U.S. Department of Labor

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

BRB No. 20-0006 BLA

J. SHELTON BOLLING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIGHLAND ENTERPRISES, INCORPORATED	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 11/30/2020
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 Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

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

Cynthia Liao (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 and its Carrier (Employer) appeal Administrative Law Judge Jonathan C. Calianos's Decision and Order Awarding Benefits (2018-BLA-05580) 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 miner's subsequent claim[1] filed on October 22, 2015.

The administrative law judge credited Claimant[2] with 18.72 years of coal mine employment and found he established 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[3] and invoked the presumption of total disability

[1] Claimant filed three prior claims but withdrew his third claim. Director's Exhibit 3. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). The district director denied his second claim, filed on December 12, 1996, as abandoned. Director's Exhibit 1 at 249-50.

[2] On September 26, 2019, Carrier informed the Department of Labor via email that Claimant died on August 19, 2019. Director's Exhibit 49.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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). Because Claimant withdrew his third claim, the applicable conditions of entitlement are determined by reference to the denial of his second claim. 20 C.F.R. §725.306(b). The district director denied Claimant's second claim as abandoned. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.309(c). Consequently, Claimant must demonstrate at least one element of entitlement to obtain review of his subsequent claim. *White*, 23 BLR at 1-3.

due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also asserts the provisions in the Administrative Procedure Act (APA) for removing administrative law judges, 5 U.S.C. §7521, rendered his appointment unconstitutional. In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, and in the alternative, contends the administrative law judge improperly invoked the presumption based on erroneous findings that Claimant has at least fifteen years of qualifying coal mine employment and was totally disabled. Employer further argues he erred in finding it did not rebut the presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the administrative law judge had the authority to decide the case, that the Section 411(c)(4) presumption is constitutionally valid, and that he properly found Claimant established that his surface coal mine employment was substantially similar to underground coal mine employment. Employer filed reply briefs, reiterating its arguments.

The Benefits Review 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

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

[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.

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 Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 13-16, 18.[8] Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[9] Employer maintains the ratification was insufficient to cure the constitutional defect in the administrative law

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Decision and Order at 6.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States 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. Comm'r*, 501 U.S. 868 (1991)).

[8] Employer raised this issue before the administrative law judge in a Motion to Cancel Hearing and Reassignment of Claim. *See* July 20, 2018 Order Denying Motion at 1. The administrative law judge denied Employer's motion as he concluded he did not have jurisdiction to consider the question. *Id.* at 1-2.

[9] 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 Calianos.

judge's prior appointment.[10] *Id*. at 14-16; Employer's Reply Brief to the Director's Response at 2-3. We reject Employer's argument, as the Secretary's ratification was a valid exercise of his authority, bringing the administrative law judge's appointment into compliance with the Appointments Clause.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). 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. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *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). 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 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, 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 administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Calianos and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Calianos. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Calianos "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified Judge Calianos's appointment. Employer's Brief at 16. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly

[10] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

ratified the administrative law judge's appointment.[11] *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 592, 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).[12]

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting they violate the separation of powers doctrine. Employer's Brief at 16-18; Employer's Reply Brief to the Director's Response at 3. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, its 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 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

[11] While Employer notes correctly that the Secretary's ratification letter was signed by an "autopen," Employer's Brief at 15, 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").

[12] 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. Employer's Brief at 17-18. The Executive Order does not state 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). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Calianos's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the administrative law judge's appointment into compliance with the Appointments Clause.

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 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 argument the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Employer refers to the removal provisions for administrative law judges contained in the APA and cites the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer's Brief at 16-18. But Employer has not explained how it undermines the administrative law judge's authority to hear and decide this case.[13] We therefore agree with the Director's position that Employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 5. Thus we decline to address this issue. *Cox*, 791 F.2d at 446; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

[13] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 16-17; Employer's Reply Brief to the Director's Response at 5-8. In *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director observes, the Supreme Court expressly stated its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 5. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Justice Breyer commented in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members." *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). Even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the majority in *Lucia*.

Constitutionality of 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 Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 19. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*. *Id.*; Employer's Reply Brief to the Director's Response at 10.

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 Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the ACA amendments to the 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). Further, 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*, *Stacy*, 671 F.3d at 383 n.2, 391; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Section 411(c)(4) Presumption: Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). Employer asserts the administrative law judge erred in crediting Claimant with 18.72 years of qualifying coal mine employment. Employer's Brief at 19-22; Decision and Order at 3, 5. We disagree.

Length of Coal Mine Employment

Claimant testified at the hearing in this claim that he worked in coal mine employment between 1947 and 1980 for "about eighteen years," and Employer's counsel conceded at that hearing that there was nothing in the record to refute such a finding. November 15, 2018 Hearing Transcript at 14, 31; Decision and Order at 3. Moreover, in its closing argument to the administrative law judge, Employer included a proposed finding of "18.72 years in the coal mining industry . . . ." Employer's Closing Argument at 19. Thus, before the administrative law judge, Employer agreed Claimant established 18.72 years of coal mine employment. A party is bound by its stipulations and concessions. *See Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985). Based on Employer's concession before the administrative law judge, we affirm the administrative law judge's finding of 18.72 years of coal mine employment.

Substantially Similar Surface Coal Mine Employment

Employer argues the administrative law judge erred in finding Claimant established his surface coal mine employment was substantially similar to underground coal mine employment because Claimant's testimony can be interpreted to suggest he was not exposed to coal mine dust every day. Employer's Brief at 22-23. We disagree.

"The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the Claimant demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). As the administrative law judge explained, Claimant testified he worked in the mines drilling, loading, and uncovering coal, and the dust conditions in his surface coal mine employment were "bad" because there was no use of water to keep the dust levels down. Decision and Order at 4; November 15, 2018 Hearing Transcript at 15, 18, 26; *see also* June 19, 1986 Hearing Transcript at 8. He also testified he sometimes looked "pretty black" and was always "real dirty," and sometimes his clothes had to be washed twice to get them clean. Decision and Order at 4; November 15, 2018 Hearing Transcript at 18. The administrative law judge permissibly relied on Claimant's credible, uncontested testimony detailing his working conditions to find Claimant was regularly exposed to coal mine dust. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1343-44 n.17 (10th Cir. 2014); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Decision and Order at 4-5. As it is supported by substantial evidence, we affirm the administrative law judge's finding that

Claimant established at least fifteen years of substantially similar surface coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful 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 pneumoconiosis and 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 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).

Based on the parties' stipulations, the administrative law judge concluded the pulmonary function studies were non-qualifying,[14] and that the blood gas studies established total disability.[15] 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 7; Administrative Law Judge Exhibit 8. The administrative law judge next considered the medical opinions of Drs. Silman, Green, Jarboe, and Fino. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8-13. Drs. Silman and Green opined Claimant was totally disabled based upon the abnormalities seen on blood gas testing. Director's Exhibits 15, 21, 22; Claimant's Exhibits 1, 2. Dr. Jarboe initially opined Claimant was not totally disabled based upon the abnormalities seen on the blood gas testing that he conducted, but subsequently opined other blood gas studies met the criteria for establishing total disability. Employer's Exhibits 7 at 4; 14 at 5. Dr. Fino opined Claimant both was and was not totally disabled based upon the blood gas studies' abnormalities. Director's Exhibit 19 at 8; Employer's Exhibits 9 at 1; 11 at 15, 22, 27; 13 at 1. Concluding the opinions of Drs. Silman and Green were more credible, the administrative law judge found the blood gas studies and medical opinions established Claimant had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2).

[14] 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).

[15] The administrative law judge found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) because there was no evidence in the record of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8 n.8.

Employer argues the administrative law judge failed to resolve a conflict in the evidence regarding the validity of the qualifying December 18, 2015 blood gas study,[16] and this error affected his weighing of the medical opinions. Employer's Brief at 23. We disagree.

The administrative law judge correctly noted the parties stipulated the arterial blood gas studies establish total disability. Decision and Order at 7; Administrative Law Judge's Exhibit 8. Employer remains bound by its stipulation. *See Richardson*, 94 F.3d at 167; *Burris*, 732 F.3d at 730. Based on Employer's concession before the administrative law judge, we affirm the administrative law judge's finding that Claimant established he had a totally disabling respiratory or pulmonary impairment based on the blood gas studies and medical opinions. 20 C.F.R. §718.204(b)(2). We also affirm his determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305(b)(1), 725.309; *see E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015).

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,[17] 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 found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

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

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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). Employer relies on the opinions of Drs. Fino and Jarboe. Dr. Fino opined that Claimant had a carbon dioxide abnormality seen on blood gas testing due to muscle wasting and weight loss caused by cancer and the malnutrition that accompanied his cancer and indicated that if Claimant's impairment were related to coal mine dust exposure, it would have manifested earlier. Employer's Exhibit 11 at 8-9, 19-22. Dr. Jarboe attributed Claimant's variable blood gas studies to chronic and repeated aspiration, reactive airway disease, and muscle dysfunction (including his respiratory muscles associated with chronic illness due to side effects of cancer treatment) and age. Employer's Exhibit 7 at 3-4. He further indicated Claimant's chronic bronchitis was unrelated to pneumoconiosis because it would have resolved with the cessation of exposure to coal mine dust. Employer's Exhibit 14 at 5-6.

Employer argues the administrative law judge erred in discrediting the opinions of Drs. Fino and Jarboe. Employer's Brief at 25-29. We disagree. The administrative law judge permissibly found their reasoning inconsistent with the regulations' acknowledgment that pneumoconiosis can be a "latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure."[18] *See* 20 C.F.R. §718.201(c); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); 65 Fed. Reg. 79,920, 79,971 (December 20, 2000); Decision and Order at 20-21; Director's Exhibit 19 at 7; Employer's Exhibit 7 at 4. Moreover, the administrative law judge also permissibly discredited their opinions because they did not adequately explain why Claimant's coal mine dust exposure did not significantly contribute to or substantially aggravate his impairment, along with the other diagnosed conditions. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order at 20; Director's Exhibit 19; Employer's Exhibits 7, 9, 11, 13, 14.

Thus we affirm the administrative law judge's determination that Employer did not disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.

[18] Dr. Fino reasoned Claimant did not have legal pneumoconiosis because his 1983 and 2005 blood gas studies would not have been normal had coal mine dust exposure caused his respiratory impairment. Director's Exhibit 19 at 7. Dr. Jarboe diagnosed Claimant with chronic bronchitis unrelated to coal mine dust exposure because of his lack of coal mine dust exposure in more than thirty years. Employer's Exhibit 7 at 4.

20 C.F.R. §718.305(d)(1)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Disability Causation

The administrative law judge next considered whether Employer established "no part" of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22-23. He permissibly discredited Dr. Fino's and Dr. Jarboe's opinions on disability causation because neither diagnosed legal pneumoconiosis, contrary to his finding Employer did not disprove the existence of the disease. *See Bender*, 782 F.3d at 144; *Epling*, 783 F.3d at 504-05; Decision and Order at 22-23. 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), and affirm the award of benefits.

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