U.S. Department of Labor

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

BRB No. 20-0280 BLA

ALMA WATTS (Widow of VENNIS WATTS) Claimant-Respondent v. B & B COAL SALES, INCORPORATED and BITCO GENERAL INSURANCE CORPORATION c/o OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Christopher Larsen, 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.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Christopher Larsen's Decision and Order Awarding Benefits (2018-BLA-05674) rendered on a survivor's claim filed on July 28, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Employer is the responsible operator. He also found Claimant[1] established the Miner had at least thirty-two years of coal mine employment, including at least twenty-five years in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[3] It further asserts the removal provisions

[1] Claimant is the widow of the Miner, who died on October 28, 2015. Director's Exhibit 16.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's death is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018), 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

applicable to the administrative law judge rendered his appointment unconstitutional. Employer also challenges the constitutionality of the Section 411(c)(4) presumption. In addition, it contends the administrative law judge erred in finding it is the responsible operator. Alternatively, it contends he erred in finding the Miner was totally disabled and invoked the Section 411(c)(4) presumption. Finally, it argues the administrative law judge erred in finding it did not rebut the presumption.[4]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges to the administrative law judge's appointment and its assertion that it is not the responsible operator. Employer filed a combined reply brief to Claimant's and the Director's response briefs, reiterating its contentions.

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.[5] 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 constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 13-17. It acknowledges the

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> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established at least thirty-two years of coal mine employment, including at least twenty-five years in an underground mine. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[5] Because the Miner performed his last coal mine employment in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4-8, 10-13.

[6] *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

Secretary of Labor (Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id.* at 14-16; Employer's Reply Brief at 2-4.

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 Response Brief at 6-7. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* at 7-8. We agree with the Director's positions.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016);

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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)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] The Secretary of Labor (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 Larsen.

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 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. Thus, at the time he ratified the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, 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 Larsen and gave "due consideration" to his appointment.[8] Secretary's December 21, 2017 Letter to Administrative Law Judge Larsen. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Larsen "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 Larsen'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 valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, supports its Appointments

[8] While Employer notes that the Secretary's ratification letter was signed with an autopen, 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"); Employer Brief at 16.

Clause argument because incumbent administrative law judges remain in the competitive civil service. Employer's Reply Brief at 9-10. 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). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Larsen's appointment, which we have held constituted a valid exercise of his authority, bringing the appointment into compliance with the Appointments Clause.

Thus we reject Employer's argument that this case should be 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. Employer's Brief at 13-14, 17-21; Employer's Reply Brief at 4-9. 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*. *Id.* It also relies on the holdings of the United States Supreme Court in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (June 29, 2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 2021 WL 2519433 (U.S. June 21, 2021). Employer's Brief at 13-14, 17-21; Employer's Reply Brief at 4-9.

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). The Supreme Court's decision in *Lucia*, declining to address "for cause" removal protections for administrative law judges at the Securities and Exchange Commission, was decided over four months before the hearing and one year and ten months prior to the administrative law judge's Decision and Order. Further, the propriety of "for cause" removal protections was the subject of judicial decisions issued long before the decision in this claim, including one of the cases on which Employer now relies. *See Free Enter. Fund*, 561 U.S. at 495-498 (addressing the

constitutionality of "for cause" removal protections for inferior officers at the Public Company Accounting Oversight Board).

Employer raises its challenge to the removal provisions for the first time on appeal to this Board.[9] *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Based on these facts, Employer forfeited its right to challenge the removal provisions for administrative law judges. *See Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion, and because petitioners "did not raise the dual for-cause removal provision before the agency," court was "powerless to excuse the forfeiture"); *Joseph Forrester Trucking v. Director, OWCP [Mabe]*, 987 F.3d 581, 588 (6th Cir. 2021) ("[T]he Benefits Review Board's governing regulations require that legal questions be raised before the ALJ to be reviewable by the Board."). Moreover, because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to entertain its arguments. *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).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 12-14. 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's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, U.S. , No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021).

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

[9] Employer's September 17, 2018 Motion for Remand solely discussed the administrative law judge's appointment, and did not mention the removal protections afforded to administrative law judges. Employer was clearly aware of the substantive law it now cites to challenge for the first time the constitutionality of the removal provisions contained in the Administrative Procedure Act for administrative law judges.

criteria set forth at 20 C.F.R. §725.494(a)-(e).[10] Once the Director identifies a responsible 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 is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The record reflects the Miner worked for Employer from 1974 to 1976, Lake Coal from 1978 to 1989, Flaget Fuels from 1989 to 1996, BBQ Resources from 1997 to 1999, and Global Coal and Carbon in 1999. Director's Exhibits 12, 13.

The district director issued a Notice of Claim to Employer identifying it as a potentially liable operator. Director's Exhibit 37. In response, Employer controverted its liability and stated it is "not the most recent company to employ this man. Please place Lake Coal on notice." Director's Exhibit 39. The district director submitted a statement in accordance with 20 C.F.R. §725.495(d)[11] that Flaget Fuels and Lake Coal are unable to assume liability for this claim because they are uninsured and not authorized to self-insure.[12] Director's Exhibits 28-31. In a June 7, 2017 Schedule for the Submission of

[10] 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 or its successor 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, at least one working day of 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. Thus we affirm the determination that it is a potentially liable operator. *Skrack*, 6 BLR at 1-711.

[11] If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

[12] In the 20 C.F.R. §725.495(d) statement, the district director indicated Lake Coal's insurer, Kentucky Coal Producers Fund, was insolvent as of January 14, 2013. Director's

Additional Evidence (SSAE), the district director named Employer the responsible operator, explaining that Global Coal & Carbon did not employ the Miner for at least one year, BBQ Resources was not a coal mine operator, and Flaget Fuels and Lake Coal were uninsured. Director's Exhibit 47 at 9. Employer did not submit any evidence relevant to the responsible operator issue in response to the SSAE.

Before the administrative law judge, Employer argued only that BBQ Resources should have been named the responsible operator because it employed the Miner for at least one year in coal mine employment. Employer's Post-Hearing Brief at 34. The administrative law judge rejected Employer's argument, concluding Employer failed to establish BBQ Resources employed the Miner for at least one year and is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c); Decision and Order at 25-28.

Employer argues for the first time on appeal that the district director should have named Global Coal and Carbon as the responsible operator because it is a successor operator[13] to BBQ Resources and Flaget Fuels.[14] Employer's Brief at 22-24; Employer's Reply Brief at 10-12. Alternatively, Employer argues for the first time on appeal that Lake Coal is the properly designated responsible operator because it was insured through the Kentucky Insurance Guaranty Association (KIGA) as the guarantor of Lake Coal's underlying insurance policy. Employer's Brief at 24-25; Employer Reply Brief at 12. The Director argues Employer has forfeited these arguments because they were not raised before the district director or the administrative law judge. Director's Response Brief at 14, 17.

We agree that Employer forfeited its arguments. In its closing brief to the administrative law judge, Employer argued that the district director erred in finding the

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Exhibit 31. Thus the district director did not consider it as a potentially liable operator. 20 C.F.R. §725.494(e)(1). Employer did not submit any evidence contradicting this finding.

[13] 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).

[14] We affirm, as unchallenged on appeal, the administrative law judge's finding that BBQ Resources is not the responsible operator. *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

Miner's employment with BBQ Resources was not coal mining related and BBQ Resources should have been named the responsible operator. Employer's Post-Hearing Brief at 34-35. Employer raised no other arguments before the administrative law judge regarding its liability or other potentially liable operators. Accordingly, Employer forfeited its arguments that Global Coal and Carbon or Lake Coal, insured through KIGA, are the properly designated responsible operators, and we decline to address them for the first time on appeal. *See Mabe*, 987 F.3d at 591; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). We therefore affirm the administrative law judge's finding that Employer is the responsible operator.

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis, Claimant must establish the Miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). 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 found Claimant established total disability based on the pulmonary function testing, arterial blood gas testing,[15] and medical opinions.[16]

[15] The administrative law judge found Claimant failed to establish the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 12.

[16] The administrative law judge credited the Miner's son's testimony that the Miner's job as a site foreman required him to periodically enter the underground coal mine, and concluded that requirement was "clearly beyond the physical capacity of a person who required full-time oxygen supplementation and who suffered frequent [chronic obstructive

20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 10-20. Employer argues the administrative law judge erred in finding the Miner totally disabled without first making a finding on the "functional demands of [his] usual coal mine employment." Employer's Brief at 26.

As an initial matter, we affirm the administrative law judge's determination that the pulmonary function study and arterial blood gas study evidence is qualifying and establishes total disability, as Employer has not challenged these findings on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 11. Moreover, requiring the administrative law judge to assess whether objective medical test results support a finding of total disability based on the Miner's job requirements, irrespective of whether those results are qualifying under the regulations, would improperly require him to act as a medical expert. *See* 20 C.F.R. §718.204(b)(2)(i), (ii) (objective test results qualify as totally disabling if they meet the numerical values set forth in the regulations); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986).

The administrative law judge also considered the medical opinions of Drs. Alam, Broudy, Sood, and Jarboe, and correctly found all the doctors concluded the Miner was totally disabled due to a pulmonary or respiratory impairment. Decision and Order at 12-19; 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibits 17, 19-21, 23; Claimant's Exhibit 1; Employer's Exhibit 1. Thus none of the medical opinions are contrary to the qualifying pulmonary function study and arterial blood gas study evidence and, therefore, do not support a finding that the Miner was *not* totally disabled, even if the administrative law judge were to weigh their opinions in light of the Miner's exertional requirements. At most, the administrative law judge could discredit their opinions and assign them no weight. In that case, the medical opinion evidence would not support a finding of total disability, but neither would it weigh against such a finding. *See Rafferty*, 9 BLR at 1-232. Thus Employer has not explained how the "error to which [it] points could have made any difference." *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because there is no "contrary probative evidence," the administrative law judge rationally found the qualifying pulmonary function study and arterial blood gas study evidence establishes the Miner was totally disabled. 20 C.F.R. §718.204(b)(2). Therefore, we affirm his finding that Claimant established a totally disabling respiratory or pulmonary

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pulmonary disease (COPD)] exacerbations requiring hospitalization." Decision and Order at 19-20; Hearing Tr. at 8-9.

impairment. Consequently, we also affirm his determination that Claimant invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[17] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.[18]

Legal Pneumoconiosis

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).

The United States Court of Appeals for the Sixth Circuit holds this standard requires Employer to show that a 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). The administrative law judge considered and rejected Dr. Jarboe's opinion that the Miner did not have legal pneumoconiosis.[19] Decision and Order at 23-24; Director's Exhibit 23;

[17] "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).

[18] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 21, 23.

[19] The administrative law judge also considered Dr. Broudy's opinion that the Miner did not have legal pneumoconiosis. Decision and Order at 23; Director's Exhibit 23. Employer generally argues the administrative law judge erred in weighing Dr. Broudy's opinion for the same reasons he erred in weighing Dr. Jarboe's opinion. Employer's Brief at 33. However, the administrative law judge discredited Dr. Broudy's opinion because it

Employer's Exhibit 1. We reject Employer's argument that the administrative law judge erred. Employer's Brief at 27-33.

Dr. Jarboe opined the Miner's chronic obstructive pulmonary disease (COPD) was caused by cigarette smoking because of the disproportionate reduction of his FEV1 compared to his FVC on pulmonary function testing, a type of functional abnormality he said is not caused by coal mine dust inhalation. Employer's Exhibit 1 at 7-8. He further opined the Miner's COPD was caused by smoking because he experienced exacerbations and remissions, and his lung function varied over time, which is not typical of the type of fixed impairment caused by coal mine dust exposure. *Id.* at 8.

The administrative law judge found Dr. Jarboe's opinion based on the Miner's FEV1/FVC ratio on pulmonary function testing is inconsistent with scientific evidence that the DOL has accepted, as stated in the preamble to the 2001 revised regulations, that coal mine dust exposure may cause COPD with a decrease in the FEV1/FVC ratio. Decision and Order at 23. Because Dr. Jarboe did not cite to "any scientific evidence challenging the [DOL]'s regulatory position," the administrative law judge discounted his opinion. *Id.* at 23-24. Thus, contrary to Employer's contentions, the administrative law judge permissibly rejected Dr. Jarboe's opinion. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); *Jericol Mining v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("coal miners have an increased risk of developing [COPD that] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC"); Decision and Order at 23-24.

We also reject Employer's argument that the administrative law judge applied an incorrect legal standard when weighing Dr. Jarboe's opinion on legal pneumoconiosis. Employer's Brief at 27-33. He permissibly found that, although Dr. Jarboe "may be correct that COPD associated with recurrent exacerbations and periods of remission is characteristic of [a] condition caused by cigarette smoke," he did not adequately explain why the Miner's more than twenty-five years of coal mine dust exposure also did not contribute, in part, to his COPD. Decision and Order at 24; *see* 20 C.F.R. §718.201(a)(2), (b); *Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th

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was premised on his erroneous belief that "only restrictive lung impairments qualify as legal pneumoconiosis, which is a much broader concept that specifically includes obstructive impairments such as those found in [COPD]." Decision and Order at 23; 20 C.F.R. §718.201(a)(2); Director's Exhibit 23 at 6. As Employer raises no specific challenge to this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Cir. 2007). 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)(2)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The administrative law judge next addressed whether Employer established that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). He permissibly discredited the opinions of Drs. Broudy and Jarboe because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease.[20] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order 25. We therefore affirm the administrative law judge's findings that Employer did not rebut the Section 411(c)(4) presumption by establishing no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

[20] Neither doctor offered an opinion on death causation that did not depend upon his prior exclusion of legal pneumoconiosis. Director's Exhibit 23; Employer's Exhibit 1. Further, Dr. Jarboe stated the Miner's severe COPD, which Employer failed to disprove was legal pneumoconiosis, "may have contributed to his death," while Dr. Broudy identified the COPD as among the "ample reason[s]" he had "to pass away." Employer's Exhibit 1 at 9; Director's Exhibit 23 at 2.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge