U.S. Department of Labor

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

BRB No. 20-0081 BLA

AUSTINE SALMONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EDD POTTER COAL COMPANY	)	DATE ISSUED: 03/31/2021
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand Awarding Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Associate Chief Administrative Law Judge William S. Colwell's Decision and Order on Remand Awarding Benefits (2013-BLA-06080) rendered on a claim filed August 15, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for a second time.[1]

The Board previously affirmed the administrative law judge's findings that Employer is the responsible operator, Claimant established at least twenty-seven years of underground coal mine employment, and the blood gas study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Salmons v. Edd Potter Coal, Co.*, BRB No. 17-0657 BLA, slip op. at 2 n.2, 7, 11 (November 30, 2018) (unpub.). However, it vacated the administrative law judge's finding that Claimant established total disability based on the pulmonary function studies because he did not resolve the conflict in Claimant's reported heights. *Id*. at 9-10. The Board further held the administrative law judge did not adequately explain his weighing of the medical opinion evidence. *Id*. at 11 - 13. Accordingly, the Board vacated his findings that Claimant established total disability and invoked the rebuttable presumption at Section 411(c)(4) of the Act,[2] and further vacated the award of benefits. *Id*. at 9, 13.

On remand, the administrative law judge again found Claimant established total disability, 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), and invoked the Section 411(c)(4) presumption. He reinstated his findings from his initial decision that Employer did not rebut the presumption and again awarded benefits.

On appeal, Employer argues the administrative law judge lacked authority to hear and decide the case because he was not appointed in a manner consistent with the

[1] We incorporate the procedural history of the case as set forth in *Salmons v. Edd Potter Coal, Co.*, BRB No. 17-0657 BLA (November 30, 2018) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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) (2018); 20 C.F.R. §718.305.

Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It further asserts the removal provisions applicable to the administrative law judge rendered his appointment unconstitutional. It also challenges the constitutionality of the Affordable Care Act (ACA), and the constitutionality and applicability of the Section 411(c)(4) presumption, enacted as part of the ACA. On the merits, Employer asserts it is not the responsible operator and the administrative law judge erred in finding the Section 411(c)(4) presumption invoked and unrebutted. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to reject Employer's constitutional challenges to the administrative law judge's appointment, and its argument that it is not the responsible operator.

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.[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, 362 (1965). The Board reviews an administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] Because Claimant's last coal mine employment occurred in Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Appointments Clause

Citing *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018),[5] Employer contends the administrative law judge was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and therefore lacked the authority to award benefits in this case. Employer's Brief in Support of Petition for Review (Employer's Brief) at 15-21. We reject Employer's contention.

The Appointments Clause issue is "non-jurisdictional" and subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture."). Employer failed to raise its challenge to the administrative law judge's appointment when the case was initially before the administrative law judge or during its first appeal to the Board, but instead waited until after the Board remanded the case.[6] *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 402-03 (6th Cir. 2020) (employer waived Appointments Clause challenge by raising the issue for the first time "four months after the merits briefing period had closed"); *see also Messer v. Andalex Resources, Inc.*, BRB No. 18-0272 BLA (May 17, 2019) (unpub.) (agreeing the "employer waived its Appointments Clause argument by failing to raise it when the case was previously before the Board"); Director's Brief at 9.

Furthermore, Employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). We reject Employer's argument that

[5] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). In *Lucia*, the United States Supreme Court held that, similar to the Special Trial Judges at the 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)).

[6] Employer first raised the Appointments Clause issue in its January 9, 2019 letter to the administrative law judge, almost seven months after *Lucia* was decided and over five months after the Board remanded the case to the administrative law judge. The administrative law judge denied Employer's request, finding it did not timely raise the issue or provide an explanation for why its untimeliness should be excused. October 23, 2019 Order Denying Request for Reassignment at 1-2 (unpaginated).

Freytag v. Commissioner, 501 U.S. 868 (1991) mandates consideration of its Appointments Clause argument. Employer's Brief at 17-18. In *Freytag*, the United States Supreme Court excused waiver of the Appointments Clause issue as it pertained to Special Trial Judges (STJs) appointed by the United States Tax Court. The Court stated "this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" because to do otherwise would leave unresolved "important questions . . . about the Constitution's structural separation of powers." 501 U.S. at 873, 879. The same rationale for excusing waiver or forfeiture is not present in this case because, as the Supreme Court determined in *Lucia*, the logic in *Freytag* for determining that STJs are inferior officers subject to the Appointments Clause applies with even greater force to administrative law judges. *Lucia*, 138 S.Ct. at 2053-2054. As the Court observed, existing case law provided "everything necessary to decide this case." 138 S.Ct. at 2053.

In addition, the exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable here because, unlike the Federal Mine Safety and Health Review Commission in that case, the Board has the long-recognized authority to address properly raised questions of substantive law.[7] *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (because the Board performs the identical appellate function the district courts previously performed, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as the district courts possessed); *Duck v. Fluid Crane and Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"). We therefore conclude Employer forfeited its right to challenge the administrative law judge's appointment.

Removal Provisions

Employer merely asserts "*Lucia* did not address a challenge to the [administrative law judges'] appointments based on the removal protections they enjoy even though the Solicitor General urged the Court to address those provisions." Employer's Brief at 21. We decline to address this issue, as it is inadequately briefed[8] and Employer failed to raise

[7] Moreover, unlike the petitioner in *Jones Brothers* who at least "identified the constitutional issue" in its appeal to the Federal Mine Safety and Health Review Commission, Employer in this case did not identify the issue at all in its previous appeal to the Board.

[8] Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other

the issue while the case was previously before Board. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

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

Employer also requests the Board hold this appeal in abeyance until a "final decision" resolves the constitutionality and severability of the ACA, which includes a provision reenacting Section 411(c)(4) of the Act. Employer's Brief at 29 n.5. The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore deny Employer's request to hold this case in abeyance.

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statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. To merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Responsible Operator

The Board previously affirmed the administrative law judge's finding that Employer is the responsible operator. *Salmons*, BRB No. 17-0657 BLA, slip op. at 7. In this appeal, Employer resurrects arguments that were already considered and rejected in its prior appeal. Employer's Brief at 22-25; *Salmons*, BRB No. 17-0657 BLA, slip op. at 3-7. Because Employer has not shown the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Total disability can be established based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[9] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In accordance with the Board's remand instructions, the administrative law judge reconsidered the pulmonary function study evidence, resolved the conflict in the reported heights for Claimant, determined Claimant's actual height, and accorded greatest weight to the most recent study dated January 27, 2015, which produced qualifying values.[10] Decision and Order on Remand at 3. We affirm, as unchallenged, the administrative law judge's finding that Claimant established total disability based on the pulmonary function

[9] The Board previously affirmed the administrative law judge's finding that Claimant established total disability based on the blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii). No party alleges there is evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); *Salmons*, BRB No. 17-0657 BLA, slip op. at 8 n.13.

[10] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

study evidence. 20 C.F.R. §718.204(b)(2)(i); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 3; Employer's Brief at 25-26.

The administrative law judge also found on remand that Claimant established total disability based on Dr. Forehand's and Dr. Rosenberg's opinions, giving greatest weight to Dr. Rosenberg's assessment and rejecting Dr. Fino's contrary opinion that Claimant is not totally disabled. Although Employer alleges error in the administrative law judge's weighing of each of the medical opinions, it fails to explain why this case must be remanded for further consideration of total disability. Dr. Rosenberg is the only physician to consider the January 27, 2015 qualifying pulmonary function study, and he opined Claimant's impairment had worsened and he appeared totally disabled based on the study's results.[11] Employer's Exhibit 1. Although Employer generally asserts Dr. Rosenberg's opinion is not a "definitive" diagnosis of total disability, there is no contrary medical opinion refuting the probative value of the qualifying January 27, 2015 pulmonary function study.[12] Employer's Brief at 27. Moreover, Claimant need not provide a medical opinion explaining why a qualifying pulmonary function study precludes him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(i), (iv). Because substantial

[11] Dr. Rosenberg provided two reports. In an April 4, 2012 report, he stated Claimant is not disabled from a pulmonary perspective from performing his previous coal mine job or other similarly arduous types of labor. Director's Exhibit 33. In an April 6, 2016 report, after considering additional medical records and the qualifying January 27, 2015 pulmonary function study, Dr. Rosenberg opined that "from an impairment perspective, [Claimant's condition] has worsened," developing increased airflow obstruction over time, and that his "impairments . . . appear disabling." Employer's Exhibit 1.

[12] Dr. Fino diagnosed a mild obstructive respiratory impairment based on his review of pulmonary function study evidence predating the January 27, 2015 qualifying study. Director's Exhibit 33. Although Dr. Fino indicated Claimant's resting blood gas studies did not show a significant oxygen impairment, the administrative law judge found Claimant established total disability based on the one qualifying exercise blood gas study obtained on September 20, 2011. *Id*. Dr. Fino did not dispute the reliability of that exercise study. *Id*. Moreover, as blood gas studies measure a different type of impairment than pulmonary function studies, Dr. Fino's opinion regarding the results of the blood gas study would not call into question the finding of total disability based on the most recent pulmonary function study (which Dr. Fino did not review). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993). Thus, we reject Employer's request that we remand the case for the administrative law judge to further consider Dr. Fino's opinion on total disability. Employer's Brief at 28.

evidence supports the administrative law judge's finding that Claimant established total disability based on the January 27, 2015 pulmonary function study, we hold error, if any, by the administrative law judge in weighing the medical opinions would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we affirm the administrative law judge's finding that Claimant established total disability and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge on remand reinstated his prior findings that Employer failed to establish rebuttal under either method.[14] Decision and Order on Remand at 6.

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

[13] "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 is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

[14] We affirm, as unchallenged, the administrative law judge's finding that Employer failed to disprove the existence of clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Although Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we address the administrative law judge's findings on legal pneumoconiosis as they are relevant to rebuttal of the presumed fact of disability causation. 20 C.F.R. §718.305(d)(1)(i), (ii).

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

Dr. Rosenberg explained that it is "unlikely" that Claimant's obstructive impairment is due to his "remote coal dust exposure" based on studies showing that miners with no impairment when leaving coal mines rarely suddenly develop an obstruction related to coal dust years after exposure. Employer's Exhibit 1. He described Claimant's "pattern of impairment with low diffusing capacity measurements" as more indicative of emphysema caused by smoking than coal dust exposure. *Id*. Dr. Fino acknowledged Claimant has "both a significant smoking history and a significant coal mine dust exposure" and stated "it would be difficult to exclude one from the other when it comes to causation." Director's Exhibit 33. However, he also concluded "[t]here is insufficient objective medical evidence" to diagnose legal pneumoconiosis. *Id*.

Contrary to Employer's contention, the administrative law judge permissibly found neither Dr. Rosenberg nor Dr. Fino persuasively explained why Claimant's twenty-seven years of coal mine dust exposure did not significantly contribute to or substantially aggravate his respiratory impairment, even if it was primarily caused by smoking. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order on Remand at 23; Director's Exhibit 33; Employer's Exhibit 1. The administrative law judge also permissibly found Dr. Rosenberg relied on "generalities" and did not adequately explain why Claimant in particular does not have legal pneumoconiosis. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding Employer did not disprove that Claimant has legal pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i)(A).

[15] As the administrative law judge gave permissible reasons for discrediting Dr. Rosenberg's and Dr. Fino's opinions on legal pneumoconiosis, we need not address Employer's assertion that he erred in finding their opinions inconsistent with the preamble to the revised regulations or that his reliance on the preamble transformed the rebuttable

Disability Causation

The administrative law judge also found Employer failed to establish that "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order Granting Benefits at 25. Employer's argument that the administrative law judge erred in finding it did not disprove disability causation is based on its arguments that Claimant does not have legal pneumoconiosis, which we have rejected. Moreover, the administrative law judge permissibly found Dr. Rosenberg's and Dr. Fino's opinions are not credible on the issue of disability causation because they did not diagnose legal pneumoconiosis.[16] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (physician who fails to diagnose pneumoconiosis, contrary to the administrative law judge's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); 2017 Decision and Order Granting Benefits at 25; Director's Exhibit 33; Employer's Exhibit 1. We therefore affirm the administrative law judge's finding that Employer failed to prove that no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

presumption into an irrebuttable presumption. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 28-32.

[16] Neither physician offered an explanation with respect to whether legal pneumoconiosis caused Claimant's disability independent of his incorrect conclusion that Claimant does not have the disease.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge