U.S. Department of Labor

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

BRB No. 19-0252 BLA

KERMIT F. BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY ELKHORN COAL INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE, INCORPORATED	)	DATE ISSUED: 07/14/2020
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Edward Waldman (Kate S. O'Scannlain, 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: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05165) of Administrative Law Judge Steven D. Bell rendered on a subsequent claim[1] filed on August 4, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act).

The administrative law judge credited claimant with 15.17 years of underground coal mine employment and found he has 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 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) (2012); 20 C.F.R. §725.309(c). He further found employer did not rebut the presumption 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.[3] It also asserts the provisions

[1] Claimant filed three previous claims for benefits. Director's Exhibits 1-3. He filed his most recent claim on July 5, 2005. Director's Exhibit 3. The district director denied that claim because claimant failed to establish any element of entitlement. *Id*.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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); *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.

for removing administrative law judges in the Administrative Procedure Act (APA), 5 U.S.C. §7521, rendered his appointment unconstitutional. In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, but nevertheless contends the administrative law judge improperly invoked the presumption based on erroneous findings that claimant had at least fifteen years of coal mine employment and is totally disabled. Employer finally argues he erred in finding it did not rebut the presumption. Claimant responds in support of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting employer forfeited its Appointments Clause challenge and urging the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional. Employer filed reply briefs, reiterating its arguments.

The 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.[4] 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).[5] Employer's Brief at 12-14. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior

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U.S. Const. art. II, § 2, cl. 2.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[5] *Lucia* involved an Appointments Clause challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. 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)). On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

appointment. *Id*. In response, the Director asserts employer forfeited its Appointments Clause challenge. Director's Response Brief at 3-8. We agree with the Director's argument.

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). Employer filed a January 30, 2018 motion before the administrative law judge requesting the case be held in abeyance pending the United States Supreme Court's decision in *Lucia*. In its motion, employer did not raise any specific challenge to the administrative law judge's authority to decide the case. The administrative law judge denied employer's motion on January 31, 2018. The Supreme Court issued its decision in *Lucia* on June 21, 2018, holding that a party who timely challenges the constitutional validity of an administrative law judge's appointment is eligible for a new hearing before a different, properly appointed administrative law judge. The administrative law judge issued his decision in this case on February 4, 2019, observing correctly that employer did not challenge his adjudicative authority after the Supreme Court issued *Lucia*. Decision and Order at 2 n.3. Indeed, employer has not affirmatively asserted an Appointments Clause challenge until its present appeal.[6]

Lucia was decided more than seven months before the administrative law judge issued his decision and order, but employer failed to raise its arguments during that time. Had employer raised its argument during that time, the administrative law judge could have addressed it and, if appropriate, referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, employer waited to affirmatively raise the issue until after the administrative law judge issued an adverse decision. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Because employer has not identified any basis for excusing its forfeiture[7]

[6] The Director points out employer's request to hold the case in abeyance pending the resolution of *Lucia* was effectively granted because the administrative law judge's decision was not issued until after the Supreme Court issued *Lucia*. Director's Response Brief at 7 n.6.

[7] Employer's assertion in its Reply Brief at 5 that administrative law judges cannot resolve constitutional issues is not a valid basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11

of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.[8] *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (recognizing exception for considering a forfeited argument due to extraordinary circumstances).

Removal Provisions

Employer also argues the administrative law judge lacked authority to adjudicate this case because the provisions that govern the removal of the administrative law judge do not "comply with the Appointments Clause and separation of powers doctrine." Employer's Brief at 14. We consider employer's arguments to be adjunct to its Appointments Clause challenge, which was forfeited. Furthermore, 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).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. 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*. To merely "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.*, 898 F.3d at 677, *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 Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

As the Director notes, employer refers to the removal provisions for administrative law judges contained in the APA and notes the Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Director's Brief at 11-13; Employer's Brief at 15-17, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer has not

(2019) (Appointments Clause argument is an "as-applied" challenge that the administrative law judge can address and thus can be waived or forfeited).

[8] Employer also forfeited its related argument that the Secretary of Labor's December 21, 2017 ratification of the administrative law judge's appointment was invalid.

explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[9] We therefore agree with the Director's position that employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 11-13. Thus we decline to address this issue. *Cox*, 791 F.2d at 446; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

Constitutionality of the Affordable Care Act and 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. Employer's Brief at 19. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted,* U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance

[9] Employer cites the Supreme Court's decisions in *Free Enterprise* and *Lucia*. Employer's Brief at 15-17. It notes that in *Free Enterprise,* the Supreme Court invalidated a statutory system that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. *Id*. Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court stated 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; Director's Brief at 11-13. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Section 411(c)(4) Presumption - Length of 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 "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

We reject employer's argument the administrative law judge erred in calculating claimant's coal mine employment. Employer's Brief at 20-22. The administrative law judge considered claimant's Social Security Administration (SSA) earnings records, deposition and hearing testimony, and paystubs. Decision and Order at 4-8; Director's Exhibits 1 at 264-301, 3, 8; Hearing Transcript at 19. He permissibly discredited claimant's testimony regarding the years 1965 to 1988 because he found claimant "attempted to estimate his hourly wage for a number of employers" but "was unsure about many of them[,] and . . . never stated the number of hours he worked per day or the number of days per week." Decision and Order at 6; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony). He also permissibly discredited claimant's paystubs because they "do not reference the number of days worked, simply showing his gross earnings and the number of hours worked during the pay period." *Id*. Having declined to rely on claimant's testimony and paystubs, the administrative law judge permissibly relied on claimant's SSA earnings records to calculate his coal mine employment. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 398 (6th Cir. 2019); *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003).

Based on claimant's SSA records, the administrative law judge permissibly credited claimant with a full quarter of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators for the years from 1965 to 1977. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd*, 915 F.3d at 405-06 (6th Cir. 2019) (administrative law judge may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"). Using this method, the administrative law judge credited claimant with thirty-seven quarters, or 9.25 years of coal

mine employment, from 1965 to 1977.[10] Decision and Order at 5-6. As this finding is supported by substantial evidence, it is affirmed.[11] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Muncy*, 25 BLR at 1-27; Decision and Order at 5-6.

Considering claimant's post-1977 coal mine employment, for the years in which he found claimant worked a full calendar year for the same employer, the administrative law judge divided his earnings for each year by the yearly average wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine*

[10] Employer contends the administrative law judge erroneously credited claimant with four quarters of employment in 1973 "even though the [SSA] earnings records reported earnings in only three quarters" for that year. Employer's Brief at 22. Contrary to employer's argument, claimant's SSA records for 1973 reflect he earned $1,530 in quarter one with Elkhorn & Jellico Coal, $1,887 in quarter two and $2,232 in quarter three with both Elkhorn & Jellico Coal and Pratt Brothers Coal, and $1,478 in quarter four with Pratt Brothers Coal. Director's Exhibit 8.

[11] Rather than applying the *Tackett* method to credit claimant for his coal mine employment based on the number of quarters he worked, employer alleges the administrative law judge should have relied on claimant's pay stubs to calculate the number of days he worked. Employer's Brief at 20-22. Employer, however, does not squarely address the administrative law judge's finding that the pay stubs are not probative on that issue because, while they report the number of hours claimant worked and his total pay, they do not report the number of his working days. Decision and Order at 6.

Further, employer's argument is based on the faulty premise that eight hours of pay can equal at most one day of work. *See* 20 C.F.R. §725.101(a)(32) ("working day" means "*any day or part of a day* for which a miner received pay for work as a miner") (emphasis added). It also does not take into account the Sixth Circuit's holding in *Shepherd* that a miner is entitled to a fraction of a year based on the ratio of the number of days worked to 125. *Shepherd*, 915 F.3d at 401-402. For example, employer asserts the administrative law judge erred in crediting claimant with 0.25 of a year of coal mine employment in the fourth quarter of 1970 because one of his two-week pay stubs reflects only eight hours of pay and his last pay stub that quarter is for the period ending on December 15. Employer's Brief at 21. Employer ignores, however, that the pay stubs together reflect 296 hours of work with Elkhorn & Jellico in October, November, and December. Director's Exhibit 1-265 – 1-267. Even adopting employer's assumption of an eight-hour work day, claimant would have worked 37 days that quarter which, divided by 125 days pursuant to *Shepherd*, equals 0.29 of a year, slightly more than the administrative law judge credited. Nor does employer's argument account for the fact that claimant's SSA records reflect additional income that quarter with Northstar Mining. Director's Exhibit 8.

(BLBA) Procedure Manual.[12] Decision and Order at 5-8. Where claimant's wages exceeded the 125-day average, the administrative law judge credited claimant with a full year of coal mine employment. *Id*. Using this method, he found claimant was "continuously employed" by the same operator in the years 1980-1982 for a total of three years. *Id*. at 7.

For the years in which the beginning and ending dates of claimant's coal mine employment could not be ascertained or his coal mine employment lasted less than a calendar year, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[13] to determine an estimated number of days of coal mine employment. Decision and Order at 5-8. He then divided the number of days by 250 to calculate a fraction of a year.[14] *Id*. Using this method of calculation, the administrative law judge credited claimant with 0.58 of a year in 1978, 0.24 of a year in 1979, 0.12 of a year in 1983, 0.43 of a year in 1984, 0.38 of a year in 1985, 0.25 of a year in 1986, 0.24 of a year in 1987, and 0.14 of a year in 1988. *Id*. at 7-8. For 2002, the administrative law judge noted claimant testified "he worked at Cheyenne Mining 'altogether' for about [six and one-half] months." Decision and Order at 8, *quoting* Director's Exhibit 3 at 73. The administrative law judge found this testimony "referred to both his work at Cheyenne Enterprises and Magic Coal Company" and credibly establishes 0.54 years of coal mine employment in 2002. *Id*. Therefore in total, he found claimant established 5.92 years of coal mine employment from 1978 onwards. *Id.*

Employer does not specifically challenge the administrative law judge's calculation of 5.92 years coal mine employment from 1978 onwards. *See* 20 C.F.R. §802.211; *Cox*,

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[12] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and yearly earnings for those who worked 125 days during a year and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[13] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics.

[14] The administrative law judge explained that he used 250 days as a divisor because, presuming a 50-week work year and a five-day work week, a miner whose earnings equal 250 days of average daily earnings from coal mine employment will usually have worked for a full calendar year. Decision and Order at 5.

791 F.2d at 446; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We agree with claimant, however, that the administrative law judge undercounted his coal mine employment for the years 1978, 1979, and 1983-88. Claimant's Reply at 5-6. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which held in *Shepherd* that a miner need not establish a full calendar year relationship under the regulatory criteria at 20 C.F.R. §725.101(a)(32)(i)-(iii). *Shepherd*, 915 F.3d at 401-402. Rather, to be credited with a full year of coal mine employment, a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship. *Id*. Thus, if the miner had greater than 125 working days during a calendar year, he is entitled to credit for a full year of coal mine employment; if he had less than 125 working days, he is entitled to a fraction of the year "based on the ratio of the actual number of days worked to 125." *Id.* at 402.

Had the administrative law judge applied the correct divisor of 125 days for these specific years, instead of the 250-day divisor he used, claimant would have established an additional 2.22 years of coal mine employment.[15] Because the administrative law judge found claimant established at least fifteen years of coal mine employment, his underestimation of claimant's coal mine employment for the years 1978, 1979, and 1983-88 is harmless.[16] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established at least fifteen years of coal mine employment. Further, because it is unchallenged on appeal, we affirm his finding that all that

[15]The administrative law judge credited claimant with 2.38 years of coal mine employment for these specific years. Decision and Order at 7-8. Had he used 125 as a divisor, the record would have established 4.6 years (145 days in 1978/125 = 1 year; 60 days in 1979/125 = 0.48 of a year; 30 days in 1983/125 = 0.24 of a year; 108 days in 1984/125 = 0.86 of a year; 95 days in 1985/125 = 0.76 of a year; 62.5 days in 1986/125 = 0.5 of a year; 60 days in 1987/125 = 0.48 of a year; 35 days in 1988/125 = 0.28 of a year).

[16] Employer argues the administrative law judge "double-counted work that took place in the same month or year or credited a full year or parts of a year even though the claimant had other, non-coal mine employment during the same period of time." Employer's Brief at 22. But employer does not identify any such discrepancies in the record. 20 C.F.R. §802.211; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

employment occurred in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

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.[17] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge considered two new pulmonary function studies conducted on August 18, 2014, and August 27, 2015. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11, 19-20; Director's Exhibits 11, 14. Because both studies produced qualifying values,[18] the administrative law judge found this evidence established total disability. *Id*.

Employer argues the August 18, 2014 study is not valid. Employer's Brief at 23-24. It asserts the administrative law judge erred in crediting the comments of the technician who conducted the study and recorded good effort over Dr. Vuskovich's opinion that the study is invalid. *Id*. Contrary to employer's argument, the administrative law judge did not rely solely on the first-hand observations of the technician who conducted this study. *Id*. Rather, he found Dr. Vuskovich "did not sufficiently explain what led him to conclude [claimant's] effort was insufficient" when invalidating the study. Decision and Order at 20.

[17] The administrative law judge found claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 19-20.

[18] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

The party who challenges the probative value of an objective study must demonstrate how the study is unreliable. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-57 (1987). Employer raises no specific challenge to the administrative law judge's discrediting of Dr. Vuskovich's opinion. *See Cox*, 791 F.2d at 446; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; *Sarf*, 10 BLR at 1-120-21. Thus we affirm his finding this study supports total disability. Decision and Order at 20. Moreover, the August 27, 2015 study is also qualifying and thus supports claimant's burden of establishing total disability. Director's Exhibit 14. Further, as discussed below, the administrative law judge found all the physicians who rendered medical opinions diagnosed total disability. Decision and Order at 20-21. Employer fails to explain how the alleged "error to which [it] points" with respect to the August 18, 2014 study "could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Thus we affirm the administrative law judge's finding the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 19-20.

The administrative law judge next weighed the medical opinions of Drs. Alam and Fino that claimant is totally disabled.[19] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 20-21; Director's Exhibits 11, 14, 16. Contrary to employer's argument, he permissibly found Dr. Alam's opinion well-reasoned and documented because it is based on "[c]laimant's qualifying [pulmonary function testing], specifically his qualifying FEV1 [value], and his qualifying [blood gas testing] showing exercise hypoxemia." Decision and Order at 20; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. He also permissibly found Dr. Fino's opinion well-reasoned and documented because the doctor cited "[c]laimant's qualifying [pulmonary function testing] and FEV1" and "noted that [c]laimant would still be disabled due to his FEV1 even if the average loss due to coal mine dust were added to it." Decision and Order at 21; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Because there is no evidence undermining the qualifying pulmonary function tests and medical opinions diagnosing total disability, we further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability.[20]

[19] The administrative law judge noted Dr. Vuskovich opined if claimant did not have "a 100 [pack-year] smoking history, he would have had the capacity to return to coal mine work." Decision and Order at 20-21; Employer's Exhibit 1. The administrative law judge found this opinion supportive of a finding of total disability, but concluded it is not well-reasoned or documented. *Id*.

[20] Although employer argues the administrative law judge failed to weigh all relevant evidence together on the issue of total disability, it identifies no contrary evidence. 20 C.F.R. §718.204(b)(2); Employer's Brief at 23. Non-qualifying blood gas studies do

20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 21. We also affirm his determinations that claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither legal nor clinical pneumoconiosis,[21] or "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 administrative law judge found employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

Employer does not challenge the administrative law judge's finding the x-ray evidence inconclusive and thus insufficient to rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 23-24. This finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

The administrative law judge also weighed the medical opinions of Drs. Fino and Vuskovich.[22] Decision and Order at 24-25. Dr. Fino conceded an August 27, 2015 x-ray he conducted was positive for irregular-shaped opacities in the lower lung zones, but opined claimant does not have pneumoconiosis because an October 13, 2005 x-ray was negative for the disease. Director's Exhibit 14 at 9-10. He opined claimant would not develop pneumoconiosis seventeen years after leaving coal mine employment absent additional coal mine dust exposure. *Id.* Contrary to employer's argument, the administrative law judge permissibly found his reasoning inconsistent with the regulations,

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not call into question valid and qualifying pulmonary function studies because they measure different types of impairment. *See Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1040-41 (6th Cir. 1993).

[21] "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). "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).

[22] Dr. Alam diagnosed clinical and legal pneumoconiosis. Director's Exhibit 11, 14. Thus his opinion does not aid employer on rebuttal.

which recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Min. Co., Inc. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491 (6th Cir. 2003); Decision and Order at 24. Dr. Fino also opined claimant does not have pneumoconiosis because irregular shaped opacities are caused by cigarette smoking. Director's Exhibit 14 at 9-10. The administrative law judge found Dr. Fino did not explain why irregular shaped opacities could not also be due to pneumoconiosis. Decision and Order at 25. As employer does not specifically challenge this credibility finding, it is affirmed. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711.

The administrative law judge discredited Dr. Vuskovich's opinion that claimant does not have clinical pneumoconiosis because he relied on Dr. Seaman's negative reading of an April 12, 2016 x-ray. Decision and Order at 25. The administrative law judge found Dr. Vuskovich "failed to address" Dr. Crum's positive reading of the same x-ray. *Id*. As employer does not challenge this credibility finding, it is affirmed. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711. Thus we affirm the administrative law judge's finding employer failed to rebut the presumed existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25.

Legal Pneumoconiosis

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 Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). The Sixth Circuit holds this standard requires employer to "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Dr. Fino opined claimant has an obstructive respiratory disease caused by cigarette-smoking related emphysema and unrelated to coal mine dust exposure. Director's Exhibit 14 at 10-17. He excluded legal pneumoconiosis based on studies indicating 90% of miners with approximately 35 years of coal mine dust exposure only experience an average loss of lung function of FEV1 of 2-3 cc per year. *Id*. For miners such as claimant with sixteen years of coal mine dust exposure, he stated this would total an average of 48 cc in lost lung function as measured by the FEV1 value on pulmonary function testing. *Id*. He explained this loss of lung function is not clinically significant and would not reflect an impairment

of lung function. *Id*. Although three to four percent of miners with sixteen years of coal mine dust exposure experience above average loss of lung function, Dr. Fino opined claimant's obstructive respiratory impairment is unrelated to dust exposure based on the length of his coal mine employment and his chest x-ray findings. *Id*. The administrative law judge permissibly found this reasoning in conflict with the preamble to the 2001 revised regulations that indicates coal mine dust exposure can cause clinically significant obstruction with associated decrements in certain measures of lung function, "especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 25-26, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

Dr. Fino also opined that coal mine dust exposure can cause obstructive lung disease, even with a negative x-ray. Director's Exhibit 14 at 10-17. But he opined that claimant's obstructive impairment is associated with emphysema; when coal mine dust exposure causes pulmonary emphysema, there should be evidence of significant coal mine dust deposition in the lungs, i.e., pathology evidence or x-ray readings greater than 1/0. *Id*. The administrative law judge permissibly found Dr. Fino's reasoning inconsistent with the DOL's recognition that legal pneumoconiosis, in the form of a clinically significant obstructive impairment, can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,940-43; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012) (opinion that emphysema could not have been caused by coal mine dust exposure because insufficient dust retention was shown on the miner's x-rays permissibly discounted as counter to the studies underlying the preamble to the revised regulations); Decision and Order 25-26.

In addition, Dr. Fino excluded legal pneumoconiosis because "obstruction due to coal mine dust occurs early on in the miner's career. Younger miners [tend] to have the greater reductions in FEVl." Director's Exhibit 14 at 10. The administrative law judge permissibly found this reasoning inconsistent with the principle that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Keathley*, 773 F.3d at 738; *Odom*, 342 F.3d at 491. Moreover, the administrative law judge permissibly found Dr. Fino did not adequately explain why coal mine dust exposure could not have "contributed to or substantially aggravated his emphysema." Decision and Order at 25-26; *see Young*, 947 F.3d at 403-07; 20 C.F.R. §718.201(b).

Dr. Vuskovich diagnosed an obstructive respiratory impairment due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 1. The administrative law judge noted the doctor excluded legal pneumoconiosis because claimant's arterial blood gas testing improved from 2014 to 2015. Decision and Order at 26; Employer's Exhibit 4 at 3-4. The administrative law judge permissibly found this

reasoning unpersuasive because the doctor "failed to address the fact that [c]laimant's [pulmonary function studies] remained qualifying" during the same time. Decision and Order at 26; *see Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. The administrative law judge also noted Dr. Vuskovich based his "conclusion on a finding that smokers lose an average additional 9 ml of FEV1 per [pack-year] solely due to smoking" and thus if claimant "had not smoked, he would have a normal ventilatory capacity." Decision and Order at 26; *citing* Employer's Exhibit 1. He permissibly found this explanation "fails to adequately explain why [c]laimant's coal mine dust exposure could not have also contributed to or aggravated his condition." Decision and Order at 26; *see Young*, 947 F.3d at 403-07; 20 C.F.R. §718.201(b). Thus we affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 26-27.

Disability Causation

The administrative law judge next considered whether employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the disability causation opinions of Drs. Fino and Vuskovich because neither diagnosed pneumoconiosis, contrary to his finding that employer failed to disprove claimant has the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 27-28. We therefore affirm the administrative law judge's finding employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge