U.S. Department of Labor

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

BRB No. 19-0366 BLA

JERRY PEHRINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DECKER COAL COMPANY, Self-insured through LIGHTHOUSE RESOURCES, INCORPORATED	)	DATE ISSUED: 03/23/2020
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

John S. Lopatto III, Washington, D.C., for employer/carrier.

Rita A. Roppolo (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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05777) and Order Denying Employer's Motion for Reconsideration of Administrative Law Judge John P. Sellers, III, rendered under the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on November 7, 2014.

Prior to the scheduled May 15, 2018 hearing, employer filed a motion for continuance until the United States Supreme Court decided *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044 (2018), involving a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). In a subsequent Pre-Hearing Order, the administrative law judge denied employer's motion, but rescheduled the hearing for June 26, 2018. At the hearing, he granted employer additional time to respond to treatment records claimant submitted and granted employer's post-hearing motion to extend the time to submit evidence. In his Decision and Order Awarding Benefits, the administrative law judge found the Secretary of Labor's ratification of his appointment on December 21, 2017, before he took any significant action in this case, cured any defects in his initial appointment.

On the merits, the administrative law judge credited claimant with 16.70 years of surface coal mine employment in conditions substantially similar to those in an underground mine. He found claimant established a totally disabling respiratory impairment and thus invoked the rebuttable presumption of disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

Employer filed a timely Motion for Reconsideration, arguing the administrative law judge erred in finding claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and in awarding benefits. Employer also requested the administrative law judge reopen the record to admit

[1] Section 411(c)(4) of the Act provides a rebuttable presumption claimant is totally disabled due to pneumoconiosis if he establishes 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.

additional evidence. The administrative law judge denied the motion and the evidentiary request.

On appeal, employer initially argues that under *Lucia*, the administrative law judge lacked authority to decide the case because he was not appointed consistent with the Appointments Clause of the Constitution, art. II § 2, cl. 2.[2] Employer also argues that the removal provisions applicable to the administrative law judge rendered his appointment unconstitutional. Employer further alleges the administrative law judge erred in failing to treat its Motion for Reconsideration and proffer of additional evidence as a request for modification. Alternatively, employer challenges the award of benefits, asserting the administrative law judge erred in finding: 1) claimant established at least fifteen years of qualifying coal mine employment and 2) the Section 411(c)(4) presumption was not rebutted.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting employer's constitutional arguments regarding the validity of the administrative law judge's appointment are without merit. In addition, the Director maintains the administrative law judge did not err in declining to treat employer's Motion for Reconsideration as a request for modification.

Employer filed with the Board a Motion to Vacate and Remand on November 14, 2019, stating that the decision the United States Court of Appeals for the Federal Circuit issued in *Arthrex, Inc. v. Smith & Nephew et al.*, 94 F.3d 1320 (Fed. Cir. 2019),[3] requires

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[2] 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.

[3] In *Arthrex, Inc. v. Smith & Nephew et al.*, 94 F.3d 1320 (Fed. Cir. 2019), the Federal Circuit Court held that 5 U.S.C. §7513, which provides for the removal of federal

remand of this case for a hearing before a different, validly appointed administrative law judge. Neither claimant nor the Director responded to employer's motion.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Appointments Clause Challenge

Employer urges the Board to vacate the administrative law judge's Decision and Order and remand the case to be heard by a different, constitutionally-appointed administrative law judge. Employer argues that pursuant to *Lucia*, the administrative law judge lacked authority to preside over this case.[5] Employer's Brief at 3-5. Employer also maintains the Secretary of Labor's December 21, 2017 ratification of the prior appointments of Department of Labor (DOL) administrative law judges was not effective.

The Director responds that the administrative law judge had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 4-5. She also maintains employer has failed

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employees in the competitive service and certain federal employees in the excepted service, was unconstitutional as applied to Administrative Patent Judges.

[4] Claimant's coal mine employment occurred in Montana. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Ninth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] *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 the Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause, which requires that they be appointed by the President or the head of a department. *Lucia v. Sec. & Exch. Comm'n*, 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.

to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. We agree with the Director's positions.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, 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). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Further, under the "presumption of regularity," courts presume that 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).

At the time of the ratification of 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. Congress has authorized the Secretary to appoint administrative law judges to decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter; he specifically identified Judge Sellers and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Judge Sellers.

Under the presumption of regularity, it thus 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. Having put forth no contrary evidence, employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Thus, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of my own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board retroactively ratified appointment of a Regional

Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions).

II. Removal Provisions

Employer also contends the administrative law judge lacked the authority to adjudicate this claim after ratification because 5 U.S.C. §7521, governing the removal of administrative law judges, provides two levels of "for cause" protections. Employer's Brief at 4. Employer relies on the Supreme Court's invalidation of a similar statutory scheme in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).[6] *Id*.

In response, the Director asserts the Supreme Court described the Public Company Accounting Oversight Board removal protections at issue in *Free Enterprise Fund* as "significant and unusual" and expressly stated its holding "does not address that subset of independent agency employees who serve as administrative law judges". 561 U.S. at 507 n.10; *see* Director's Brief at 7. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. We agree with the Director that neither *Free Enterprise Fund* nor *Lucia* establish that 5 U.S.C. §7521 is unconstitutional as applied to DOL administrative law judges.

Employer's reliance on the Federal Circuit Court's recent decision in *Arthrex* in its Motion to Vacate and Remand is also unavailing. In *Arthrex*, the court determined that the Administrative Patent Judges (APJs) who comprise the Patent Trial and Appeal Board (PTAB) are principal officers who must be appointed and removed by the President. *Arthrex*, 94 F.3d at 1329-35. The court held that because APJs are subject to removal for cause under 5 U.S.C. §7513, "the current structure of the [PTAB] violates the Appointments Clause." *Id*. at 1335. To preserve the constitutionality of the statute that created the PTAB, the court severed application of 5 U.S.C. §7513 to APJs, making them properly appointed inferior officers. *Id*. at 1337-38. Employer maintains:

> After *Lucia* and this Federal Circuit ruling in *Arthrex*, it is only a matter of months or weeks before a U.S. Court of Appeals will rule in a Federal Black Lung case that the civil service protection attaching to most Department of Labor ALJs must be severed from Title 5 of the U.S. Code *and* that a new

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[6] The Supreme Court determined that the two level removal protection provided to the members of the Public Company Accounting Oversight Board resulted in a constitutionally impermissible "diffusion of accountability." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

> hearing is mandated before a different ALJ who is properly appointed. The Benefits Review Board does not have the authority to make such a ruling that is now required by the *Lucia* and Public Accounting Board precedents. Keeping the case before the Benefits Review Board until such issuance of such Court of Appeals ruling is wasteful and inefficient.

Employer's Motion to Vacate and Remand at 2.

The Board's procedural rules require that a brief in support of a petition for review must contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b). In relying on *Arthrex*, employer has not advanced an argument, but rather requests remand based on its speculation as to the effect the Federal Circuit Court's ruling may have in future cases involving DOL administrative law judges. Additionally, employer does not acknowledge that in contrast to the Supreme Court's determination in *Lucia* SEC administrative law judges are inferior officers, the Federal Circuit Court determined APJs are principal officers. *Arthrex*, 94 F.3d at 1329-35. Employer also does not address the fact that the *Arthrex* court interpreted 5 U.S.C. §7513, which sets forth removal provisions applying to federal employees in the competitive service and certain federal employees in the excepted service, but not 5 U.S.C. §7521, containing removal provisions that apply specifically to administrative law judges. *Id*. at 1332-35; *compare* 5 U.S.C. §7513 and 5 U.S.C. §7521. We therefore reject employer's contention that remand is required in light of the Federal Circuit Court's decision in *Arthrex* and deny employer's Motion to Vacate and Remand.

III. Motion for Reconsideration/ Request for Modification

In its Motion for Reconsideration before the administrative law judge, employer asserted that the administrative law judge had discretion to revisit the award of benefits and correct any errors pursuant to either a request for reconsideration or a request for modification. Employer's Motion for Reconsideration at 3, *citing* 20 C.F.R. §725.479(b); 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a). Employer attached to its motion evidence obtained post-hearing regarding claimant's employment history and argued the administrative law judge erred in crediting claimant with over fifteen years of qualifying coal mine employment. *Id*. at 3-14. Making no reference to modification, the administrative law judge denied employer's Motion for Reconsideration and rejected employer's request to admit the newly obtained evidence. Order Denying Employer's Motion for Reconsideration at 1-2. He observed that he had granted employer additional time to develop evidence at the close of the hearing on June 26, 2018, and again by Order dated October 3, 2018, but employer did not submit any additional evidence or a closing brief. *Id*. at 1.

Employer attached the post-hearing evidence to its brief on appeal, arguing that the administrative law judge should have considered its modification request and determined whether that evidence established a mistake in a determination of fact in his finding that claimant had 16.70 years of qualifying coal mine employment. Employer's Brief at 7. The Board reviews the administrative law judge's evidentiary rulings for abuse of discretion. *See McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc). We hold that the administrative law judge acted within his discretion in treating employer's post-decision filing as a request for reconsideration of his decision awarding benefits, rather than a request for modification. *See McClanahan*, 25 BLR at 1-175; Order Denying Employer's Motion for Reconsideration at 1-2.

As the Director avers, the regulations mandate that a request for modification be initiated before the district director. Director's Brief at 7-8; 20 C.F.R. §725.310(b) ("Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits."). The administrative law judge therefore acted in accordance with the relevant regulation in declining to treat employer's Motion for Reconsideration as a request for modification. In addition, he acted within his discretion in denying employer's Motion for Reconsideration and request to admit additional evidence on the ground that he had given employer ample time to develop the evidence necessary to defend the claim. *See Keener*, 23 BLR at 1-236; Order Denying Employer's Motion for Reconsideration at 1-2.

IV. Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, claimant must establish he worked for at least fifteen years in underground coal mines, or in substantially similar conditions in surface coal mine employment.[7] 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR

[7] Claimant is also required to establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(ii). We affirm as unchallenged by employer on appeal the administrative law judge's finding claimant established total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). *Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment that is based on a "reasonable method" and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

When the record closed in this claim, the evidence relevant to the length of claimant's coal mine employment consisted of DOL Form CM-911a – Employment History, a letter from employer's Human Resources Manager confirming that claimant worked for employer between 1997 and 1999, claimant's Social Security Administration (SSA) earnings records, and claimant's deposition and hearing testimony.[8] Because claimant was continuously employed by a single employer, the administrative law judge stated he would credit claimant with one year of coal mine employment for each year in which his earnings exceeded the industry average earnings for 125 days.[9] Decision and Order at 4. The administrative law judge further explained that in years in which claimant earned less than the industry average earnings for 125 days, he would divide claimant's earnings from coal mine employment by the daily average earnings of miners for that year to arrive at an estimate of the number of days claimant actually worked as a miner. *Id*. at 5. He then indicated that he would add two days to every five days claimant worked to account for weekends and divide the number of days by 365 to compute the fraction of a year that claimant worked. *Id*.

Using these calculation methods, the administrative law judge credited claimant with one full year of coal mine employment in 1997 and for each year from 1978 through 1987, and from 1991 through 1995, totaling 16.00 years of coal mine employment.[10]

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[8] Based on DOL Form CM-911a, the letter from employer, and claimant's SSA records, the district director credited claimant with 21.0 years of coal mine employment.

[9] The administrative law judge used the table in Exhibit 610 of the *Black Lung Benefits Act Procedure Manual* to determine the average daily wage for coal miners and the average annual earnings based on 125 days of work. Decision and Order at 5 n.3.

[10] The administrative law judge noted that although claimant testified he was on strike from employer's mine between 1987 and 1991, he also stated he was not "100 percent" certain how long the strike lasted. Decision and Order at 6, *quoting* Hearing Transcript at 34. Because claimant's SSA records show he had no earnings from employer in 1988, 1989 or 1990, the administrative law judge found "it is reasonable to assume that he was on strike during those years" and did not credit claimant with coal mine employment for those three years. Decision and Order at 6.

Decision and Order at 6. For 1977, the year claimant began working for employer on September 23, the administrative law judge credited him with 0.27 years of coal mine employment. *Id*. at 5. Regarding 1996, the year claimant testified he missed some work due to a neck injury, the administrative law judge credited claimant with 0.42 years of coal mine employment because his SSA records showed earnings of $16,609.00. *Id*. With respect to 1998 and 1999, a period claimant described as involving part-time and full-time work as he recovered from his neck injury and surgery, the administrative law judge relied on claimant's SSA records showing earnings of $2,195.40 in 1998 and $11,166.80 in 1999 to credit him with 0.05 years and 0.28 years of coal mine employment, respectively. *Id*. Totaling the full and partial years, the administrative law judge credited claimant with 17.03 years of coal mine employment. *Id*. at 7.

When considering whether claimant's work, all of which took place aboveground, occurred in conditions substantially similar to those in an underground mine, the administrative law judge found claimant "was regularly exposed to coal mine dust during every year except his last two years of employment with the [e]mployer." *Id*. at 13. He therefore subtracted the total of 0.33 years calculated for 1998 and 1999 from 17.03 years of coal mine employment, and credited claimant with 16.70 years of qualifying coal mine employment, sufficient to invoke the Section 411(c)(4) presumption. *Id*.; 20 C.F.R. 718.305(b)(1)(i).

Employer argues that the evidence attached to its Motion for Reconsideration/request for modification and its brief on appeal establishes claimant had no more than 14.93 years of qualifying coal mine employment. Employer's Brief at 9-11. Employer maintains that because this evidence contains specific beginning and ending dates for claimant's absences from work due to a strike and his neck injury, the administrative law judge miscalculated claimant's partial years of coal mine employment in 1996 and 1997[11] and incorrectly credited claimant with full years of coal mine employment in 1987, 1991 and 1995. *Id*. at 10-17.

By basing its allegations of error on evidence the administrative law judge permissibly excluded from the record, *see* discussion supra, employer has failed to raise an

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[11] Employer also argues the administrative law judge erred in crediting claimant with partial years of coal mine employment in 1998 and 1999. Employer's Brief at 10. This contention is without merit based on the administrative law judge's ultimate decision not to credit claimant with qualifying coal mine employment in those two years because he was not regularly exposed to coal dust during that time period. Decision and Order at 13.

issue the Board is empowered to resolve.[12] 20 C.F.R. §802.301(a), (b) (Board cannot engage in *de novo* proceeding or unrestricted review and cannot consider any evidence not submitted before the administrative law judge); *see Anderson Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because employer does not otherwise challenge the administrative law judge's finding on the length of claimant's qualifying coal mine employment, we affirm this finding, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), but modify it in part. Adding the full and partial years the administrative law judge calculated results in a total of 17.02 years of coal mine employment (16.00 + 0.27, 0.42, 0.05 and 0.28 = 17.02), rather than the 17.03 years the administrative law judge found. Decision and Order at 5-7. Subtracting the 0.33 years of non-qualifying coal mine employment in 1998 and 1999 from 17.02 then produces a total of 16.69 years of qualifying coal mine employment rather than 16.70.[13]

Because we have affirmed the administrative law judge's determination claimant had at least fifteen years of qualifying employment, we further affirm his finding claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 13.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative

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[12] If employer wishes to have this evidence considered, it can file a request for modification before the district director. 20 C.F.R. §725.310(a).

[13] The administrative law judge's error in his calculation is harmless, as it does not alter his conclusion that claimant had the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[14] "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).

law judge found employer rebutted clinical pneumoconiosis but failed to rebut either legal pneumoconiosis or total disability causation.

A. Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish that 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); *see* 20 C.F.R. §718.305(d)(1)(i)(A). Dr. Cahill examined claimant at the DOL's request and diagnosed chronic obstructive pulmonary disease (COPD) caused by smoking and coal dust exposure. Director's Exhibit 11. Employer did not submit any medical opinion evidence.

The administrative law judge found Dr. Cahill's opinion well-reasoned and well-documented, and gave it "probative weight." Decision and Order at 15. He further determined Dr. Ackerman's statement that it was "possible, if not probable" that coal dust exposure "played a role" in claimant's COPD based on his "extensive work in the mines," did not assist employer in rebutting legal pneumoconiosis.[15] *Id*. The administrative law judge concluded employer failed to satisfy its burden on rebuttal with respect to legal pneumoconiosis. *Id*.

Employer argues the administrative law judge erred in finding Dr. Cahill's opinion well-reasoned, asserting her identification of coal dust exposure as a cause of claimant's COPD is "ambiguous," "imprecise," and inadequately explained. Employer's Brief at 17-19. Contrary to employer's contention, because it is employer's burden to disprove legal pneumoconiosis, any error in the administrative law judge's crediting of Dr. Cahill's diagnosis of legal pneumoconiosis is harmless. 20 C.F.R. §718.305(d)(2)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Based on the absence of evidence relevant to employer's burden, the administrative law judge properly determined it failed to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order at 15. We therefore affirm the administrative law judge's finding employer did not establish rebuttal of the existence of pneumoconiosis.[16]

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[15] Dr. Ackerman is one of claimant's treating physicians. His opinion appears in claimant's treatment records. Claimant's Exhibit 1.

[16] Because employer must rebut both legal and clinical pneumoconiosis, the administrative law judge's finding that employer did not disprove legal pneumoconiosis

B. Disability Causation

The administrative law judge next addressed whether employer established that "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 accurately determined employer did not submit evidence to support its burden. Decision and Order at 16. He further permissibly found, "[e]ven assuming" cigarette smoking contributed to claimant's total disability, employer "failed to rule out pneumoconiosis as an additional causal factor." *Id*, *citing Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013). Thus, we affirm the administrative law judge's determination employer did not disprove disability causation. 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

precluded rebuttal under 20 C.F.R. §718.305(d)(1)(i), despite his finding that employer disproved clinical pneumoconiosis. Decision and Order at 15.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge