**U.S. Department of Labor**

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

BRB No. 19-0217 BLA

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| ROBERT CUNNINGHAM | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| PROSPECT MINING & DEVELOPMENT, INCORPORATED | ) | |
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| and | ) | |
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| AMERICAN MINING INSURANCE COMPANY | ) | DATE ISSUED: 05/08/2020 |
| | ) | |
| 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 Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

James E. Fleenor, Jr. (Fleenor & Green LLP), Tuscaloosa, Alabama, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05722) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on April 29, 2015.[1]

The administrative law judge credited claimant with 35.58 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked authority to decide the case because he had not been appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also challenges the validity of the administrative law judge's appointment in light of the removal provisions governing administrative law judges. On the merits, employer argues the administrative law judge erred in finding claimant established total disability and invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The

[1] Claimant filed two prior claims, both of which were denied. Director's Exhibits 1, 2. The district director denied his most recent prior claim, filed on August 24, 2006, because claimant failed to establish any element of entitlement. Director's Exhibit 2.

[2] Section 411(c)(4) 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 coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the administrative law judge had authority to decide the case.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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, 361-62 (1965).

**Appointments Clause**

Employer alleges the administrative law judge did not have the authority to hear and decide this case, noting the United States Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission (SEC) administrative law judges were not appointed in accordance with the Appointments Clause[5] of the U.S. Constitution.[6] Employer's Brief at 9-17. Employer argues the administrative law judge in

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 35.58 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[4] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as claimant was last employed in the coal mining industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 8.

[5] 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.

[6] Employer raised this issue before the administrative law judge in a Motion to Remand. The administrative law judge denied employer's motion, finding that the Secretary of Labor's ratification of his appointment on December 21, 2017, foreclosed

this case was similarly appointed improperly. Employer acknowledges the Secretary of Labor ratified the prior appointment of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[7] but maintains that action was insufficient as there was no prior valid appointment to ratify. *Id*. at 13-14. Employer further alleges no evidence demonstrates the Secretary engaged in a "genuine . . . thoughtful consideration of potential candidates for these positions" or "interviewed them, or administered an oath or took any other action that suggests that these appointments were his own." *Id*. at 16.

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

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4, *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

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employer's argument. *Cunningham v. Proctor Mining & Dev., Inc*., 2017-BLA-05722 (Sept. 25, 2018) (unpub. Order).

[7] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Clement J. Kennington.

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). Thus, 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 he ratified 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 hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105.

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. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Kennington and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Kennington. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Kennington "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, employer has not overcome the presumption of regularity.[8] *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.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the administrative law judge's appointment.[9] *See Edmond v. United States*,

[8] While employer notes correctly that the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 16, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

[9] We also reject employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 15-16. We agree with the Director's assertion that employer's argument has no merit because the Executive Order does not state the prior appointment procedures were impermissible or

520 U.S. 651, 654-66 (1997) (appointment valid where the 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 of appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was sufficient).

Employer next argues that *Lucia* precludes the administrative law judge from hearing this case, notwithstanding the Secretary's ratification, because the administrative law judge took significant action while not properly appointed. Employer's Brief at 13-14. We disagree.

Employer asserts the administrative law judge's decision must be vacated because he was not properly appointed when he issued a Notice of Hearing, "ruled on a motion relating to the timing of the hearing, and accepted other motions relating to discovery and evidence." *Id*. at 13. Employer does not explain why the administrative law judge's actions entitle it to have the case reheard by a different administrative law judge pursuant to *Lucia*.

The Supreme Court did not order reassignment to a new adjudicator in *Lucia* simply because the administrative law judge was improperly appointed during an early phase of the proceedings. Reassignment was necessary because the administrative law judge, while improperly appointed, "already both heard Lucia's case and issued an initial decision on the merits" and thus could not "be expected to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S.Ct. at 2055. Accordingly, pre-ratification actions "not based on the merits of the case" do not require remand as they "would not be expected to color the administrative law judge's consideration of the case" and therefore do not "taint the proceedings" with an Appointments Clause violation requiring remand. *Noble v. B & W Res., Inc.*, BLR , BRB No. 18-0533 BLA, slip op. at 4 n.5 (Jan. 15, 2020).

The administrative law judge issued two orders before the ratification of his appointment, neither of which requires remand under *Lucia*. On May 23, 2017, he issued a Notice of Hearing setting deadlines for the parties to exchange evidence and submit briefs, as well as scheduling the hearing date. On September 18, 2017, he issued an Order granting employer's unopposed motion to reschedule the hearing. Neither action involves consideration of the merits of the case. The Notice of Hearing reiterates statutory and regulatory requirements governing hearing procedures and the later Order merely

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violated the Appointments Clause. Director's Brief at 5 n.4. The Order 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).

rescheduled the hearing at employer's request. *Noble*, BRB No. 18-0533 BLA, slip op. at 4.

Thus, unlike *Lucia*, in which the judge presided over a hearing and issued a decision on the merits while not being properly appointed, the orders the administrative law judge issued in this case did not affect his ability to consider the merits after his ratification "as though he had not adjudicated [the claim] before." *Lucia*, 138 S.Ct. at 2055. Because the administrative law judge took no action[10] that would "taint the adjudication with an Appointments Clause violation" requiring remand, we decline to remand this case to the Office of Administrative Law Judges. *Noble*, BRB No. 18-0533 BLA, slip op. at 4; *see also Lucia*, 138 S.Ct. at 2055.

**Removal Provisions**

Employer argues the administrative law judge lacked authority to adjudicate this case because "he is still subject to the removal provisions of the Civil Service" and thus his consideration of this case violates "the separation of powers doctrine." Employer's Brief at 10-13. Employer has failed to adequately brief this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other 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*. Further, to "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).

Employer states that the administrative law judge's appointment was improper in view of the removal provisions applicable to DOL administrative law judges contained in the Administrative Procedure Act, 5 U.S.C. §7521. Employer's Brief at 11-13. Employer

[10] Employer does not explain why it believes the administrative law judge's receipt of other motions that he did not rule upon until after the Secretary ratified his appointment constituted action that would taint the adjudication with an Appointments Clause violation. Employer's Brief at 10. Therefore we have not addressed the administrative law judge's receipt of those motions before the ratification of his appointment.

has not specified how those provisions violate the separation of powers doctrine or explained how such a holding undermines the administrative law judge's authority to preside over this case.[11] *Id*. Thus, we decline to address the issue. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

**Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption**

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the Board should hold this appeal in abeyance because the Affordable Care Act (ACA), Pub. L. No. 111-148 (2010), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 17-18. Employer cites the district court's rationale in *Texas* that the ACA requirement that individuals maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, 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). 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).[12] We, therefore, reject employer's argument that the Section

[11] Employer cites the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and Justice Breyer's concurrence and dissent in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Employer's Brief 11-13. It notes that in *Free Enterprise*, the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus resulted in a "constitutionally impermissible diffusion of accountability." *Id*. at 12-13. Contrary to employer's argument, the Supreme Court in *Free Enterprise* stated that its holding "does not address that subset of independent agency employees who serve as administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10. Moreover, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

[12] Further, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a

411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

## Entitlement to Benefits

### 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. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh the relevant evidence supporting total disability against the 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). Employer contends the administrative law judge erred in finding claimant established total disability based on the medical opinions.[13] Decision and Order at 13. We disagree.

Total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents him from performing his usual coal mine work. 20 C.F.R. §§718.204(b)(1)(i), 718.204(b)(2)(iv). After finding that claimant's usual coal mine work as a "working supervisor" required "at least a moderate amount of physical labor,"[14]

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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).

[13] The administrative law judge found claimant did not establish total disability through pulmonary function studies or blood gas studies, or with evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 22-23.

[14] The administrative law judge found that claimant's job as a working supervisor required at least moderate physical labor because claimant had to walk several miles a day underground and intermittently perform more strenuous activities such as hanging curtains and rock dusting. Decision and Order at 19; Director's Exhibit 6; Hearing Tr. at 17-18. As this finding is unchallenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

Decision and Order at 19, the administrative law judge considered the medical opinions of Drs. Barney, Connolly, and Rosenberg.[15]

Drs. Barney[16] and Connolly[17] opined that claimant's pulmonary condition prevents him from performing his usual coal mine work, Director's Exhibits 17, 22, 23; Claimant's Exhibit 3, while Dr. Rosenberg[18] opined that claimant is not totally disabled. Director's

[15] The administrative law judge also considered Dr. Goldstein's opinion employer submitted but gave it "little weight" because it was not well-reasoned or well documented. Decision and Order at 36-37. We affirm his credibility determination as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[16] In an initial report dated October 6, 2015, Dr. Barney diagnosed moderate obstruction based on a pulmonary function study and resting hypoxemia based on a blood gas study, and opined that claimant is totally disabled because of his "abnormal" pulmonary function study. Director's Exhibit 17 at 3-4. In a November 6, 2015 supplemental report, Dr. Barney reiterated that claimant has moderate obstruction and opined that he is short of breath "with moderate activities and is limited by his pulmonary impairment alone." Director's Exhibit 22.

[17] In an initial report dated June 9, 2015, Dr. Connolly diagnosed mild obstruction, moderate restriction, and resting hypoxemia but did not address whether claimant is disabled. Director's Exhibit 23 at 3-4. In a sworn statement dated December 16, 2015, he opined that a respiratory impairment, standing alone, prevents claimant from performing his last coal mine job. *Id*. at 26. In a supplemental report dated December 21, 2017, Dr. Connolly reiterated that claimant has mild obstruction, moderate restriction, and resting hypoxemia. Claimant's Exhibit 3 at 1. He explained that because of his respiratory impairment, claimant would be unable to walk the several miles a day his last coal mine job required. *Id*. In Dr. Connolly's view, if claimant attempted to exert himself to walk that far, he would "become breathless in a short amount of time, become fatigued, experience rapid heart rate and be unable to continue." *Id.*

[18] In an initial report dated January 1, 2016, and a supplemental report dated February 17, 2016, Dr. Rosenberg diagnosed claimant with restriction, noted that his blood oxygenation with exercise is normal, and concluded that he is able to perform his usual coal mine employment because his pulmonary function studies and blood gas studies are above qualifying levels. Director's Exhibits 24 at 2-3; 25 at 2-3. Dr. Rosenberg specified that claimant's pulmonary function studies did not reveal obstruction. *Id*. In a later supplemental report dated April 18, 2018, Dr. Rosenberg noted that a March 24, 2016 pulmonary function study showed "new evidence of airway obstruction," and he diagnosed claimant with mild obstruction and restriction. Employer's Exhibit 4 at 5. However, Dr.

Exhibit 24; Employer's Exhibit 4. The administrative law judge found Dr. Barney adequately explained his opinion in his supplemental report, found it reasoned and documented, and accorded it "some" weight. Decision and Order at 35. He found Dr. Connolly best explained his opinion in his supplemental report, in which he set forth how claimant's respiratory impairment would prevent claimant from walking the several miles a day his job required. Finding Dr. Connolly's supplemental report well-reasoned and documented, he accorded it "significant weight." Decision and Order at 36.

In contrast, the administrative law judge gave Dr. Rosenberg's opinion that claimant is not disabled less weight than Dr. Connolly's opinion. He found Dr. Rosenberg's opinion "more general in nature" because he focused on whether claimant's pulmonary function studies and blood gas studies were qualifying,[19] whereas Dr. Connolly's opinion was "much more tailored" to claimant's respiratory ability to perform the specific exertional requirements of his usual coal mine work. Decision and Order at 37. Affording the most weight to Dr. Connolly's opinion, the administrative law judge found the weight of the medical opinions establish total disability.

Employer contends the administrative law judge erred in relying on Dr. Connolly's opinion because it does not clearly assert total disability and is speculative. Employer's Brief at 20-21. We reject this contention. As the administrative law judge summarized, Dr. Connolly specified that claimant has a respiratory impairment which, standing alone, prevents him from performing his usual coal mine employment. Decision and Order at 27; Director's Exhibit 23 at 26. Further, as the administrative law judge found, Dr. Connolly relied on a pulmonary function study that showed values consistent with the other, valid studies of record to support his conclusion that claimant is totally disabled. Decision and Order at 36-37; Director's Exhibit 23; Claimant's Exhibit 3. Substantial evidence supports the administrative law judge's determination that Dr. Connolly provided a documented and reasoned opinion supporting total disability. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently

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Rosenberg concluded that claimant is not totally disabled because the pulmonary function study was "well above qualifying levels for both his FEV1 and FVC." *Id*. at 4.

[19] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

documented and reasoned is one of credibility for the fact finder."). We therefore reject employer's contention that he erred in relying upon it.

Employer further argues that the administrative law judge did not adequately explain why he credited Dr. Connolly's opinion over Dr. Rosenberg's. Employer's Brief at 19, 22. We disagree. The administrative law judge permissibly accorded greater weight to Dr. Connolly's opinion because he found it better addressed claimant's respiratory ability to meet the exertional requirements of his job as a working supervisor. *See Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460. Contrary to employer's contention, substantial evidence supports the administrative law judge's finding that Dr. Rosenberg focused more on whether claimant's test results were qualifying than on whether his obstructive and restrictive impairments would prevent him from performing the physical tasks his job as a working supervisor required. Director's Exhibit 23 at 3, 6; Employer's Exhibit 4 at 4.

The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that the weight of the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985).

We further affirm the administrative law judge's conclusion that the evidence, weighed together, establishes total disability at 20 C.F.R. §718.204(b)(2),[20] *see Shedlock*, 9 BLR at 1-198, and his determination that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 38.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[21] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

[20] In light of our affirmance of the administrative law judge's finding that the new evidence establishes total disability, we also affirm his determination that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[21] 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).

in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Oak Grove Res., LLC v. Director, OWCP* [*Ferguson*], 920 F.3d 1283, 1287-88 (11th Cir. 2019). The administrative law judge found employer failed to rebut the presumption by either method.

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), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the medical opinions of Drs. Goldstein and Rosenberg. Dr. Goldstein opined that claimant does not have legal pneumoconiosis but a restrictive impairment due solely to his obesity, and chronic obstructive pulmonary disease (COPD) of "unclear" etiology. Employer's Exhibit 3 at 9. Dr. Goldstein noted that medical literature shows individuals with asthma "may develop COPD" if the asthma is not properly treated or is treated late in its course. *Id*. Dr. Rosenberg concluded that claimant has an "extrinsic" restrictive impairment caused by his obesity and an obstructive impairment consistent with asthma. Employer's Exhibit 4 at 4-5. He stated "there are notations in the [treatment record] that [claimant] has asthma" and opined that the asthma is not related to coal mine dust exposure. *Id*. at 5.

The administrative law judge noted that to support his opinion that claimant's restrictive impairment is due to his obesity Dr. Goldstein relied, in part, on his observation that claimant's shortness of breath worsened after he left coal mining and then gained weight. He discounted Dr. Goldstein's opinion because the doctor did not take into account that claimant "reported to Dr. Goldstein that he was short of breath in the 1990s, well before he ceased mining work in 2014." Decision and Order at 45. Employer does not challenge that credibility determination. We therefore affirm it. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Regarding Dr. Rosenberg's opinion, the administrative law judge found that although some treatment records contained notations of a history of asthma, claimant consistently denied a personal history of asthma.[22] Because the administrative law judge found only "some support" for the conclusion claimant may have asthma, he found Dr. Rosenberg's opinion "somewhat speculative" and therefore insufficient to establish by a preponderance of the evidence that claimant does not have legal pneumoconiosis. Decision

[22] The administrative law judge noted that claimant denied a history of asthma when he was examined by Drs. Barney and Goldstein. Decision and Order at 47 n.101; Director's Exhibit 17; Employer's Exhibit 3.

and Order at 47. Additionally, he found that even assuming claimant has asthma, Dr. Rosenberg did not address whether the asthma may be significantly related to claimant's coal mine dust exposure. Decision and Order at 52.

Employer argues the administrative law judge erred in considering claimant's statements denying a history of asthma when he weighed Dr. Rosenberg's opinion. Employer's Brief at 23. We disagree. While an administrative law judge may not rely solely on lay testimony, he may consider lay testimony along with other evidence when evaluating the credibility of a medical opinion. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Here, the administrative law judge did not err in considering claimant's denial of a personal history of asthma, in conjunction with treatment record medical history notations providing only "some support"[23] for the conclusion claimant may have asthma, to find Dr. Rosenberg's opinion "somewhat speculative." Decision and Order at 47; *see Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Fields*, 10 BLR at 1-22. As substantial evidence supports the administrative law judge's credibility determination, we affirm his decision to discredit Dr. Rosenberg's opinion regarding legal pneumoconiosis.[24] 20 C.F.R. §718.305(d)(1)(i)(A). Thus we affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis and therefore did not rebut the presumption by establishing claimant does not have pneumoconiosis.[25] 20 C.F.R. §718.305(d)(2)(i); *see Ferguson*, 920 F.3d at 1287-88; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

[23] The administrative law judge considered approximately 400 pages of treatment records and found a few notations of a history of asthma. Decision and Order at 47 n.101 (citing Employer's Exhibits 5 at 9, 40; 6 at 1, 3). A review of these records does not reveal diagnoses of or treatment for asthma but rather notations of asthma in the history section of some records. *See, e.g.*, Employer's Exhibits 5 at 40, 99; 6 at 4, 9, 64. Substantial evidence supports the administrative law judge's determination that the treatment records provide at best "some support" for the conclusion claimant may have asthma.

[24] Because the administrative law judge gave a valid reason for rejecting Dr. Rosenberg's opinion, we need not address employer's remaining arguments regarding why his opinion should have been found credible regarding legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[25] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address its argument that the administrative law judge erred in finding that

The administrative law judge next considered 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 permissibly discredited the disability causation opinions of Drs. Goldstein and Rosenberg because neither doctor diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove claimant has the disease. *See Ferguson*, 920 F.3d at 1288-89; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 51-52. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

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

employer also failed to disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 22-23.