U.S. Department of Labor

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

BRB No. 19-0407 BLA

ORVILLE M. BURNETTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED, Self-insured by SUNCOKE ENERGY, INCORPORATED	)	DATE ISSUED: 06/25/2020
	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Michelle S. Gerdano (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 GRESH, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2016-BLA-05838) of Administrative Law Judge Jason A. Golden rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on December 8, 2014.[1]

The administrative law judge found claimant established approximately thirty-four years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C.

[1] On July 2, 2003, Administrative Law Judge Rudolf L. Jansen denied claimant's initial claim, filed on February 12, 2001, because claimant did not establish pneumoconiosis or total disability. Director's Exhibit 1. The Board and the United States Court of Appeals for the Sixth Circuit affirmed the denial. *Id*. Claimant filed a subsequent claim on June 29, 2006, which Administrative Law Judge Larry S. Merck denied on February 3, 2009, because claimant did not establish a change in an applicable condition of entitlement. *Id*. The Board affirmed Judge Merck's denial of benefits on December 29, 2009. *Id*. Claimant did not take any further action before filing his current claim. Director's Exhibit 3.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption he is totally disabled 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); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claims were denied because he did not establish pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements in order for the administrative law judge to consider the merits of his subsequent claim. *See* 20 C.F.R. §725.309(c).

§921(c)(4); 20 C.F.R. §725.309(c). The administrative law judge further determined 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 consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[4] and it challenges the constitutionality and applicability of the Section 411(c)(4) presumption. On the merits, employer challenges the administrative law judge's finding claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also argues even if properly invoked, the administrative law judge erred in finding the presumption unrebutted.

Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject employer's Appointments Clause challenge and its contention the Section 411(c)(4) presumption is unconstitutional and inapplicable.[5] The Director also noted the administrative law judge's finding concerning the conditions of

[4] 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.

U.S. Const. art. II, § 2, cl. 2.

[5] On February 6, 2020, the Board issued an Order declining employer's request to hold this case in abeyance pursuant to *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting) and rejecting its argument the Section 411(c)(4) presumption is unconstitutional. *Burnette v. Shamrock Coal Co., Inc.*, BRB No. 19-0407 BLA (Feb. 6, 2020) (unpub.).

claimant's coal mine employment is affirmable. Employer filed a reply brief, reiterating its arguments.[6]

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.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 20-21. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges,[9] but maintains

[6] We affirm, as unchallenged, the administrative law judge's finding claimant established a totally disabling respiratory impairment and therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13-21.

[7] 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); Decision and Order at 4; Director's Exhibits 4, 7; Hearing Transcript at 11.

[8] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[9] The Secretary of Labor issued a letter to Judge Golden 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 a District Chief Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over

the ratification was insufficient to cure the constitutional defect because it merely "rubber stamped" his improper appointment. Employer's Brief at 21.

The Director responds the administrative law judge had the authority to adjudicate this case because the Secretary's ratification brought his appointment into constitutional compliance. Director's Brief at 4-5. She also maintains employer failed to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Id.* at 4, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). 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. Thus, 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 Judge Golden and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Golden. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Golden "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 the administrative law judge's appointment. Employer therefore has not overcome the presumption of

---

> 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 Golden.

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's ratification of the administrative law judge's appointment was proper.[10] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 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" earlier invalid actions was proper).

Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). "Conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014). A miner who worked aboveground at an underground mine need not otherwise establish the conditions were substantially similar to those in an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

The administrative law judge indicated he took judicial notice that the mine where claimant worked for employer was an underground mine. Decision and

[10] The case was initially assigned to Administrative Law Judge Alice Craft but she retired before issuing a decision and the case was transferred to Judge Golden who, in light of *Lucia*, asked the parties if a new hearing was desired. June 29, 2019 Order to Show Cause. In his order denying employer's request that the case be reassigned to a new administrative law judge, Judge Golden indicated he would hold a new hearing in order to be fully consistent with the remedy *Lucia* required. August 23, 2019 Order on Employer's Response to Show Cause and Motion to Remand. Judge Golden also specifically vacated Judge Craft's prior orders. *Id*. Employer is not challenging Judge Craft's appointment.

Order at 8. Because all of claimant's work occurred at an underground mine site, the administrative law judge found claimant did not need to establish substantial similarity. *Id*. In addition, relying on claimant's testimony, the administrative law judge alternatively found claimant was regularly exposed to coal dust during his coal mine employment. *Id*. at 7. Thus, he determined claimant's work with employer occurred in conditions substantially similar to that of an underground coal miner. *Id*. Consequently, he found claimant established "about" thirty-four years of qualifying coal mine employment. *Id*. at 8.

Employer does not dispute claimant had thirty-four years of coal mine employment, but challenges the administrative law judge's decision to take judicial notice that claimant's surface work at a preparation plant constituted work at an underground mine because "the fact was clearly in dispute." Employer's Brief at 11. Thus, it maintains the Board must vacate the administrative law judge's qualifying coal mine employment finding and remand the case for additional consideration. It also asserts the administrative law judge erred in not adequately explaining how he determined at least fifteen years of claimant's coal mine employment occurred in conditions "substantially similar" to those in an underground coal mine. *Id*. at 8-9.

The Director states employer waived the judicial notice issue because it did not object at the hearing when the administrative law judge indicated he might take judicial notice of the nature of the mine where claimant worked. Director's Brief at 3 n.4. In the alternative, the Director urges the Board to affirm the administrative law judge's substantially similar finding as supported by substantial evidence. *Id*. We agree with the Director on both points.

At the hearing, the administrative law judge stated: "If I'm unable to ascertain from the exhibits or testimony whether particular mines were underground or surface mines, I may take judicial notice and consider information regarding same on the [Mine Safety Health Administration] MSHA.gov website." Hearing Transcript at 13. Both parties indicated they did not object to him doing so. *Id*. Because he found it unclear from the record whether claimant worked at underground or surface mines with employer, the administrative law judge took "judicial notice that according to MSHA.gov, Shamrock Coal Company Incorporated, mine 1502502 "Shamrock #18 Series," in Leslie County, Kentucky, is classified as an abandoned underground mine."[11] Decision and Order at 8.

[11] Employer notes claimant's testimony and employment history form, CM-911a, where he indicated his employment was at the "surface" and stated he worked at the "washing plants" and the "unit train loadout." Employer's Reply Brief at 9, *citing*

Claimant testified he worked his entire coal mining career for employer at a single site. Claimant's Exhibit 7 at 12.[12] Thus, as all of claimant's coal mine work was at an underground mine site, the administrative law judge determined claimant did not need to establish substantial similarity. Decision and Order at 8.

We reject employer's request for a remand because employer failed to properly preserve its argument by first raising it before the administrative law judge. *See Maples v. Texports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331 (5th Cir. 1991); *Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019) (declining to consider employer's argument where it was not timely raised before the administrative law judge). Instead, employer waited to 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).

Generally, a party may not raise a new issue on appeal. *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). An exception arises where failure to address a pure error of law would result in a miscarriage of justice. *Martinez v. Mathews*, 544 F.2d 1233 (5th Cir. 1976). The classification of the type of mine where claimant worked, however, is a factual determination that an administrative law judge must resolve. Employer had an opportunity to object to the administrative law judge taking judicial notice or to submit evidence that the mine it owned was not an underground mine, but failed to do so.[13] Thus, by failing to address the issue when the administrative law judge raised it at the hearing, employer waived this argument on appeal.[14] *See Chaffin v. Peter Cave Coal Co.*,

---

Director's Exhibit 1 at 155; Director's Exhibits 4, 5. At the 2008 hearing, however, when asked whether his employment was "above ground, underground, or some combination of the two," claimant responded "[w]ell, it was – I didn't work inside the mines. It was outside. It was on the outside of the mines." Director's Exhibit 1 at 147. He also replied "[n]o" when asked if his work was "all surface or a strip job?" *Id*. at 154.

[12] Claimant's Exhibit 7 consists of testimony from the March 21, 2017 hearing before Judge Craft.

[13] Indeed, employer does not now and has never directly maintained the mine at which claimant worked was not an underground mine.

[14] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood*

22 BLR 1-294, 1-298-99 (2003); *Kurcaba*, 9 BLR at 1-75; *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Consequently, we decline to address employer's argument on appeal. Employer therefore has waived the argument.

Moreover, in the alternative, the administrative law judge properly determined claimant's surface work occurred in conditions substantially similar to an underground mine. Decision and Order at 7. At the March 26, 2003 hearing held in conjunction with his initial claim, claimant agreed he was "exposed to coal and rock dust on a constant basis on the job" and testified he operated the end loader with the doors open. Director's Exhibit 1 at 697-98. Similarly, at the April 23, 2008 hearing, he stated he worked with the doors open when operating machines until his final year when "they fixed the air conditioner." *Id*. at 148. He also testified it was "[r]eal, real bad dusty" when operating the equipment and the dust would come into the cab. *Id*. at 148-49. He agreed he was "exposed to coal dust on a regular basis throughout" his coal mine employment. *Id*. at 149. Consistent with his earlier testimony, claimant stated at the March 21, 2017 hearing that when operating the high lift and dozer "it would get really dusty" and the equipment did not have an air conditioner. Claimant's Exhibit 7 at 15, 17. Claimant also testified he would be "real dusty, you know. My face and hands and clothes would be dusty . . . . [t]hey'd be black, coal, black coal dust." *Id*. at 18.

Contrary to employer's contention, the administrative law judge permissibly relied on claimant's credible uncontested testimony detailing his working conditions to find he was regularly exposed to coal mine dust during his thirty-four years of coal mine employment. *See Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular exposure); Decision and Order at 8; Employer's Brief at 15. Employer has not otherwise challenged the administrative law judge's coal mine employment findings. Thus, as it is supported by substantial evidence, we affirm the administrative law judge's finding claimant has about thirty-four years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 6-13.

Hous. Servs. of Chicago, 583 U.S. , 138 S. Ct. 13, 17 n.1 (2017), *quoting United States v. Olano*, 507 U. S. 725, 733 (1993).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[15] or "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer did not rebut the presumption by either method.[16]

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 Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds this standard requires employer to show "coal mine employment did not contribute, in part, to [claimant's] alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

Employer relies on the opinions of Drs. Jarboe and Castle to disprove legal pneumoconiosis. They opined claimant's respiratory impairment was related to cigarette smoking and asthma with no contribution from coal mine dust exposure. *See* Employer's Exhibits 2-7. We reject employer's contentions the administrative law judge erred by applying an incorrect burden of proof when evaluating their opinions and in finding their opinions inadequately reasoned. *See* Employer's Brief at 12-19.

[15] 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). This definition encompasses 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). 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).

[16] The administrative law judge did not specifically find employer rebutted clinical pneumoconiosis but appears to have so concluded based on the x-ray and medical opinion evidence. Decision and Order at 23-30.

Employer initially alleges the administrative law judge applied "an incorrect legal standard" by requiring its physicians to prove claimant's impairment is caused exclusively by cigarette smoking.[17] Employer's Brief at 12-15; Decision and Order at 27-28, 30. In finding Dr. Jarboe did not adequately explain his conclusion claimant's impairment was due "solely to smoking" or how he was able to "rule out" a contribution from coal dust or "preclude some contribution from coal dust," the administrative law judge did not apply an incorrect standard;[18] he evaluated whether Dr. Jarboe offered a reasoned opinion for completely excluding any contribution from the miner's coal mine dust exposure. Decision and Order at 27-28; Employer's Exhibits 2, 5, 7. The same is true of the administrative law judge's determination Dr. Castle did not adequately explain his conclusion coal dust did not contribute to the miner's respiratory impairment; Dr. Castle himself completely excluded any contribution from the miner's coal mine dust exposure, but the administrative law judge did not require him to.[19] Decision and Order at 29; Employer's Exhibits 3, 4, 6. Thus, the administrative law judge did not discredit their opinions for failing to satisfy a particular standard; he found they did not credibly explain how they ruled out any contribution from the miner's coal mine dust exposure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 26-30.

We further reject employer's assertions the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Jarboe and Castle. Employer's Brief at 16-19. The administrative law judge noted Dr. Jarboe relied on medical studies indicating miners have very minor elevations of residual volume on pulmonary function testing to conclude the miner's elevated residual volume is inconsistent with an obstructive

[17] We also reject employer's assertion the administrative law judge applied an incorrect definition of legal pneumoconiosis. Employer's Brief at 14. The administrative law correctly stated legal pneumoconiosis "includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 21, quoting 20 C.F.R. §718.201(b).

[18] The administrative law judge stated: "Rebutting the presumption in the Sixth Circuit requires proof of 'the absence of pneumoconiosis' or 'an affirmative showing . . . that the [Claimant] does not suffer from pneumoconiosis, or that the disease is *not* related to coal mine work." Decision and Order at 25, *citing Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011).

[19] Employer generally states "[a]s he did with Dr. Jarboe's opinion, the judge applied an incorrect legal standard to Dr. Castle's opinion," but does not provide any specific details. Employer's Brief at 15.

impairment caused by coal dust inhalation. Decision and Order at 27; Employer's Exhibit 2. Dr. Castle referenced Dr. Jarboe's report in reaching a similar conclusion that "a marked increase in the residual volume [] is not typically seen in coal mine dust induced lung disease. Employer's Exhibit 3. Thus, contrary to employer's contention, the administrative law judge permissibly found Drs. Jarboe and Castle failed to credibly explain why the entire increase in claimant's residual volume was not due even in part to coal dust exposure.[20] Decision and Order at 27, 29; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Employer's Brief at 17, 19.

The administrative law judge additionally determined Drs. Jarboe and Castle excluded a diagnosis of legal pneumoconiosis based, in part, on claimant's response to bronchodilators on pulmonary function testing. Decision and Order at 27-29; Employer's Exhibits 2, 3. Noting that some reversibility on pulmonary function testing following the administration of bronchodilators does not preclude the presence of pneumoconiosis, and permissibly relying on binding precedent in *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350 (6th Cir. 2007), the administrative law judge found the physicians failed to adequately explain why a response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. Decision and Order at 28-29; *see Barrett*, 478 F.3d at 356. Because the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Castle, we affirm his finding employer did not disprove legal pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

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 rejected Drs. Jarboe's and Castle's causation opinions because neither physician diagnosed legal

[20] The administrative law judge noted Dr. Jarboe specifically cited a study from "Nemery," which dealt with nonsmoking miners, whereas claimant smoked. Decision and Order at 27. Contrary to employer's contention, however, the administrative law judge did not indicate Dr. Jarboe relied solely on this study. *See* Decision and Order at 27; Employer's Brief at 17.

pneumoconiosis,[21] contrary to his finding employer did not disprove the disease. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 30. Employer does not allege any specific error on disability causation other than its same arguments on legal pneumoconiosis, which we have rejected. *See* Employer's Brief at12-19. We therefore affirm the administrative law judge's finding employer failed to rebut the Section 411(c)(4) presumption by establishing no part of the miner's respiratory disability was due to legal pneumoconiosis. Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and employer did not rebut the presumption, we affirm the award of benefits.

[21]Neither physician offered an opinion as to causation apart from his exclusion of the existence of legal pneumoconiosis.

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

SO ORDERED.

JONATHAN ROLFE

Administrative Appeals Judge

I concur.

DANIEL T. GRESH

Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

Concerning the qualifying coal mine employment issue, I agree with the majority that the administrative law judge's alternative finding (that the miner was regularly exposed to coal-mine dust and thus his working conditions were substantially similar to those of an underground mine), in conjunction with his uncontested finding concerning the length of claimant's coal mine employment, supports his determination claimant qualified for application of the Section 411(c)(4) presumption. 20 CFR §718.305. Consequently, it

is not necessary to address employer's judicial notice argument, and I would not do so. I concur in the majority's opinion in all other respects.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge