U.S. Department of Labor

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

BRB Nos. 19-0331 BLA
and 19-0332 BLA

SHIRLEY L. MOORE (o/b/o and Widow of VERNOY W. MOORE) Claimant-Respondent v. BULLION HOLLOW ENTERPRISES, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/31/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Dana Rosen, 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/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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier, Old Republic Insurance Company (Old Republic) appeal Administrative Law Judge Dana Rosen's Decision and Order Awarding Benefits (2013-BLA-06042, 2015-BLA-05121) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a miner's subsequent claim filed on November 30, 2012[1] and a survivor's claim filed on January 12, 2016.[2]

After crediting the Miner with at least forty-four years of qualifying coal mine employment,[3] the administrative law judge found the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant[4] invoked the Section 411(c)(4) presumption the Miner was totally disabled due

[1] The Miner filed three prior claims in 1979, 1995 and 2010. Director's Exhibits 1-2. The district director denied the Miner's most recent 2010 claim on June 8, 2011 because the evidence did not establish pneumoconiosis. Director's Exhibit 2.

[2] The appeal in the Miner's claim was assigned BRB No. 19-0331 BLA and the appeal in the survivor's claim was assigned BRB No. 19-0332 BLA. The Benefits Review Board consolidated these appeals for purposes of decision only. *Moore v. Bullion Hollow Enterprises, Inc.*, BRB Nos. 19-0331 BLA, 19-0332 BLA (Apr. 26, 2019) (Order) (unpub.).

[3] The Board will apply the law of the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 30; Director's Exhibits 7, 9.

[4] Claimant is the widow of the Miner who died on July 18, 2014. Director's Exhibit 4 (Survivor's Claim).

to pneumoconiosis and established a change in an applicable condition of entitlement.[5] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits. Based on the award in the Miner's claim, she found Claimant entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[6] 30 U.S.C. §932(*l*) (2012).

On appeal, Employer argues the administrative law judge lacked authority to decide the case because she had not been appointed consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2. Employer also challenges the validity of the administrative law judge's appointment in light of the removal provisions governing administrative law judges. On the merits, Employer argues the administrative law judge erred in finding the evidence established the Miner was totally disabled and therefore erred in finding Claimant invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption. Although Employer does not challenge its designation as the responsible operator, Old Republic challenges its designation as the responsible carrier.

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 authority to decide the case, but requesting the Benefits Review Board vacate the administrative law judge's responsible carrier finding and remand the case for reconsideration of that issue. In a reply brief, Employer reiterates its previous contentions.[7]

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

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

[6] Section 422(*l*) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the Miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding of Miner's at least forty-four years qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

evidence and in accordance with applicable law. 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

Employer urges the Board to vacate the Decision and Order 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).[8] Employer's Brief at 15-17. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[9] Employer maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[10] *Id*. at 16. We reject Employer's argument, as the Secretary's

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

[9] 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 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 Rosen.

[10] On July 20, 2018, the Department of Labor (DOL) expressly conceded that 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.

ratification was a valid exercise of his authority, bringing the administrative law judge's appointment into compliance with the Appointments Clause.[11]

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint 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 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 Rosen and indicated he gave "due consideration" to her appointment, acting in his "capacity as head of the Department of Labor." Secretary's December 21, 2017 Letter to Administrative Law Judge Rosen.

Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgment" when he ratified Judge Rosen'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 properly ratified the administrative law judge's appointment.[12] *See*

[11] Employer does not set forth any argument alleging case-related pre-ratification activities that could have colored the administrative law judge's subsequent post-ratification consideration of the case.

[12] While Employer notes correctly that the Secretary's ratification letter was signed "by a robo-pen," Employer's Reply Brief at 3, this fact does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375

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" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (NLRB's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different administrative law judge.[13]

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting that they "violate [the] separation of powers doctrine." Employer's Reply Brief at 2. We decline to address this issue, as it is inadequately briefed. *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, its 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

---

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").

[13] 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 16 n.3. 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). Employer points to the fact that the Executive Order "notes that *Lucia* may raise questions about the method of appointing . . . [administrative law judges] using the competitive selection process." Employer's Reply Brief at 5. Employer, however, has not explained how the Executive Order undermines the Secretary's ratification of Judge Rosen, which we have held constituted a valid exercise of his authority bringing the administrative law judge's appointment into compliance with the Appointments Clause.

. . . [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 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. 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 argument the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Employer refers to the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, and cites the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer's Reply Brief at 3-5. But Employer has not explained how it undermines the administrative law judge's authority to hear and decide this case.[14] Employer's argument amounts to an "unarticulated and unsupported assertion regarding removal protections[,]" Director's Brief at 5 n.2, and we decline to address this issue. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[14] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Reply Brief at 3-5. In *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court expressly stated that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 5 n.2. Further, 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 *Free Enterprise Fund* interpreted the Constitution to forbid in the case of Board members." *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 Court in *Lucia*.

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 Board should hold this appeal in abeyance because 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 18; Employer's Reply Brief at 6. 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*.

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 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 pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010).[15] We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and deny its request to hold this case in abeyance.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of 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).

[15] Further, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012).

The administrative law judge found the arterial blood gas studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 34-35. She also found Claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(iii) because there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 35. But she found the pulmonary function studies and medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(i), (iv). Decision and Order at 33-39. Weighing all the evidence together, she found the evidence established a totally disabling respiratory impairment. *Id.* at 39.

Employer initially argues the administrative law judge erred in finding the pulmonary function studies established total disability. The administrative law judge considered the results of two new pulmonary function studies conducted on January 27, 2013 and May 23, 2013.[16] Decision and Order at 33-34; Director's Exhibits 13, 14.

The administrative law judge found the Miner was eighty-five years old at the time of the January 27, 2013 and May 23, 2013 pulmonary function studies. Decision and Order at 11. Citing *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), she noted studies performed on a miner over the age of seventy-one must be treated as qualifying if they qualify for a seventy-one year old, but the party opposing entitlement may offer evidence the studies do not indicate disability for a miner over seventy-one. *Meade*, 24 BLR at 1-47. The administrative law judge therefore considered Dr. Rosenberg's assertion the "Knudson predictive equation" establishes the January 27, 2013 and May 23, 2013 pulmonary function studies are non-qualifying. Employer's Exhibit 4 at 4.

The administrative law judge was not persuaded by Dr. Rosenberg's opinion, noting the doctor did not use the Miner's correct height.[17] Decision and Order at 34. The

[16] The administrative law judge credited Dr. Rosenberg's invalidation of a January 23, 2014 study, noting the doctor attributed the low results to the Miner's generalized weakness caused by his overall poor health. Decision and Order at 34; Employer's Exhibit at 4. She therefore accorded less weight to it. *Id.*

[17] The administrative law judge noted a discrepancy in the measurements of the Miner's height. Decision and Order at 11. The administrative law judge resolved the evidentiary conflict by averaging the recorded heights on pulmonary function studies conducted from 1980 to 2014, finding that the Miner's correct height was at least 68.5 inches. *Id*. Because no party challenges this determination, it is affirmed. *See Skrack*, 6 BLR at 1-711.

administrative law judge further noted he did not address Dr. Perper's conclusion that decreases in pulmonary capacity are not as rapid after the age of seventy and the 2013 pulmonary function studies reflected values significantly lower than those expected by aging alone. *Id.* The administrative law judge therefore used the values for a seventy-one year old man set forth in the tables at Appendix B, which are qualifying for a seventy one year old man 68.5 inches tall. *Id.*

Employer argues the administrative law judge erred in discounting Dr. Rosenberg's opinion. Employer's Brief at 22-23. We disagree. The administrative law judge acted within her discretion in discounting his conclusions, finding the doctor's opinion unpersuasive as based upon inaccurate information: the use of an inaccurate height in applying his formula. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 34. We therefore affirm the administrative law judge's discrediting of Dr. Rosenberg's assessment of the Miner's 2013 pulmonary function studies, and affirm her finding that the new pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i).

Employer next contends the administrative law judge erred in finding Drs. Gallai's and Habre's medical opinions that the Miner was totally disabled from a pulmonary standpoint better-reasoned than Drs. Rosenberg's and Dahhan's contrary opinions. Decision and Order at 35-39; Director's Exhibits 13, 14; Claimant's Exhibit 2; Employer's Exhibits 4-5, 8-11. We disagree.

The administrative law judge permissibly accorded less weight to Dr. Rosenberg's opinion as based in part on his discredited view that the 2013 pulmonary function studies produced non-qualifying values. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 36. This finding is therefore affirmed. The administrative law judge likewise discredited Dr. Dahhan's opinion as based on an inaccurate assessment of the May 23, 2013 pulmonary function study, with Dr. Dahhan relying on the predicted values rather than the Miner's lower actual values. Decision and Order at 37-38. Because Employer does not challenge this basis for discrediting Dr. Dahhan's opinion, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We also reject Employer's contention the administrative law judge erred in her consideration of Dr. Gallai's opinion. Employer's Brief at 22. The administrative law judge found his opinion[18] supported by his physical examination as well as the qualifying

[18] The administrative law judge found "the Miner's statements to [his] physicians that he operated all equipment, performed dead work moving the belt platforms, as well as walked and crawled in coal 30 inches to 12 feet in height, established that his coal mine

results from the Miner's January 23, 2013 pulmonary function study. Decision and Order at 35; Director's Exhibit 13. The administrative law judge therefore found Dr. Gallai's opinion well-reasoned and entitled to significant weight.

Employer does not contend the administrative law judge erred in finding Dr. Gallai's opinion well-reasoned, only that she erred in according it additional weight based on his role as the DOL-sponsored physician. Employer's Brief at 22. Unless the opinions of the physicians retained by the parties are properly held to be biased, and a foundation exists for finding the DOL expert independent, the opinions of DOL physicians should not be accorded greater weight due to their impartiality. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991) (en banc). But having discredited the opinions of Drs. Rosenberg and Dahhan, the administrative law judge permissibly relied upon Dr. Gallai's well-reasoned opinion to support a finding of total disability, independent of his role as the DOL-sponsored physician. Under the facts of this case, the administrative law judge's error in according any extra deference to Dr. Gallai's opinion based upon his presumed impartiality therefore was harmless.[19] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

Finally, contrary to Employer's contention, the administrative law judge properly weighed the blood gas studies, finding the non-qualifying blood gas studies did not call into question the 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); Decision and Order at 39. We therefore affirm the administrative law judge's finding that the medical evidence established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). We also affirm her determinations that Claimant established a change in the applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b), 725.309.

---

employment required heavy labor." Decision and Order at 31-32. Because the administrative law judge's finding that the Miner's coal mine work involved heavy labor is not challenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[19] We need not address Employer's errors regarding Dr. Habre's opinion. Because he opined the Miner was totally disabled, the administrative law judge's errors in crediting his opinion, if any, would not undermine her reliance upon Dr. Gallai's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal[20] nor clinical pneumoconiosis,[21] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis, Employer must establish the Miner did 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). On this issue, the administrative law judge considered the opinions of Drs. Rosenberg and Dahhan.[22] Dr. Rosenberg opined that the Miner did not have legal pneumoconiosis because the post-bronchodilator FEV1 value from the May 23, 2013 pulmonary function study was normal. Director's Exhibit 14 at 16. He also noted that the decrease in the Miner's lung function over a short period of time was not representative of a coal mine dust-related disorder. Employer's Exhibit 11 at 4. Dr. Dahhan opined that the Miner had a variable obstructive ventilatory impairment due to cigarette smoking. Employer's Exhibit 10 at 3-4. He opined that the Miner's obstructive impairment was not caused by coal mine dust exposure. *Id.*

Employer argues the administrative law judge erred in her consideration of the opinions of Drs. Rosenberg and Dahhan. Employer's Brief at 24-27. We disagree. The administrative law judge permissibly questioned Dr. Rosenberg's assertion the Miner did

[20] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[21] "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] The administrative law judge also considered Drs. Gallai's, Habre's and Perper's opinions that the Miner suffered from legal pneumoconiosis. Decision and Order at 33; Director's Exhibits 14, 20; Claimant's Exhibits 1, 2.

not have legal pneumoconiosis because his post-bronchodilator FEV1 value on the May 23, 2013 pulmonary function test was normal, noting it was based on the doctor's discredited analysis of the pulmonary function study evidence. *Id.* In light of our affirmance of the administrative law judge's treatment of those studies, we also affirm her finding Dr. Rosenberg's basis for excluding a diagnosis of legal pneumoconiosis was not well-reasoned.[23] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

The administrative law judge also permissibly rejected Dr. Dahhan's opinion because he did not adequately explain why the Miner's forty-four years of coal mine dust exposure was not an additive factor, along with smoking, in causing his respiratory impairment.[24] *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000)[25]; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 45. We affirm the administrative law judge's determination that Employer did not disprove legal pneumoconiosis and therefore did not rebut the presumption by establishing the Miner did not have pneumoconiosis.[26] 20 C.F.R. §718.305(d)(1)(i).

---

[23] Moreover, Employer does not specifically challenge this basis for discrediting Dr. Rosenberg's opinion. *See Skrack*, 6 BLR at 1-711.

[24] Although the administrative law judge noted that Dr. Dahhan attributed the Miner's respiratory impairment to smoking, she found that he did not provide any rationale for why coal dust exposure could not also be a substantially contributing factor. Decision and Order at 45.

[25] We reject Employer's assertion that the administrative law judge erred in referring to the preamble to the revised regulations when weighing the medical opinions relevant to rebuttal of the Section 411(c)(4) presumption. Contrary to Employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by the DOL, and to consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

[26] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address Employer's contentions of error regarding the administrative law judge's finding that it did not disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278 (1984); Employer's Brief at 24.

The administrative law judge next considered whether Employer established that "no part of [Claimant'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). She rationally discounted Drs. Rosenberg's and Dahhan's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 46-47. Therefore, we affirm the administrative law judge's determination that Employer failed to rebut legal pneumoconiosis as a cause of the Miner's disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis, and Employer did not rebut it, we affirm the award of benefits in the Miner's claim.

The Survivor's Claim

The administrative law judge found Claimant satisfied her burden to establish each element necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 48. Because we have affirmed the administrative law judge's award of benefits in the Miner's claim, we affirm her determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Responsible Carrier

Old Republic contends the administrative law judge erred in designating it the responsible carrier, asserting the Miner's last coal mine employment took place after its liability coverage for Employer had terminated and another carrier was responsible for Employer's black lung liability. Employer's Brief at 21-22; *see* 20 C.F.R. §726.203(a). It also contends a stipulation made by another carrier during the adjudication of the Miner's prior 1995 claim precludes its current designation as the responsible carrier. *Id*. at 18-21.

Based on the Miner's Social Security Administration earnings record and statements, the administrative law judge found that the Miner worked for Employer from 1983 through 1992. Decision and Order at 31. The administrative law judge rejected Old Republic's allegation that the Miner continued to work as a miner until 1995, a period of time during which Travelers Insurance Company (Travelers) provided Employer's liability

coverage.[27] The administrative law judge noted that Administrative Law Judge Alice M. Craft, in denying the Miner's request for modification of his 1995 claim, found that the Miner's coal mine employment ended in 1992. *See Moore v. Bullion Hollow Enter., Inc.*, 2002-BLA-00199, slip op. at 9-11 (Aug. 31, 2004) (unpub). The administrative law judge took "judicial notice" of this determination and designated Old Republic the responsible carrier.

We find merit in the arguments of Old Republic and the Director; the administrative law judge erred by relying on Judge Craft's determination the Miner's coal mine employment ended in 1992. The administrative law judge effectively applied a form of collateral estoppel, finding herself bound by Judge Craft's determination. But for collateral estoppel to apply: (1) the issue sought to be precluded must be identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) the issue must have been a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment must have been final and valid; and (5) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999) (en banc).

As the Director accurately observes, at least two of the necessary elements for applying collateral estoppel are not satisfied in this case. Director's Brief at 8-9. First, the issue of carrier liability was not a critical and necessary part of the judgment in the prior proceeding because Judge Craft denied benefits. Second, as the prevailing party, Old Republic did not have the opportunity to contest Judge Craft's determination. Consequently, the administrative law judge erred by not addressing the relevant evidence and making her own determination as to when the Miner's coal mine employment ended. We therefore vacate the administrative law judge's designation of Old Republic as the responsible carrier.

[27] Old Republic provided Employer's black lung liability coverage until October 1, 1992, with Travelers providing that coverage from January 5, 1993 until sometime in 1995. Director's Exhibits 1, 2.

Employer further alleges that Travelers' stipulation during the adjudication of the Miner's 1995 claim relieves it from being designated as the responsible carrier. The administrative law judge, however, has not addressed the relevant facts underlying Traveler's prior stipulation to liability. Because the administrative law judge has not addressed Travelers' previous stipulation, we decline to address its impact on Old Republic's liability for the payment of benefits. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion). On remand, the administrative law judge is instructed to address this issue when reconsidering the identification of the responsible carrier.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge