at 18-19; Employer's Exhibit 4. And he permissibly found that reason inconsistent with the regulations and the preamble to the 2001 revised regulations, recognizing that *legal* pneumoconiosis is independent of clinical pneumoconiosis, and that a diagnosis of *legal* pneumoconiosis does not require a positive x-ray. Decision and Order at 18; 20 C.F.R. §718.202(a)(4), (b); *Adams*, 694 F.3d at 801-02; 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000).

We therefore affirm the administrative law judge's weighing of the medical opinions concerning legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 19. Consequently we affirm his determination that Claimant established the disease. *Id*.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge found Claimant established total disability based on the blood gas

[14] We affirm, as unchallenged, the administrative law judge's finding that the opinions of Drs. Green, Raj, and Dahhan support that Claimant has been experiencing shortness of breath and wheezing for up to twenty years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[15] As Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

studies and medical opinion evidence, and on his weighing of the evidence as a whole. Decision and Order at 20-26; see 20 C.F.R. §718.204(b)(2)(4).

Employer argues the administrative law judge improperly discarded the pulmonary function study results because they contradict the results of the arterial blood gas studies. Employer's Brief at 24. Employer's argument lacks merit. The administrative law judge found that all of the pulmonary function studies yielded non-qualifying results[16] and thus did not establish total disability. Decision and Order at 23, 26; *see* Director's Exhibits 9, 17; Claimant's Exhibits 1, 2. He then permissibly determined that, when weighing the evidence as a whole, the non-qualifying pulmonary function studies do not undermine his finding the weight of the arterial blood gas evidence is qualifying, because the tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order at 23, 26.

Employer also asserts the administrative law judge erred in finding the conflicting arterial blood gas study evidence weighs in favor of a finding of total disability. Employer's Brief at 24. We disagree. The administrative law judge considered the results of five arterial blood gas studies. Decision and Order at 21-22; *see* Director's Exhibits 9, 17; Claimant's Exhibits 1, 2, 3; Employer's Exhibit 3. He first determined he would not consider the May 5, 2013 study administered at the Emergency Department at Highlands Regional Medical Center because Claimant was experiencing acute pulmonary symptoms at the time. Decision and Order at 21; Claimant's Exhibit 3 at 11; Employer's Exhibit 3 at 8. He then considered the four remaining studies – all of which were conducted at rest only. Decision and Order at 21-22. The October 17, 2016 study administered by Dr. Green produced qualifying values; the May 17, 2017 study administered by Dr. Dahhan had non-qualifying values; the January 8, 2018 study administered by Dr. Green produced qualifying values; and the March 5, 2018 study administered by Dr. Raj produced values "very close to qualifying."[17] Decision and Order at 21; Director's Exhibit 9 at 16; Director's Exhibit 17 at 6; Claimant's Exhibit 1 at 12; Claimant's Exhibit 2 at 11.

[16] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[17] As the administrative law judge accurately observed, "a qualifying PO2 [on the March 5, 2018 study] would have been 60, while the Claimant's PO2 was 61." Decision and Order at 21.

The administrative law judge observed that the two most recent studies were taken less than two months apart in 2018 and found "they are essentially contemporaneous." Decision and Order at 22. He noted Dr. Raj, who conducted the most recent non-qualifying study, did not conduct an exercise study because the resting value already showed hypoxemia, consistent with the values on the January 8, 2018 study.[18] Decision and Order at 22; Claimant's Exhibit 2. The administrative law judge did not find any reason to question the validity of the two most recent studies, and because one produced qualifying values and the other was halted because the resting value already established hypoxemia, he permissibly found that "they support the conclusion that the Claimant is totally disabled." Decision and Order at 22; *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014) (administrative law judge permissibly found valid contemporaneous pulmonary function tests established disability where most recent and two of three most recent studies were qualifying); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Claimant's Exhibits 1, 2; Employer's Brief at 24.

We therefore affirm the administrative law judge's finding that the blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 22. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability.[19] 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 26.

Total Disability Causation

[18] Dr. Raj indicated he did not exercise Claimant based on the "[electrocardiogram] showing frequent premature ventricular contractions." Claimant's Exhibit 2. He also stated that Claimant was totally disabled based, in part, on the resting hypoxemia shown on the study he obtained and Dr. Green's January 8, 2018 study. *Id*.

[19] We reject Employer's argument that the administrative law judge discredited Dr. Jarboe's opinion simply because he "was not persuaded" by Dr. Jarboe's characterization of Claimant's impairment. Employer's Brief at 24. Contrary to Employer's contention, the administrative law judge permissibly discredited Dr. Jarboe's opinion because he found Dr. Jarboe "did not explain how the Claimant could meet the exertional demands of his usual coal mine work with chronic resting hypoxemia." Decision and Order at 26; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Kozele*, 6 BLR at 1-382 n.4. Employer has not otherwise challenged the administrative law judge's weighing of the medical opinion evidence and we therefore affirm his determination that the opinions of Drs. Raj and Green are entitled to "the most probative weight" and support a finding of total disability. Decision and Order at 26; *see Skrack*, 6 BLR at 1-711.

The administrative law judge next found Claimant established he is totally disabled due to legal pneumoconiosis. Decision and Order at 26-28. Employer argues the administrative law judge "ignored the [C]laimant's burden here along with all basic notions of causation." Employers Brief at 25-27. We disagree.

The administrative law judge articulated and applied the proper standard: Claimant must establish that pneumoconiosis was a "substantially contributing cause" of his "totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599; Decision and Order at 26. He further recognized pneumoconiosis is a "substantially contributing cause" of disability if it: "(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially 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); Decision and Order at 26.

The administrative law judge noted Drs. Green and Raj found Claimant totally disabled due to his COPD and hypoxemia, which he held constituted legal pneumoconiosis. Decision and Order at 26-27. He gave "no probative weight" to Dr. Dahhan's opinion because the doctor did not diagnose a totally disabling impairment and therefore did not provide an opinion at total disability causation. *Id*. at 27. He gave "little probative weight" to Dr. Jarboe's opinion because the doctor did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *Id*. Because we have affirmed the administrative law judge's finding that Claimant's COPD and hypoxemia constitutes legal pneumoconiosis, and Employer raises no other specific arguments on disability causation,[20] we further affirm his determination that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 28. Having affirmed the administrative law judge's determination that Claimant established the requisite elements of entitlement, we further affirm the award of benefits.

[20] Employer has not explained how the administrative law judge's failure to consider Dr. Green's diagnosis of clinical pneumoconiosis affected his diagnosis of a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis, nor has it explained its assertion that "the [administrative law judge] preferred the preamble to the actual record developed by the parties." Employer's Brief at 26. Thus we need not address these statements. *See* 20 C.F.R. §802.211(b); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Cox*, 791 F.2d at 446-47.

Responsible Operator

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).[21] Once the Director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves that it is either financially incapable of assuming liability for benefits or another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

Before the administrative law judge, Energy Coal Corporation (Employer or Energy Coal), asserted that Prater Creek Processing Company (Prater Creek) should have been named the responsible operator because it was the last coal mine operator that employed Claimant for 125 days. Based on Claimant's deposition and hearing testimony, the administrative law judge found Claimant worked for Prater Creek for 116.38 days and therefore did not work for it for the year necessary for it to meet the regulatory definition of a "potentially liable operator." 20 C.F.R. §725.494(c); Decision and Order at 8. As Employer has not challenged this finding on appeal, we affirm it. *See Skrack*, 6 BLR at 1-711.

Further, Claimant testified the companies he worked for after Employer – "Western, Laurel, Highwire, and Prater" – were located in the same county in Kentucky, consisted of all the same people, including owners and bosses, and were "the same company." Decision

[21] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability must have arisen at least in part out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and 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). Employer does not contest that it meets these requirements.

and Order at 9, *citing* Hearing Transcript at 26, 30-32; Director's Exhibit 31 at 10, 12, 16. The administrative law judge concluded that, "[e]ven if, *arguendo*, the Claimant worked for Prater [Creek] for 125 days, I find that the Claimant's uncontested testimony supports the conclusion that [Prater Creek] is the same company as [Employer] for liability purposes." Decision and Order at 9, citing *Koch v. Middleport Materials, Inc.*, BRB No. 00-0322 BLA, 2001 WL 36391688 (January 31, 2001) (unpub.), *aff'd sub nom Middleport Materials, Inc. v. Director, OWCP*, 281 F.3d 222 (3d Cir. Dec. 19, 2001).

Employer asserts the administrative law judge erred in identifying it as the responsible operator, as the evidence establishes several of the companies Claimant subsequently worked for were successors to it and therefore should have been identified as the responsible operator. Employer's Brief at 17-19. The Director responds, asserting that, while the Employer's ultimate conclusion is incorrect, the administrative law judge's findings are "confusing and not well reasoned" and therefore concurs that remand is required. Director's Brief at 5. We agree that remand is necessary to analyze the responsible operator issue.

While the administrative law judge identified portions of Claimant's testimony that are consistent with his finding of a common enterprise, he failed to address the contradictory evidence of record or make a finding on the credibility of Claimant's testimony.[22] Decision and Order at 9; Hearing Transcript at 22, 25-26, 29-32, 43; Director's Exhibits 6; 31 at 10-14. Consequently, he failed to consider all relevant evidence and explain his findings in compliance with the APA. *See* 30 U.S.C. §923(b); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989); Decision and Order at 9. Thus, we vacate the administrative law judge's finding Employer and Prater Creek are the same company, and remand for further consideration of whether they share a successor operator relationship, common enterprise relationship, or no relationship.[23] On remand,

[22] The Director highlights several discrepancies in the record including: Claimant's testimony that the Prater Creek mine was located in a different Kentucky county than the other mines, Claimant's statement that the owners were the same for each operator lacks support, and Claimant's inconsistent testimony concerning whether the same equipment was used at each mine. *See* Director's Brief at 6. The Director also notes Claimant referred to an operator as "Highwire" but there is no record of such a company on his Social Security Administration (SSA) earnings records, and Employer and Prater Creek do not share the same address on Claimants SSA earnings records as the other companies Employer referenced in a successor relationship. *Id*; *see* Director's Exhibit 6.

[23] The Director also argues remand is required, in part, because the administrative law judge did not consider whether the evidence supports a theory of successor operator liability, and what effect, if any, his findings "had on Energy's liability given that it would

the administrative law judge must set forth his findings in detail, including the underlying rationale for his decision, as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

necessarily alter [Claimant's] last date of employment." Director's Brief at 5. These issues should also be considered on remand.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge