U.S. Department of Labor

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

BRB No. 21-0478 BLA

JOE C. RYAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REBEL COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE, INSURANCE c/o OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/13/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm, PLLC), Pikeville, Kentucky, for Claimant.

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

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-05068) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on September 9, 2016.[1]

The ALJ found Claimant established at least twelve years of coal mine employment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, he found Claimant established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b), (c). He therefore found Claimant established a change in an applicable condition of entitlement[3] and awarded benefits. 20 C.F.R. §725.309(c).

[1] This is Claimant's second claim for benefits. He filed his first claim on June 10, 1987. Director's Exhibit 1. In a Decision and Order – Rejection of Claim dated March 4, 1991, ALJ Rudolf L. Jansen denied benefits because Claimant failed to establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment. Director's Brief at 15-16 (referencing Attachment A). Claimant took no further action until filing the current claim. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); see 20 C.F.R. §718.305.

[3] When a miner 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(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

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.[4] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. Further, it contends the ALJ erred in finding the claim timely filed. Employer additionally contends the destruction of Claimant's prior claim record by the Federal Records Center and the ALJ's refusal to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions violated its due process rights. It therefore maintains that liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund). On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established legal pneumoconiosis.[5]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and removal protections, and its assertion that Claimant did not file a timely claim. Employer filed a reply to the Director's and Claimant's response briefs, reiterating its contentions.

Because Claimant's prior claim was denied for failure to establish pneumoconiosis and total disability, Claimant had to establish at least one of those entitlements in order to obtain review of the merits of his current claim. *Id.*; Director's Exhibit 1; Director's Brief at 15-16 (referencing Attachment A).

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

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

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least twelve years of coal mine employment, a totally disabling respiratory or pulmonary impairment, and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.204(b), (c), 725.309; Decision and Order at 7, 21-24.

The 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the ALJ's 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).[7] Employer's Brief at 13-21; Employer's Reply Brief at 1-8. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 11-16; Employer's Reply Brief at 8-9.

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[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6, 7; Hearing Tr. at 14, 31-32.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to the 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.

[8] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an Associate Chief [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

The Director argues the ALJ 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 3-5. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 5-6. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (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 Hosp. Co.*, 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). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; see also 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Kane and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Kane. The Secretary further acted in his "capacity as head of the [DOL]" when ratifying the appointment of ALJ Kane "as an [ALJ]."[9] *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates he did not make a "detached and considered affirmation" when he ratified ALJ Kane's appointment. Employer's Brief at 14; Employer's Reply Brief at 8-9.

[9] Employer's assertion that the Secretary, in his December 21, 2017 letter to ALJ Kane, "did not approve the appointment as his own" ignores that the Secretary explicitly approved the ALJ's prior appointment "in [his] capacity as head of the [DOL]." Employer's Brief at 14; *c.f.* Secretary's December 21, 2017 Letter to ALJ Kane.

It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (a lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 21-22. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Kane's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

We also reject Employer's assertion that the Secretary's ratification of the ALJ's appointment was issued without notice and comment and violates the Administrative Procedure Act (APA).[10] Employer's Brief at 15. Employer cites no authority to support its argument.[11] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

[10] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[11] The Director also notes that 5 U.S.C. §553(a)(2) provides an exception from the APA's rulemaking requirements for matters "relating to agency management or personnel[.]" Director's Brief at 8.

Moreover, although Employer filed a Motion to Hold Claim in Abeyance in light of *Lucia* on June 11, 2018, the ALJ properly denied Employer's motion as he took no action on the claim before his appointment was ratified on December 21, 2017.[12] Unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, here the ALJ took no action that could affect his ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S. Ct. at 2055. Therefore, the ALJ's denial of Employer's motion did not taint the adjudication with an Appointments Clause violation requiring remand, and we decline to remand this case to the Office of Administrative Law Judges for a new hearing before a different, properly appointed ALJ. *Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020).

Removal Provisions Challenges

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-22; Employer's Reply Brief at 9-12. It generally argues the removal provisions for ALJs contained in the APA, 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 18-21; Employer's Reply Brief at 9-10. In addition, it relies on the 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), as well as the opinion of 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 17-21; Employer's Reply Brief at 10-12. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), the Board rejects Employer's arguments.

Timeliness of Claim

Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, Employer must show the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Employer relies on Dr. Hieronymus's opinion for its assertion that Claimant's claim was not timely filed. Employer's Brief at 22-29. Claimant testified Dr. Hieronymus

[12] This claim was assigned to the ALJ on February 26, 2018.

communicated to him that he was totally disabled due to pneumoconiosis "probably about the same time [he] quit" his coal mine job in 1986 and "about a year before [he] filed [his] state claim."[13] Hearing Tr. at 34. The ALJ credited Claimant's testimony[14] and found Dr. Hieronymus communicated his diagnosis to Claimant "between 1986 and 1987," and "no later than 1987." Decision and Order at 5. He also found Dr. Hieronymus "clearly made it before the prior, final denial of benefits in Claimant's state claim in 1989 and his federal claim in 1991." *Id*. Thus, he found "Dr. Hieronymus's prior medical determination of total disability due to pneumoconiosis . . . constitutes a misdiagnosis for purposes of triggering the statute of limitations for filing a subsequent claim." *Id*.

Employer argues the ALJ erred in finding Dr. Hieronymus's opinion constitutes a misdiagnosis because he inaccurately characterized the award of Claimant's state claim as a denial. Employer's Brief 22-24; Employer's Reply Brief at 2-3. It further asserts the ALJ erred in assuming that Claimant's first federal claim was filed after Dr. Hieronymus's opinion, that the doctor's opinion was evidence in that claim, and that the claim was denied on the merits as opposed to dismissed as abandoned. Employer's Brief at 22, 27-28; Employer's Reply Brief at 2-3. It contends there is no support for the ALJ's assumptions because the record in Claimant's prior federal claim was destroyed. It therefore asserts Dr. Hieronymus's opinion is sufficient to trigger the statute of limitations for filing a subsequent claim and the ALJ therefore improperly "continued to apply a presumption of timeliness." Employer's Brief 21.

The Director argues "Employer's reliance on the state award . . . fundamentally disregards" the importance of the prior denial in 1991 of Claimant's "federal black lung claim," which "followed Claimant's receipt of Dr. Hieronymus'[s] diagnosis" and established the doctor's opinion was "incorrect." Director's Brief at 16. He asserts the prior denial of Claimant's federal claim "was sufficient to apply the misdiagnosis rule to any diagnosis communicated to [Claimant] prior to 1991, regardless of the reason for denying the claim." *Id*. at 16 n.13.

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[13] Claimant testified Dr. Hieronymus first examined him while he worked for Employer and continued to treat him until the doctor died in 2009. Hearing Tr. at 33.

[14] As Employer does not challenge Claimant's testimony about the timeline of when Dr. Hieronymus communicated his opinion to Claimant, we affirm the ALJ's reliance on this testimony. *Skrack*, 6 BLR at 1-711; *see* Decision and Order at 4-6; Employer's Brief at 23-24 (explaining Claimant's "sworn testimony was more than sufficient to prove all necessary facts").

We agree with the Director's position that Dr. Hieronymus's opinion constitutes a misdiagnosis and thus does not trigger the statute of limitations.

As noted, whether a claim is filed within the statute of limitations hinges on whether and when a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a medical determination of total disability due to pneumoconiosis predating a prior denial of benefits is legally insufficient to trigger the statute of limitations for filing a subsequent claim, because the doctor's opinion must be deemed a misdiagnosis in view of the superseding denial of benefits. *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594 (6th Cir. 2013); *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483 (6th Cir. 2009). Here, the ALJ acted within his discretion in finding Dr. Hieronymus communicated his medical determination of total disability due to pneumoconiosis to Claimant "no later than 1987" based on Claimant's uncontested testimony. Decision and Order at 5. He also rationally found Dr. Hieronymus "clearly made" his opinion "before the prior, final denial of benefits" in Claimant's "federal claim in 1991." *Id*. As the Director points out, ALJ Rudolf L. Jansen denied Claimant's prior federal claim on the merits on March 4, 1991, because he failed to establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment.[15] Director's Brief at 16 (referencing Attachment A).

Additionally, as the pertinent inquiry is the timing of when the medical determination of total disability due to pneumoconiosis is communicated to the miner, there is no requirement that Dr. Hieronymus's diagnosis have been part of the record in Claimant's prior federal claim. *See Brigance*, 718 F.3d at 594 (the court explained that "[b]ecause the statute does not provide that the medical diagnosis communicated to the miner must be in the record and well-reasoned, it unambiguously does not impose such

[15] In its reply to the Director's arguments on timeliness, Employer does not object to the Board's use of ALJ Jansen's Decision and Order – Rejection of Claim dated March 4, 1991, attached to the Director's brief as Attachment A. Employer's Combined Reply Brief at 1-3. Although the Board does not accept new evidence, 20 C.F.R. §802.301, the attachment is a relevant official document, and we take official notice of it. *See* 29 C.F.R. §18.84; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-138 (1990). Further, because Claimant's prior federal claim was denied on the merits in 1991, we decline to address Employer's assertion that the misdiagnosis rule should apply only to a denial of a prior claim on the merits as opposed to a denial of a prior claim by reason of abandonment. Director's Brief at 15-16 (referencing Attachment A); Employer's Brief at 27-28.

requirements"). Thus, substantial evidence supports the ALJ's finding that Dr. Hieronymus's opinion is a misdiagnosis and insufficient to trigger the statute of limitations for filing Claimant's current subsequent claim. *Brigance*, 718 F.3d at 594; *Hatfield*, 556 F.3d at 483.

Further, although the ALJ at one point inaccurately characterized Claimant's state claim as a denial of benefits, we need not remand the case for this error as Employer has not explained how an accurate characterization of the state claim would have made a difference when determining the timeliness of Claimant's subsequent federal claim.[16] *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which he points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see* Director's Exhibits 9, 10; Employer's Brief at 23-24.

Therefore, to rebut the timeliness presumption, Employer needed to show that a medical determination of total disability due to pneumoconiosis was communicated to Claimant after the 1991 denial of his prior federal claim but more than three years before he filed his current federal claim, which it has not done. *See Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). As it is supported by substantial evidence, we affirm the ALJ's finding Employer failed to rebut the presumption that Claimant's subsequent claim was timely filed. *Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 299-300 (6th Cir. 2018); *Brigance*, 718 F.3d at 594; 20 C.F.R. §725.308(a); *see* Decision and Order at 6.

Due Process

Employer argues its due process rights have been violated because it did not have access to Claimant's initial claim file after the Federal Records Center destroyed it. Employer's Brief at 24-29, 38-39; Employer's Reply Brief at 2, 6-7. It maintains the DOL had the duty to preserve the record and its failure to do so barred a determination of whether Claimant established a change in an applicable condition of entitlement. Employer's Brief at 24-29; Employer's Reply at 2. Therefore, it asserts any liability for benefits must transfer to the Trust Fund. Employer's Brief at 24-29. We disagree.

In the absence of deliberate misconduct, "the mere failure to preserve evidence – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v.*

[16] The ALJ otherwise accurately observed that Claimant was awarded state benefits for only a *partial disability* due to pneumoconiosis, Decision and Order at 5, whereas the federal program, and the diagnosis necessary to trigger its statute of limitations, concerns whether a miner is *totally disabled* due to pneumoconiosis. 30 U.S.C. §932(f).

Oliver, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the DOL loses or destroys evidence from a miner's prior claim); *see also* Director's Brief at 20. Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). As the United States Court of Appeals for the Tenth Circuit explained in *Oliver*, Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

We also reject Employer's argument that it was unable to rebut the presumption of timeliness because the basis of the prior claim is unknown. Employer's Brief at 24-25; Employer Reply Brief at 2. As previously discussed, Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment. *See* 29 C.F.R. §18.84; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-138 (1990); Director's Brief at 16 (referencing Attachment A). Additionally, there is no indication Employer was prevented from developing evidence or obtaining testimony from Claimant regarding the timeliness of the claim.[17] As the ALJ found, Employer elicited testimony from Claimant but submitted no other evidence relevant to the timeliness of the claim. Decision and Order at 5-6.

We further reject Employer's argument that because the DOL, as custodian of the record, did not perform its duty to protect it, Employer was unable to adequately prepare its defense and, thus, should be dismissed as the responsible operator. Contrary to Employer's contention, the lack of access to the files of Claimant's previous claim did not deprive it of its ability to defend his current claim based on timeliness or the merits. Employer's Brief at 24-29; Employer's Reply Brief at 2. Furthermore, as explained above, as a result of the denial of Claimant's initial claim in 1991, any medical evidence from that claim that could have triggered the statute of limitations is a misdiagnosis. Additionally, the ALJ found the evidence submitted in the previous claim would not be probative of Claimant's current pulmonary condition. *See* Decision and Order at 7-8.

Therefore, Employer has failed to demonstrate any specific prejudice resulting from the destruction of Claimant's prior claim file in this case. As the Director points out, Employer was timely notified of Claimant's subsequent claim as well as the existence of

[17] Employer cross examined Claimant as to when Dr. Hieronymus communicated his opinion to Claimant. Hearing Tr. at 12, 34.

his prior claim, developed evidence, and participated in every stage of the adjudication. Director's Brief at 6. Thus, we reject Employer's assertion that its due process rights were violated and liability for benefits should transfer to the Trust Fund.

Employer next argues the ALJ prohibited discovery regarding the DOL's development of the preamble to the 2001 revised regulations, thus violating its due process rights. Employer's Brief at 38-39; Employer's Reply Brief at 6-7. We disagree.

At the June 7, 2018 hearing, Employer's counsel requested additional time post-hearing to obtain and submit Claimant's Veterans' Administration (VA) medical records and supplemental medical opinions addressing those records. Hearing Tr. at 7-8. The ALJ granted Employer's request, setting a deadline of August 7, 2018, and provided Claimant additional time to respond by September 7, 2018, with post-hearing briefs due on October 8, 2018. *Id.* at 8.

Next, on August 3, 2018, Employer served interrogatories and requests for admissions and documents on the Director regarding the deliberative process underlying the preamble to the 2001 revised regulations. Rebel Coal's Interrogatories, Requests for Admissions and Documents Regarding the Preamble (Aug. 3, 2018). The Director did not respond to Employer's request, *see* Director's Response to Employer's Brief to ALJ at 2, but Employer submitted neither a motion to compel discovery nor a motion to admit such evidence post-hearing in accordance with 20 C.F.R. §725.458. It only requested in its closing brief to the ALJ that the admissions be deemed admitted and, if not, that the ALJ reopen the record for the Director to respond to its discovery request. Employer's Brief to the ALJ at 3.

As the Directly correctly points out, the ALJ left the record open only for the submission of evidence concerning Claimant's VA records and supplemental medical opinions addressing these records, not discovery regarding the preamble. Hearing Tr. at 7-8; Director's Brief at 17 n.14. As Employer does not explain what efforts it made to timely obtain that information, identify any determinations the ALJ may have made in response, or address how its due process was violated in that context, its argument is inadequately briefed and we are unable to evaluate it. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; Employer's Brief at 38-39; Employer's Reply Brief at 6-7; Director's Brief at 17 n.14.

Further, Employer had the opportunity to submit evidence challenging the science that the DOL relied on in the preamble when promulgating its revised regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). It submitted such evidence in the form of Drs. Rosenberg's and

Jarboe's opinions. Director's Exhibit 19; Employer's Exhibits 1, 5, 6. The ALJ considered their opinions and permissibly found them unpersuasive, as discussed more fully below. *See 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 14-24.

Because Employer was afforded and took advantage of the opportunity to submit evidence challenging the scientific findings contained in the preamble and review the published studies themselves, it has failed to demonstrate how it was deprived of due process. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. We therefore find Employer's due process arguments unpersuasive and accordingly reject its assertion that liability for benefits should transfer to the Trust Fund.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, 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 claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See 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, 1-2 (1986) (en banc).

Legal Pneumoconiosis

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[18] Employer's Brief at 29-40; Employer's Reply Brief at 3-7. We disagree.

To establish legal pneumoconiosis, Claimant must prove he has 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). The Sixth Circuit has held a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. 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

[18] The ALJ found Claimant failed to establish the existence of clinical pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(1), 718.202(a); Decision and Order at 10-11.

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. Baker, Rosenberg, and Jarboe. Dr. Baker opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure and smoking. Director's Exhibit 13. In contrast, Dr. Rosenberg opined Claimant does not have legal pneumoconiosis but has COPD, as well as emphysema caused solely by smoking. Director's Exhibit 19 at 7, 10; Employer's Exhibit 6 at 4-10. Similarly, Dr. Jarboe opined Claimant does not have legal pneumoconiosis but chronic bronchitis and moderate obstructive airways disease caused by smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 1 at 5, 5 at 2-3. The ALJ found Dr. Baker's opinion reasoned and documented and entitled to probative weight. Decision and Order at 14. He found Drs. Rosenberg's and Jarboe's opinions poorly reasoned and entitled to little probative weight. *Id.* at 17, 20. Thus he found Claimant established the existence of legal pneumoconiosis based on Dr. Baker's opinion.

Employer argues the ALJ improperly shifted the burden of proof by focusing on the reasons why its experts' opinions were neither well-reasoned nor well-documented to affirmatively disprove the existence of pneumoconiosis, instead of establishing why Claimant's expert's opinion was sufficient to establish the existence of the disease. Employer's Brief at 3, 29-30. We disagree.

Contrary to Employer's contentions, the ALJ correctly stated Claimant bears the burden of establishing legal pneumoconiosis and considered whether Dr. Baker's opinion is sufficient to establish the disease. *See* 20 C.F.R. §718.201(b); Decision and Order at 8, 13-14. Dr. Baker examined Claimant and considered his coal mine employment and smoking histories, his physical examination findings, and objective test results. Director's Exhibit 13. He opined Claimant's "COPD, resting arterial hypoxemia and bronchitis are due to a combination of his cigarette smoking history and coal mine dust exposure" based on medical literature stating that "when both exposures are present, the effects on the lungs may be either synergistic or additive."[19] Director's Exhibit 13.

[19] We also reject Employer's contentions that Dr. Baker's opinion is insufficiently reasoned due to his reliance on "unexplained 'signs and symptoms'" and that the ALJ erred in crediting his opinion when the doctor failed to review the full record. Employer's Brief at 30-33. The ALJ correctly noted Dr. Baker relied on Claimant's arterial blood gas studies, qualifying pulmonary function studies, and coal mine employment and smoking histories, and not just on the "signs and symptoms" he observed during Claimant's physical examination. *See* Decision and Order at 14; Director's Exhibit 13. Moreover, an ALJ is

To satisfy the definition of legal pneumoconiosis, a physician need only credibly diagnose the disease or impairment as "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §718.201(b). The ALJ permissibly found Dr. Baker's opinion reasoned and documented and thus "sufficient to satisfy Claimant's burden in showing that his 'coal mine employment contributed at least in part' to his chronic pulmonary disease." *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Crisp*, 866 F.2d at 185; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusions); Decision and Order at 14. Therefore, we see no error in the ALJ's determination that Dr. Baker's opinion is sufficient to establish the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (a physician need not specifically apportion the extent to which various causal factors contribute to a respiratory or pulmonary impairment); Decision and Order at 14; Director's Exhibit 13; Employer's Brief at 30-33.

Employer further argues the ALJ erred in weighing Drs. Rosenberg's and Jarboe's opinions, generally asserting he improperly relied on the preamble to the revised 2001 regulations to discredit their opinions. Employer's Brief at 33-40; Employer's Reply Brief at 3-7.

The preamble sets forth the scientific evidence the DOL found credible in promulgating the regulations. 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011). The ALJ therefore permissibly considered the medical opinions in conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Sterling*, 762 F.3d at 491; *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-03; Employer's Brief at 25-28, 36. Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment, *Maddaleni*, 14 BLR at 139, and does not constitute evidence from outside of the record requiring the ALJ to give notice and an opportunity to respond. Employer's Brief at 39 n.9; *see generally Adams*, 694 F.3d at 801-03.

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not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984).

Initially, Drs. Rosenberg and Jarboe supported their opinions by citing studies indicating smoking causes greater reductions in the FEV_1 on pulmonary function testing per year than coal mine dust exposure. Director's Exhibit 19 at 4-5; Employer's Exhibits 1 at 6-7, 6 at 5-6. They eliminated coal mine dust exposure as a source of Claimant's COPD, in part, because they found a reduction in his FEV_1/FVC ratio on pulmonary function testing which, in their view, was inconsistent with obstruction due to coal mine dust exposure. *Id*. The ALJ permissibly found their reasoning conflicts with the medical science that the DOL accepts, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV_1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; Decision and Order at 20; Employer's Brief at 36; Employer's Reply Brief at 4-6.

Next, Drs. Rosenberg and Jarboe excluded legal pneumoconiosis based, in part, on the partial reversibility of Claimant's obstructive impairment in response to bronchodilators on pulmonary function testing. Employer's Exhibits 1 at 7, 6 at 9-10. The ALJ noted that "some reversibility of pulmonary function test values post-bronchodilator does not preclude the presence of a chronic lung disease due to coal dust exposure." Decision and Order at 16, 18-19. Thus he permissibly found they failed to adequately explain why this factor necessarily eliminated coal mine dust exposure as a contributing cause of the impairment that remained after bronchodilators were administered. *See Young*, 947 F.3d at 405-09; *Barrett*, 478 F.3d at 356; Decision and Order at 16, 18-19; Employer's Brief at 36.

Drs. Rosenberg and Jarboe also opined Claimant's pulmonary obstruction is due to cigarette smoking because cigarette smoking is "more destructive" than coal mine dust exposure and therefore explains the dramatic reduction of the FEV_1/FVC ratio. Director's Exhibit 19 at 5-7; Employer's Exhibit 1 at 6-8. The ALJ permissibly discredited their opinions because neither doctor adequately addressed why Claimant's coal mine dust exposure was not an additive factor in his obstructive impairment or could not have contributed to or aggravated his impairment along with smoking. 65 Fed. Reg. at 79,941 (the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); *see Barrett*, 478 F.3d at 356; Decision and Order at 16, 19; Employer's Brief at 36.

Further, Drs. Rosenberg and Jarboe opined Claimant's chronic bronchitis is unrelated to his coal mine dust exposure because any such bronchitis would have dissipated within months after he left his coal mine employment. Director's Exhibit 19 at 10; Employer's Exhibits 1 at 9, 6 at 10. The ALJ permissibly found both physicians expressed views in conflict with the regulations, which recognize a miner's coal mine dust exposure may have a latent effect on his respiratory condition. 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's

decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); (same); 65 Fed. Reg. at 79,971 ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); Decision and Order at 17; Employer's Brief at 33-34, 38.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Banks*, 690 F.3d at 487-88. Employer's argument that the ALJ erred in finding Dr. Baker's opinion reasoned and documented while finding Drs. Rosenberg's and Jarboe's opinions not well-reasoned or documented is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. As substantial evidence supports it, we affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 597-98; Decision and Order at 20. Finally, because Employer does not otherwise challenge the ALJ's finding Claimant's totally disabling impairment is due to pneumoconiosis, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge