U.S. Department of Labor

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

BRB Nos. 21-0181 BLA
and 21-0182 BLA

ALLEEN SLONE (o/b/o and Widow of JAMES SLONE) Claimant-Respondent v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/29/2022 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting 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, GRESH and JONES, Administrative Appeals Judges

BOGGS, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim (2016-BLA-05996; 2017-BLA-05651) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent miner's claim filed on March 10, 2013,[1] and a survivor's claim filed on June 17, 2016.

The ALJ accepted the parties' stipulations that the Miner had at least eleven but less than fifteen years of coal mine employment, and therefore found Claimant[2] could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ accepted the parties' stipulation that the Miner was totally disabled, and therefore found Claimant established a change in an applicable condition of

[1] On November 8, 2007, the district director denied the Miner's most recent prior claim for failure to establish any element of entitlement. Director's Exhibit 2 at 270.

[2] Claimant is the widow of the Miner, who died on April 27, 2016, and she is pursuing the miner's claim on his behalf. Director's Exhibit 46 at 16, 394. The miner's claim was initially scheduled for a hearing before ALJ John P. Sellers, III on June 23, 2016. *Id*. at 514. However, on September 16, 2015, ALJ Sellers issued an Order remanding the case to the district director to consolidate it with the survivor's claim. *Id*. at 521.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

entitlement.[4] 20 C.F.R. §§718.204(b)(2), 725.309(c). The ALJ further found the Miner was totally disabled due to legal pneumoconiosis and awarded benefits in the miner's claim. 20 C.F.R. §§718.202(a), 718.204 (c). Based on this award, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act.[5] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[6] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding the Miner had legal pneumoconiosis and that his total disability was caused by coal dust exposure. Claimant responds, urging affirmance of both awards. The Director, Office of Workers' Compensation Programs (the Director), filed a

[4] Where a claimant files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he 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(d); *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(d)(2). Because the district director finally denied the Miner's prior claim for a failure to establish any element of entitlement, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of the miner's claim. *White*, 23 BLR at 1-3; Director's Exhibits 2 at 6.

[5] Under Section 422(*l*) of the Act, the survivor of a miner who was 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*) (2018).

[6] 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.

limited response arguing Employer forfeited its Appointments Clause challenge by failing to raise it before the ALJ and urging rejection of its constitutional challenges to the ALJ's appointment and removal protections. Employer filed separate briefs replying to Claimant and the Director, reiterating its contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ'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 & Grylls Assocs., Inc*., 380 U.S. 359 (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 ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 22-26; Employer's Reply to the Director at 1-5 (unpaginated). It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but maintains ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] *Id*. at 24-27; Employer's Reply to the Director at 2-5 (unpaginated).

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[7] This case arises within the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[8] *Lucia* involved a challenge to the appointment of an ALJ 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 ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary of Labor (Secretary) issued a letter to the ALJ 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

The Director responds that Employer has forfeited its argument by failing to raise it before the ALJ. Director's Response at 3-4, *citing Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581 (6th Cir. 2021). Alternatively, the Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointment's Clause. Director's Response at 4-6.

We agree with the Director's argument that Employer forfeited its Appointments Clause challenge by failing to raise it when the case was before the ALJ.[10] Director's Response at 3-4. 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"); *Davis*, 987 F.3d at 588; *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).

Lucia was decided nearly two months before the hearing in this case and more than two years before the ALJ issued his Decision and Order. Employer, however, failed to raise its argument while the case was before the ALJ. At that time, he could have addressed Employer's argument and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision. Employer has not raised any basis for excusing its forfeiture of the issue. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Davis*, 987 F.3d at 588; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019).

Consequently we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

> Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Kane.

[10] "[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 Hous. Servs. of Chi.*, 583 U.S. , 138 S. Ct. 13, 17 n.1 (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 27-30; Employer's Reply to the Director at 5-8 (unpaginated). Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 27-29; Employer's Reply to the Director at 6-7 (unpaginated). Employer also relies on the United States Supreme Court's holdings 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 (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. , 141 S. Ct. 1970 (2021). Employer's Brief at 28-29; Employer's Reply to the Director at 7-8 (unpaginated).

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs). Regardless, the removal argument is subject to issue preservation requirements similar to those addressed above, and Employer likewise forfeited this issue by not raising it before the ALJ. *See, e.g., Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion; because petitioners "did not raise the dual for-cause removal provision before the agency," the court was "powerless to excuse the forfeiture"); *Davis*, 987 F.3d at 588 ("[T]he Benefits Review Board's governing regulations require that legal questions be raised before the ALJ to be reviewable by the Board."). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements of entitlement if certain conditions are met, but failure to establish any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ found Claimant

established the Miner had clinical and legal pneumoconiosis[11] arising out of coal mine employment and that his totally disabling respiratory impairment was due to his legal pneumoconiosis.[12] Decision and Order at 21.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had 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(b). The United States Court of Appeals for the Sixth Circuit has held a claimant can satisfy this burden by showing that the disease was caused 'in part' by coal mine employment. *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Klayton, Jarboe, and Caffrey. Decision and Order at 15-20. Dr. Klayton diagnosed legal pneumoconiosis in the form of moderate hypoxemia and obstructive lung disease due to coal mine dust exposure and cigarette smoking. Director's Exhibit 16 at 35. Dr. Jarboe opined the Miner did not have legal pneumoconiosis, but instead had chronic bronchitis, pulmonary emphysema, and bronchial asthma due to smoking. Director's Exhibit 18 at 8; Employer's Exhibit 5 at 7. Similarly, Dr. Caffrey opined the Miner did not have legal pneumoconiosis, but instead had emphysema due to smoking. Employer's Exhibit 6 at 3.

[11] "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). "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).

[12] We affirm the ALJ's finding that Claimant established clinical pneumoconiosis arising out of coal mine employment as it is unchallenged on appeal. 20 C.F.R. §§718.202(a), 718.203(b); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

The ALJ accorded the greatest weight to Dr. Klayton's opinion, which he found well-documented and well-reasoned. Decision and Order at 16. Conversely, the ALJ accorded little weight to Dr. Jarboe's opinion as not well-reasoned or well-documented. *Id.* at 17-19. Similarly, the ALJ accorded little weight to Dr. Caffrey's opinion as not well-reasoned. *Id.* at 20.

Employer contends the ALJ erred in weighing Drs. Klayton's and Jarboe's medical opinions.[13] Employer's Brief at 8-13. We disagree.

Employer suggests the ALJ was required to find Dr. Klayton's diagnosis of legal pneumoconiosis to be conclusory or inadequately reasoned because he was unable to apportion the relative contributions of the Miner's cigarette smoking and coal mine dust exposure. Employer's Brief at 8-13. Employer's Brief at 8-10. However, a physician need not apportion the relative contributions of each exposure to establish legal pneumoconiosis, provided he has credibly diagnosed a chronic respiratory or pulmonary impairment caused "at least in part" by coal mine employment. 20 C.F.R. §718.201(b); *see Groves*, 761 F.3d at 597-98; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (opinion that coal dust and smoking were both significant causal factors and that it was impossible to allocate between them establishes legal pneumoconiosis).

Here, the ALJ accurately noted Dr. Klayton diagnosed the Miner with "legal pneumoconiosis" based upon his employment and smoking histories, symptoms of dyspnea and a daily productive cough, a physical examination, pulmonary function testing revealing a moderately severe and partially reversible obstructive impairment, a resting arterial blood gas study showing moderate hypoxemia, and a chest x-ray showing emphysema. Decision and Order at 15; Director's Exhibit 16. He further accurately noted the physician attributed the Miner's condition to both his coal mine dust exposure and cigarette smoking, but was unable to apportion their relative contributions. *Id.*; Director's Exhibit 16. The ALJ permissibly found Dr. Klayton's opinion supported by the evidence he relied upon and the subsequent evidence that was not available to him. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 16. Consequently, we affirm the ALJ's determination that Dr. Klayton's opinion is sufficient to establish the Miner had legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); *Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-600; Decision and Order at 16.

[13] We affirm the ALJ's determination to accord little weight to Dr. Caffrey's opinion relevant to legal pneumoconiosis as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 20.

Nor is there any merit in Employer's argument that the ALJ erred in discrediting Dr. Jarboe's opinion. Employer's Brief at 13-22. The ALJ accurately noted that, in opining the Miner's respiratory disease was unrelated to coal mine dust exposure, Dr. Jarboe relied on the Miner's partial response to bronchodilators on pulmonary function testing to exclude coal mine dust exposure as a cause of the Miner's pulmonary diseases. Decision and Order at 17; Director's Exhibit 18; Employer's Exhibit 5. The ALJ permissibly discredited Dr. Jarboe's opinion because he did not sufficiently explain why the irreversible portion of the Miner's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 17-18. Employer has not challenged this credibility finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ further accurately noted Dr. Jarboe believed a disproportionately reduced FEV1 on pulmonary function testing is indicative of causation by cigarette smoking and asthma, not coal dust. Decision and Order at 17; Director's Exhibit 18; Employer's Exhibit 5. Contrary to Employer's arguments, the ALJ permissibly discredited Dr. Jarboe's opinion as inconsistent with the DOL's recognition in the preamble to the 2001 revised regulations of credible scientific studies that coal dust exposure may cause COPD with associated decrements in the FEV1 and FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); 65 Fed. Reg. 79, 920, 79,943 (Dec. 20, 2000); Employer's Brief at 18-19. The ALJ further permissibly found his opinion inadequately explained as it did not address why a miner who smoked and produced these values could not also have lung damage from coal dust.[14] *Groves*, 761 F.3d

[14] Employer suggests the ALJ erred in relying on the preamble to discredit its experts when it was not subject to notice-and-comment, and argues he erred in his use of the preamble to discredit Dr. Jarboe. Employer's Brief at 19. However, an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1225 (10th Cir. 2018); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] v. *Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

at 601; *A& E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 18.

The ALJ permissibly discredited Dr. Jarboe's opinion as the doctor failed to consider the possibility of multiple etiologies in determining cigarette smoking was the sole cause of the Miner's chronic bronchitis, emphysema, asthma, and obstructive pulmonary impairment, and therefore failed to adequately explain why coal mine dust exposure could not have aggravated or exacerbated his allegedly smoking-related disease. *Sterling*, 762 F.3d at 491; *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-03; Decision and Order at 18-19. Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Jarboe's opinion is not well-reasoned or documented and therefore entitled to little weight.[15] Decision and Order at 19.

Finally, we reject Employer's argument that the ALJ erred in failing to consider Dr. Alam's opinion, and the Miner's treatment records from 2007 and earlier, that document a smoking-related pulmonary impairment. Employer's Brief at 11. Contrary to Employer's argument, the ALJ considered the evidence developed in the Miner's prior claim and permissibly found it less relevant than the evidence submitted in the Miner's current claim, which he found more indicative of the Miner's condition at the time of his death given the progressive and irreversible nature of pneumoconiosis. *See Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than that submitted with a prior claim because of the progressive nature of pneumoconiosis); Decision and Order at 8, 20.

Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the ALJ provided valid reasons for crediting Dr. Klayton's diagnosis of legal pneumoconiosis over the contrary opinions of Drs. Jarboe and Caffrey, we affirm the ALJ's finding that Claimant established the Miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), 718.203; Decision and Order at 20.

[15] As the ALJ gave permissible reasons for discrediting Dr. Jarboe's opinion, we need not address Employer's remaining challenges to the ALJ's weighing of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13-22.

Disability Causation

To establish the Miner was totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis was "a substantially contributing cause of [the Miner's] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 601-02. Pneumoconiosis was a "substantially contributing cause" if it had a "material adverse effect" on the Miner's respiratory or pulmonary condition or "[m]aterially worsen[ed]" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

The ALJ credited Dr. Klayton's opinion, that the Miner's totally disabling respiratory impairment is due to legal pneumoconiosis, over the contrary opinion of Dr. Jarboe.[16] Decision and Order at 21. Employer contends Dr. Klayton's opinion is not sufficient to establish the Miner's totally disabling respiratory impairment was due to pneumoconiosis. Employer's Brief at 12. We disagree.

The ALJ accurately noted Drs. Klayton and Jarboe agreed the Miner had a disabling obstructive impairment but disagreed as to its etiology. Decision and Order at 21. Having affirmed the ALJ's determination that Dr. Klayton's opinion is reasoned and documented, and therefore sufficient to prove the Miner's totally disabling obstructive lung disease constituted legal pneumoconiosis, the ALJ did not err in finding his opinion also establishes the Miner was totally disabled due to the disease; it is the only logical conclusion from those facts. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 21. Because Dr. Jarboe did not diagnose legal pneumoconiosis, the ALJ also permissibly accorded less weight to his opinion because it was contrary to the ALJ's findings on pneumoconiosis and not credible on the issue of disability causation. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (ALJ may discount a physician's opinion as to disability causation because he erroneously failed to diagnose pneumoconiosis); *see also Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (ALJ who has found the disease and disability elements established may not credit an opinion denying disability

[16] The ALJ accurately found Dr. Caffrey did not address whether the Miner was totally disabled and therefore did not address the cause of his disabling impairment. Decision and Order at 21; Employer's Exhibit 6.

causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements); Decision and Order at 21.

Consequently, we affirm the ALJ's finding that Claimant established the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c). We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Administrative Appeals Judge, concurring:

I concur with my colleagues' decision to affirm the ALJ's Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim. However, I write separately to express my opinion that as the Board has previously rejected Employer's argument that the removal provisions are unconstitutional on the merits, *see Shepherd v. Nat'l Mines Corp.*, BRB Nos. 20-0495 BLA and 20-0498 BLA (Dec. 29, 2021) (unpub.), there is no need to determine whether Employer forfeited those same arguments.

As my colleagues note, Employer's arguments are without merit as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Pehringer*, 8 F.4th at 1137.

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus

infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[17] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an *inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *D' Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-

[17] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

In all other respects, I also concur with my colleagues' decision to affirm the ALJ's Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim.

DANIEL T. GRESH
Administrative Appeals Judge