U.S. Department of Labor

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

BRB No. 20-0322 BLA

RUSH CREECH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY, LIMITED LIABILITY COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 11/28/2022
ARCH COAL, INCORPORATED	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-06053) rendered on a miner's subsequent claim filed on July 28, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal, Incorporated (Arch Coal) is the responsible carrier. He found Claimant established 29.47 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further concluded Employer did not rebut the presumption and awarded benefits.

[1] This is Claimant's third claim. Director's Exhibits 1-3. Claimant filed an initial claim on October 2, 2008, which he withdrew. Director's Exhibits 1, 50. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. ALJ Adele Higgins Odegard denied Claimant's second claim on June 18, 2013, for failure to establish total disability. Director's Exhibit 2 at 35. Claimant took no further action on that claim. *See* Director's Exhibit 2.

[2] 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). Because ALJ Odegard denied Claimant's second claim for failure to establish total disability, Claimant had to submit new evidence establishing this element in order to obtain review of the merits of his current claim. *Id*.

[3] Section 411(c)(4) 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); 20 C.F.R. §718.305.

On appeal, Employer argues the ALJ lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further asserts remand is required because removal provisions applicable to ALJs render his appointment unconstitutional. Next, it contends the ALJ erred in finding Apogee, self-insured through Arch Coal, is the responsible operator. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it. Claimant responds urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenge and affirm the ALJ's responsible operator determination. Employer filed a combined reply brief.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer requests the Board vacate the ALJ's Decision and Order and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 15-19; Employer's Reply at 5-8. It

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[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] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers"

acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 15-19; Employer's Reply at 5-6. We disagree.

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

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

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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 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.

[7] The Secretary issued a letter to ALJ Morris 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 ALJ Morris.

single letter. Rather, he specifically identified ALJ Morris and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Morris. The Secretary further stated he was acting in his "capacity as head of [DOL]" when ratifying the appointment of ALJ Morris "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," and generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified the ALJ's appointment. Employer's Reply at 6-7. Employer therefore 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. We thus hold the Secretary 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 of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 20-22; Employer's Reply Brief at 9-11. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*, 138 S. Ct. 2044. Employer's Brief at 19-21; Employer's Reply Brief at 9-11. In addition, it relies on the United States 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 19-22. For the reasons set forth in *Howard v. Apogee Coal*

[8] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 19, 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").

Co., BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and it was self-insured by Arch Coal on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 13-14. In 2005, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 28. In 2011, Patriot was authorized to insure itself and its subsidiaries. Director's Brief at 19. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. *Id.* at 2, 19. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company, as the Director states. *Id.* at 19-20.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (Trust Fund), not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 23-38; Employer's Reply Brief at 11-19. It argues the ALJ erred in finding Arch liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[9] (2) the ALJ erroneously excluded its liability evidence; (3) he evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (4) the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability in authorizing Patriot to retroactively self-insure Apogee's liabilities; (5) the Director changed its policy by naming Arch Coal as the responsible carrier; (6) the DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[10] reflects a change in policy where the DOL began to retroactively impose new liability on self-insured mine operators and bypass traditional rulemaking; and (7) the ALJ abused his discretion and

[9] Employer first contested the district director's appointment in its brief before the Board. Employer's Brief at 36 n.10.

[10] The BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015 to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

violated Employer's procedural due process rights in denying its request for discovery regarding BLBA Bulletin No. 16-01. Employer's Brief at 23-38; Employer's Reply Brief at 11-19.

The Board has previously addressed arguments (1) and (3) through (7) and rejected them in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard* and *Graham*, we reject Employer's arguments.[11] We also reject Employer's argument (2) with respect to the exclusion of evidence for the reasons set forth in those decisions; however, in order to establish the relevant factual context in this appeal, below we describe the relevant procedural history of this claim.

Procedural History

On September 4, 2016, the district director issued a Notice of Claim identifying Apogee, self-insured through Arch Coal, as the potentially liable operator and self-insurer for the claim. Director's Exhibit 24. The Notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id.* Employer responded, denying liability and requesting the district director dismiss it, arguing Patriot was the proper self-insurer and the Trust Fund must assume Patriot's liability for this claim. Director's Exhibit 27.

On June 22, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch Coal, as the responsible operator. Director's Exhibit 30. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until August 21, 2017, to submit evidence in support of their positions. *Id*. at 3. Moreover, the district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges

[11] As Claimant filed his 2010 claim before Patriot's bankruptcy, we reject Employer's assertion that "the Department's decision to name Amvest as the self-insurer responsible for [Claimant's] [2010] claim, proves that, without [BLBA Bulletin No. 16-01], Arch Coal would not be a party to this claim." Employer's Brief at 30 (internal citations omitted); *see* Director's Exhibit 2 at 396, 423. We agree with the Director that Amvest's designation as the self-insurer in Claimant's prior claim is immaterial to Arch Coal's liability in his current claim, as Employer does not dispute that Arch Coal self-insured Apogee on the date of Claimant's last coal mine employment. Director's Brief at 24 n.15.

[(OALJ)]." *Id*. (citing 20 C.F.R. §§725.414(b),(c), 725.456(b)(1)). Employer responded on July 20, 2017, asserting that the district director had improperly designated Apogee and Arch Coal as parties to the claim, but did not submit any liability evidence or designate any liability witnesses aside from Claimant. Director's Exhibit 31 at 3.

On March 27, 2018, the district director issued a Proposed Decision and Order (PDO) awarding benefits and designating Apogee, self-insured through Arch Coal, as the responsible operator and carrier, respectively. Director's Exhibit 32.

On April 23, 2018, Employer requested reconsideration of the award or, in the alternative, a formal hearing before an ALJ. Director's Exhibit 38. On July 11, 2018, the district director transferred the case to the OALJ for a hearing. Director's Exhibit 50.

On June 20, 2018, after the district director issued the PDO but before he transferred the case to OALJ, Employer submitted an initial request to Chief ALJ Henley to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation Programs' employees. June 20, 2018 Subpoena Requests; March 11, 2019 Order Correcting Recitation of Procedural History in the February 14, 2019 Order. The requested discovery related to various liability-related topics, including BLBA Bulletin No. 16-01 and the DOL's authorization of Patriot Coal and Arch Coal to self-insure. *See* June 20, 2018 Subpoena Requests.

On November 28, 2018, the ALJ issued a Notice of Assignment, Notice of Hearing, and Pre-Hearing Order, which stated in relevant part that documentary liability evidence not submitted to the district director, and testimony by liability witnesses not identified to the district director, would not be admitted absent extraordinary circumstances. On January 9, 2019, Employer renewed its request for subpoenas to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier related to Arch Coal's liability for this claim. *See* Jan. 9, 2019 Subpoena Requests. The Director objected, and Employer responded to the Director's objection.

The ALJ denied Employer's request, finding the requested liability documents and testimony is inadmissible under the relevant regulations unless Employer established extraordinary circumstances excusing its failure to timely designate liability witnesses before, or submit liability evidence to, the district director. Feb. 14, 2019 Order Denying Employer's Request to Issue Subpoenas (Feb. 14, 2019 Order); *see* 20 C.F.R. §§725.414(c), 725.456(b)(1). Further, the ALJ found Employer did not establish extraordinary circumstances that would warrant the admission of its requested discovery. He concluded "Employer did not present any liability evidence or name any liability witnesses [except for Claimant] before the District Director," despite "having been afforded the opportunity to do so." Feb. 14, 2019 Order at 9; *see* 20 C.F.R. §§725.414(c), 725.456(b)(1).

While the case was pending before the ALJ, Employer submitted documentary liability evidence that it designated as Employer's Exhibits 6-21. Hearing Transcript at 8. The ALJ excluded this liability evidence because he found Employer did not establish extraordinary circumstances for failing to submit it to the district director. Hearing Transcript at 8-11 (excluding Employer's Exhibits 6-21 as untimely submitted liability evidence), 15-16 (referencing disposition of Employer's request to develop liability evidence in prior orders); *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000); Decision and Order at 13. Subsequently, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Apogee and Arch Coal are the properly designated responsible operator and carrier pursuant to 20 C.F.R. §§725.494, 725.495. Decision and Order at 13-14.

For the reasons set forth in *Bailey*, BRB No. 20-0094 BLA, slip op. at 11-13; *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham*, BRB No. 20-0221 BLA, slip op. at 6-7, we affirm the ALJ's determination that Employer's failure to timely submit the evidence or establish extraordinary circumstances justifying its failure to do so precluded its admission by the ALJ. Thus we affirm the ALJ's determination that Apogee and Arch Coal are the responsible operator and carrier, respectively, and are liable for this claim.

Due Process Challenges

Loss of Medical Evidence in Claimant's Prior Claim

We next reject Employer's assertion that the unavailability of various medical exhibits contained in the record of Claimant's prior claim compromises Employer's ability to defend against a "material change in condition[s]."[12] Employer's Brief at 22-23. Under the revised regulations applicable to this and other claims filed after January 19, 2001, a

[12] Employer correctly notes various medical exhibits contained in the record of Claimant's prior claim were not made part of the record in his current claim as the regulations require. Employer's Brief at 22-23; *see* 20 C.F.R. §§718.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim."), 725.102(a) (DOL is responsible for maintaining the records of a claim). We note, however, that ALJ Odegard's decision denying Claimant's prior claim is available and enables us to determine the applicable conditions of entitlement upon which the denial was based.

claimant no longer has the burden of proving a "material change in conditions."[13] *See* 20 C.F.R. §§725.2(c), 725.309(c). Rather, a claimant must show that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final" by submitting new evidence that establishes an element of entitlement upon which the prior denial was based. 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

As ALJ Odegard denied Claimant's prior claim on June 18, 2013, for failure to establish total disability, Director's Exhibit 2 at 35, Claimant had to submit new evidence establishing this element to establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3. Thus, contrary to Employer's assertion, medical evidence that Claimant was not disabled as of the time of the denial of his prior claim would not preclude a finding that he is disabled now. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012) (("[T]he ALJ need not compare the old and new evidence to determine a change in condition . . . ."); *Consol. Coal Co. v. Williams*, 453 F.3d 609, 617 (4th Cir. 2006) ("[O]nly new evidence following the denial of the previous claim, rather than evidence predating the denial can sustain a subsequent claim."); *White*, 23 BLR at 1-3.

Further, to sustain its allegation of a procedural due process violation, 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). In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – 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. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Although Employer speculates that medical evidence from the record of Claimant's prior claim might have been helpful to its defense, it neither alleges that such evidence was made unavailable due to deliberate misconduct nor explains how it was deprived of a fair opportunity to mount a meaningful defense in this claim. *See Holdman*, 202 F.3d at 883-84; *Oliver*, 555 F.3d at 1219. Employer therefore has not shown a due process violation.

Order Granting the Director's Motion for Protective Order

[13] Employer appears to reference the prior regulation in using the term "material." Employer's Brief at 22-23; *see* 20 C.F.R. §725.309(d) (2000) (requiring a miner to establish a *material change* in *conditions*).

While the case was before the ALJ, Employer sought discovery from the DOL related to the agency's deliberative process underlying the preamble to the 2001 revised regulations. Dec. 20, 2018 Employer's Discovery Request. In response, the Director filed a Motion for a Protective Order seeking to bar the requested discovery. Dec. 29, 2018 Director's Renewed Motion for Protective Order. Employer replied, urging the ALJ to deny the Director's motion. Jan. 29, 2019 Employer's Opposition to Motion for Protective Order. The ALJ granted the Director's motion, finding:

> [T]he basis and rationale for the regulations is fully explained [in the preamble] and available for public scrutiny. The Tribunal sees no relevance to any request to "discover" that which is already made available to the public in the DOL's proposed rulemaking as well as in the Preamble to the Final Rule.

Jan. 17, 2019 Order Granting the Director's Motion for Protective Order at 9 (Jan. 17, 2019 Order). The ALJ further found "Employer's claim that 'discovery is the only way that Arch can challenge the use of the Preamble in weighing medical evidence' is simply inaccurate" as "Employer is free to present other scientific evidence or research studies challenging the scientific data and conclusions by use of its own expert." *Id.* (citing *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (parties may challenge the substance of the DOL's position as articulated in the preamble); *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1262 (10th Cir. 2015) (parties may "submit evidence or expert opinions to persuade the ALJ that the Preamble's findings were no longer valid or were not relevant to the facts of this case")).

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians' opinions as being contrary to the scientific evidence cited in the preamble. Employer's Brief at 45-46. We disagree.

As the ALJ accurately observed, interested parties had the opportunity to submit evidence challenging the underlying scientific bases for the DOL's proposed revised regulations at the time they were promulgated; and, in this case, Employer had the opportunity to submit evidence invalidating the science set forth in the preamble to those revised regulations, but failed to do so. *See Sterling*, 762 F.3d at 491; *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); Jan. 17, 2019 Order at 9. Therefore, Employer has not shown a due process violation. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm it. *See Skrack*, 6 BLR at 1-711.

Invocation of the Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground or substantially similar surface coal mine employment and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Qualifying Coal Mine Employment

Employer concedes Claimant worked 29.47 years in coal mine employment between 1968 and 1998. *See Skrack*, 6 BLR at 1-711. However, it contends the ALJ failed to adequately explain the basis for his conclusion that at least fifteen of those years qualify for purposes of invoking the Section 411(c)(4) presumption. Employer's Brief at 41. We disagree.

Claimant stated he worked as a shuttle car operator, supply man, and braddish man in underground mines between 1968-1992 and worked as a stationary equipment operator at the tipple coal preparation plant between 1993-1998.[14] Hearing Transcript at 19-22, 25-26; Director's Exhibits 4, 5. He further testified that his exposure to coal mine dust at the tipple "was a whole lot worse than it was working in the mines." Hearing Transcript at 22.

Based on Claimant's testimony and the ALJ's "knowledge of coal mine operations obtained [in] adjudicating Black Lung claims," the ALJ found Claimant's 29.47 years of work "involve[d] direct exposure to rock and coal dust, due to the nature of the work." Decision and Order at 12. He therefore found Claimant established 29.47 years of qualifying coal mine employment.[15] As Employer identifies no specific error in the ALJ's crediting of Claimant's testimony that he worked in underground coal mines between 1968

[14] Claimant testified he operated a "piece of stationary equipment" that separated the water from all the "settlings" and "there would be a lot of dust around even though there's a lot of water." Hearing Transcript at 25-26. He further testified that he worked as an electrician/repairman on "idle days." Hearing Transcript at 22-23. It is unclear if Claimant's aboveground work occurred at an underground mine site or a strip mine. Assuming the former, he would not have to establish substantial similarity. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1059 (6th Cir. 2013).

[15] The ALJ credited Claimant with 23.63 years of qualifying coal mine employment between 1968 and 1992, and 5.84 years of qualifying coal mine employment between 1993 and 1998. Decision and Order at 10-11. [16] Claimant also certified as "true and correct to the best of [his] knowledge and belief" that his work in 1968-1992 as a braddish man, shuttle car operator, and supply man involved "deep min[ing]" and exposed him to "dust, gases, or fumes." Director's Exhibit 4 at 1-2, Director's Exhibit 5 at 1, 4.

and 1992, we affirm the ALJ's conclusion that Claimant established 23.63 years of qualifying coal mine employment during this period.[16] 20 C.F.R. §718.305(b)(1)(i) (work in underground mines is qualifying coal mine employment for purposes of invoking the rebuttable presumption); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony). The number of years of Claimant's underground coal mine employment alone are sufficient to invoke the Section 411(c)(4) presumption.

Moreover, because Claimant's testimony regarding his dust exposure at the tipple is uncontradicted, we see no error in the ALJ's finding that Claimant worked in conditions substantially similar to an underground mine for an additional 5.84 years in 1993-1998. 20 C.F.R. §718.305(b)(2) (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 the miner was regularly exposed to coal-mine dust while working there); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (the ALJ may rely on a miner's testimony especially if the testimony is not contradicted by any documentation of record). We therefore affirm the ALJ's conclusion that Claimant established 29.47 years of qualifying coal mine employment.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). 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 ALJ 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).

The ALJ found Claimant established total disability and therefore invoked the Section 411(c)(4) presumption. Decision and Order at 16-17, 26. Employer raises no

[16] Claimant also certified as "true and correct to the best of [his] knowledge and belief" that his work in 1968-1992 as a braddish man, shuttle car operator, and supply man involved "deep min[ing]" and exposed him to "dust, gases, or fumes." Director's Exhibit 4 at 1-2, Director's Exhibit 5 at 1, 4.

specific challenge to the ALJ's findings at 20 C.F.R. §718.204(b)(2)(i)-(iv).[17] Rather, it asserts the ALJ failed to consider that Claimant has a preexisting back injury that independently precludes his return to work.[18] Employer's Brief at 40. Citing case law of the United States Court of Appeals for the Seventh Circuit, Employer maintains that a pre-existing disability or co-existing non-respiratory impairment precludes an award of benefits. *Id*. Contrary to Employer's argument, the Sixth Circuit has held that a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See e.g.*, *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 216-17 (6th Cir. 1996). Moreover, in claims such as this, filed after January 19, 2001, the applicable regulation states that any independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). As Employer raises no other challenges, we affirm the ALJ's findings that Claimant established total disability, 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(c); Decision and Order at 26.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Clamant has neither legal nor clinical pneumoconiosis,[19] or that "no

[17] The ALJ found the preponderance of pulmonary function studies, blood gas studies, and medical opinion evidence establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv).

[18] Employer cites *Gulley v. Director, OWCP*, 397 F.3d 535 (7th Cir. 2005) (disability due to blindness precludes entitlement); *Peabody Coal Co. v Vigna*, 22 F.3d 1388 (7th Cir. 1994) (disability due to stroke precludes entitlement); *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994) (disability due to back injury precludes entitlement); and *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 667 (7th Cir. 1991) (a claimant cannot be more than totally disabled). Employer's Brief at 40.

[19] "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 or respiratory or pulmonary impairment that is 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

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 ALJ found Employer failed to establish rebuttal by either method.[20]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit has held this standard requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. The ALJ found their opinions inconsistent with the preamble to the revised 2001 regulations and unpersuasive. Decision and Order at 34-35.

Initially, we reject Employer's assertion that the ALJ improperly relied on the preamble to assess the credibility of its physicians' opinions. Employer's Brief at 41-46. The preamble sets forth the scientific evidence DOL found credible in promulgating the regulations.[21] 65 Fed. Reg. at 79,939-42; *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); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd 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.

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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).

[20] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 30, 32, 38.

[21] Contrary to Employer's contention, the preamble does not constitute evidence outside of the record. Employer's Brief at 43; *see A & E Coal Co., v. Adams*, 694 F.3d 798, 801-03 (6th Cir. 2012).

We also reject Employer's contention that the ALJ failed to adequately explain his specific credibility determinations. As the ALJ correctly observed, Dr. Rosenberg opined Claimant does not have legal pneumoconiosis based, in part, on his belief that coal dust does not cause significant impairment in the absence of clinical pneumoconiosis[22] and that generally coal-dust related lung disease does not progress after exposure to coal mine dust ceases. Decision and Order at 33; Employer's Exhibit 2 at 3, 30. The ALJ permissibly found Dr. Rosenberg's opinion unpersuasive as it conflicts with scientific evidence cited in the preamble that coal mine dust-induced obstructive impairments can be clinically significant regardless of whether clinical pneumoconiosis is also present and that pneumoconiosis can be both latent and progressive. *See* 20 C.F.R. §718.201; 65 Fed. Reg. at 79,938-43, 79,971; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Adams*, 694 F.3d at 801-02 (legal pneumoconiosis can exist in the absence of clinical pneumoconiosis); Decision and Order at 34.

Dr. Tuteur diagnosed Claimant with totally disabling chronic obstructive pulmonary disease (COPD) caused by smoking and not coal dust exposure. Employer's Exhibit 3 at 8. Specifically, Dr. Tuteur explained he eliminated coal dust exposure as a cause of Claimant's COPD, in part, because smoking carries a greater risk of pulmonary impairment than coal mine dust exposure does. *Id.* The ALJ permissibly found his explanation unpersuasive as it fails to account for the preamble's recognition, citing scientific evidence, that coal mine dust can cause obstructive lung disease, and that the risks of smoking and coal mine dust exposure may be additive. Decision and Order at 29; *see* 65 Fed. Reg. at 79,940-943; *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-02. Thus, the ALJ permissibly discounted Dr. Tuteur's opinion as inadequately explained. Decision and Order at 34-35; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We see no error in the ALJ's finding that Drs. Rosenberg and Tuteur failed to adequately explain how they eliminated Claimant's 29.47 years of coal dust exposure as a contributing cause of his lung disease. Decision and Order at 39; *see Crisp*, 866 F.2d at

[22] Dr. Rosenberg explained he eliminated coal dust exposure as a cause of Claimant's lung disease because "no reliable medical studies show that coal dust causes primary linear interstitial lung disease without some micronodular changes" and "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." Employer's Exhibit 2 at 3, 30.

185; *Rowe*, 710 F.2d at 255. Thus, we affirm the ALJ's conclusion that Employer did not disprove legal pneumoconiosis.[23] *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 35.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Contrary to Employer's assertion, the ALJ correctly cited to the Sixth Circuit's decision in *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013), which held that to rebut the Section 411(c)(4) presumption, the employer "must establish that: '(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine,'" citing *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479 (6th Cir.2011) (quoting 30 U.S.C. § 921(c)(4)). Decision and Order at 38. Further, the ALJ permissibly discredited the opinions of Drs. Tuteur and Rosenberg on the cause of Claimant's respiratory disability because their conclusions were tied to their erroneous conclusions that Claimant does not have legal pneumoconiosis, contrary to the ALJ's findings. *See Ogle*, 737 F.3d at 1070; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 38-39. Thus, we affirm the ALJ's conclusion that Employer failed to establish no part of Claimant's respiratory or

[23] Employer's failure to disprove legal pneumoconiosis precludes a finding that it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

pulmonary disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 39.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge