U.S. Department of Labor

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

BRB No. 21-0147 BLA

KIMBLE C. LARSEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 11/30/2022
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 - Granting Benefits of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

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

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

Jennifer A. Ledig (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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order - Granting Benefits (2018-BLA-05492) rendered on a claim filed on July 14, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Employer is the responsible operator. He also found Claimant established 27.33 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 invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[2] and the removal provisions applicable to the ALJ rendered his appointment unconstitutional. It also challenges its designation as the responsible operator. On the merits, Employer argues the ALJ erred in finding Claimant

[1] 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 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.

[2] 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.

established total disability, and thus in invoking the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it did not rebut the presumption.[3]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument with respect to its designation as the responsible operator. In two separate reply briefs, Employer reiterates its contentions.

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.[4] 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 urges the Board to vacate the ALJ's decision and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 11-16; Employer's Reply Brief to the Director at 7-11. Although the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6]

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 27.33 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 36.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant performed his coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 13; Director's Exhibits 3; 67 at 17.

[5] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018), *citing Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded the Supreme Court's holding in *Lucia* applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

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

Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* We disagree.

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. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). 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 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*, 857 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 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)).

Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Nordby and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Nordby. The Secretary further stated he was acting in his "capacity as head of the [DOL]" when ratifying the appointment of ALJ Nordby "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," but generally speculates the ratification was made without "genuine consideration." Employer's Brief at 14. Employer therefore has not overcome the presumption of

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> 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 Nordby.

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 thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 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). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 20-21. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. V. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Nordby's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 16-21; Employer's Reply Brief to the Director at 8-11. Employer generally argues the removal provisions 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*. Employer's Brief at 18-21; Employer's Reply Brief to the Director at 11. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and *Arthrex, Inc. v. Smith & Nephew, Inc*., 594 U.S. , 141 S. Ct. 1970 (2021). *Id*. For the reasons stated in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[7] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator is financially capable of assuming liability and more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

The ALJ found the evidence supports a finding that Genwal Resources, Inc. (Genwal) last employed Claimant for one year and Employer, as the parent corporation of Genwal, was properly named as a potentially liable operator. Decision and Order at 37-39. The ALJ further found Employer provided no evidence that there was not a relationship between the companies, that Employer was financially incapable of paying benefits, or that another financially capable operator more recently employed Claimant for more than one year. *Id.* at 39. Thus, he found Employer was properly named as the responsible operator. *Id.*

Employer contends the ALJ failed to independently evaluate the evidence regarding the responsible operator and simply accepted the district director's findings in violation of the APA.[8] Employer's Brief at 21-23. It further contends that the Director failed to provide evidence of a relationship between Employer and Genwal and the ALJ erroneously shifted

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R §725.494(a)-(e).

[8] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

the burden to Employer to disprove a relationship.[9] *Id.* at 23-27. The Director responds that the ALJ properly considered the evidence and applied the correct burden of proof to determine Employer is the responsible operator. Director's Brief at 19. We agree.

Initially, contrary to Employer's argument, the ALJ did not simply "wholesale" accept the district director's findings. Employer's Brief at 21. Rather, the ALJ thoroughly summarized Claimant's testimony, noted the evidence the district director considered in making her findings,[10] noted the parties' arguments, and made his own independent findings on the issue. Decision and Order 5-6, 9-13, 37-39. The ALJ found Claimant was last employed as a miner by Genwal for 7.25 years, ending on April 24, 2000. Decision and Order at 35-37; Director's Exhibits 7-8, 15, 67. Additionally, Employer conceded that Claimant was employed as a coal miner under the Act after 1969 and that it is financially capable of paying benefits. Decision and Order at 37; Director's Exhibit 132; Hearing Transcript at 5-6. The ALJ also noted the district director's finding that Employer was the parent company of Genwal and it maintained federal black lung benefits insurance on the date of Claimant's last exposure. Decision and Order at 34, 39. He further found Employer, "as parent entity and/or business entity of [Genwal]," was a mine operator. *Id.* at 39 (citing 20 C.F.R. §725.491(e)). Specifically, he found Employer introduced no evidence "to contradict the parent company and insurance relationship with [Genwal]" and thus found Employer is the responsible operator. Decision and Order at 39.

Because the ALJ adequately considered and summarized the relevant evidence and made findings based on this evidence, we reject Employer's assertion that his determinations fail to comply with the APA. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762, (4th Cir. 1999) (APA duty of explanation is satisfied if reviewing court can discern what the ALJ did and why he did it).

[9] Employer also argues that the ALJ's reference to "Employer" without defining the term renders his findings inadequate. Employer's Brief at 22-23. Contrary to Employer's argument, it is evident from the ALJ's decision that "Employer" refers to the named responsible operator: Andalex Resources, Inc. *See, e.g.*, Decision and Order at 39 ("I find that Employer, as parent entity and/or business entity of Genwal Resources, Inc., [(Genwal)], was a mine operator . . . .").

[10] The district director referenced employment letters from Energy West Mining Company, Arch Coal, Utah American Energy Inc., Genwal; pay stubs from Genwal; and Claimant's Form 1099-R from Andalex Resources, Inc., dated 1998. Director's Exhibits 5-8, 12-16, 60, 67, 123.

We also reject Employer's contentions that the ALJ incorrectly applied the burden of proof and that the district director's alleged failure to investigate and identify other potential operators relieves it of liability in this claim.[11] Employer's Brief at 21-26; 20 C.F.R. §725.495(b). While the Director bears the burden of "proving that the responsible operator initially found liable for the payment of benefits . . . is a potentially liable operator," once the responsible operator designation was made, the burden shifted to Employer to establish either that it is financially incapable of paying benefits or another financially capable operator subsequently employed Claimant as a miner for at least one year. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1), 725.495(c)(2).

Employer's related argument that the district director and ALJ impermissibly "pierced the corporate veil" to name Employer as an operator relies on the incorrect assumption that a parent corporation cannot be named as an operator. Employer's Brief at 23-24. As the ALJ indicated, a parent company may be an operator under the Act. Decision and Order at 39 n.29 (citing 20 C.F.R. §725.491(e)) ("any parent entity or other controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities"); *see also* 20 C.F.R. §725.493(b)(2) ("in any case in which the operator which directed, controlled, or supervised the miner is no longer in business and such operator was a subsidiary of a parent company . . . such parent entity . . . may be considered the employer of any employees of such operator").

Employer does not dispute that Genwal was a subsidiary of Employer. Moreover, as the ALJ found, Employer does not contest its ability to pay benefits.[12] Decision and

[11] We decline to address Employer's argument that the district director should have named Murray Energy Coal Corporation as a potentially liable operator because it is a successor operator to Employer, as Employer did not raise this argument below. Employer's Brief at 26-27; Employer's Closing Argument; *Joseph Forrester Trucking v. Dir., Off. of Workers' Comp. Programs* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021) ("Black lung benefits adjudication regulations require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board."); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995).

[12] While Employer argues there is no evidence that its insurance covered Genwal's liabilities, the district director reported that an Old Republic Federal Black Lung Policy issued to Employer covered this claim. Decision and Order at 39; Director's Exhibit 51. As the Director argues, while Employer pointed to evidence it alleged demonstrated that Genwal had no independent insurance coverage for this claim, it provided no evidence to disprove that Employer's Old Republic insurance policy covered this claim. Director's Brief at 24-25; Employer's Brief at 65; Director's Exhibit 65; *see* 20 C.F.R. §725.495(b)

Order at 37; Director's Exhibit 132; Hearing Transcript at 5-6. Thus, we affirm the ALJ's findings that Employer is the responsible operator. 20 C.F.R. §§725.494(e), 725.495(a)(1).

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

A miner is totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying[13] pulmonary function study evidence or arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must consider all the 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 based on the arterial blood gas studies, medical opinions, and in consideration of the evidence as a whole.[14] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 17-34.

Employer contends that the ALJ erred in his consideration of the medical opinion evidence.[15] We disagree.

(absent contrary evidence, the designated responsible operator is presumed financially capable of paying benefits).

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

[14] The ALJ found the pulmonary function studies do not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i),(iii); Decision and Order at 16-17.

[15] While Employer generally asserts the ALJ did not properly consider Dr. Farney's explanation that the altitude where the arterial blood gas studies were administered would affect their results, the ALJ permissibly rejected this argument and applied the tables in Appendix C to 20 C.F.R. Part 718, which already account for the effects of altitude. Employer's Brief at 7, 11; *Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990); Decision and Order at 16-17. Moreover, Employer does not specifically contest the ALJ's finding that the arterial blood gas studies establish total disability. Employer's Brief at 7-8, 10. Thus, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

The ALJ considered the opinions of Drs. Gagon, Sood, Farney, and Rosenberg on the issue of total disability. Decision and Order at 17-34. He found all the physicians agreed that Claimant is totally disabled by a respiratory or pulmonary impairment. *Id.* at 34.

Employer argues the ALJ erred given that Drs. Gagon, Sood, and Farney all attribute "at least a portion" of Claimant's disability to "non-compensable processes." Employer's Brief at 27-28. Specifically, Employer contends: Dr. Farney opined that "non-pulmonary conditions" of old age, obesity, heart disease, and cancer treatment contribute to Claimant's impairment; Dr. Gagon acknowledged that radiation treatment can compromise gas exchange; and Dr. Sood agreed old age and radiation therapy could not be ruled out as causing Claimant's impairment.[16] *Id.* at 28-29. But Employer conflates total disability with disability causation.

The issues of total disability and disability causation are distinct issues, with the inquiry into the presence of a totally disabling respiratory or pulmonary impairment governed by 20 C.F.R. §718.204(b), and the cause of the impairment governed by 20 C.F.R. §718.204(c). Further, 20 C.F.R. §718.204(a) provides that if a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, "that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis."

Employer acknowledges all the experts opined that Claimant is totally disabled by a respiratory impairment and any alleged "non-pulmonary" conditions[17] are also causes of his disabling hypoxemia[18] -- a pulmonary impairment.[19] Decision and Order at 22, 24-25;

[16] Employer does not challenge the ALJ's finding that Dr. Rosenberg's opinion supports a finding of a total disabling respiratory impairment; thus, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 33-34; Employer's Exhibits 12, 20.

[17] While Employer points to Drs. Farney's, Gagon's, and Sood's opinions that radiation fibrosis in the lungs could not be ruled out as contributing to Claimant's disabling hypoxemia, it is unclear how these opinions support Employer's argument given that radiation fibrosis is a lung condition. Employer's Brief at 28-29.

[18] Hypoxemia is defined as "deficient oxygenation of the blood." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/hypoxemia#dictionary-entry-1 (last visited Nov. 18, 2022).

[19] Employer's argument that Dr. Farney indicated Claimant's hypoxemia was "non-disabling" is inaccurate. Employer's Brief at 28. While Dr. Farney initially hesitated to diagnose a pulmonary disability due to a chronic lung disease, Director's Exhibit 33 at 75-

31-34; Director's Exhibits 21, 26, 40, 112 at 42-45; Claimant's Exhibit 1; Employer's Exhibits 12, 18, 20. Thus, the ALJ permissibly found the medical opinion evidence establishes total disability and we affirm his finding. 20 C.F.R. §718.204(b)(iv); *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order at 34. Consequently, we also affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Shedlock,* 9 BLR at 1-198; Decision and Order at 34.

In light of our affirmance of the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 39-40.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[20] 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 ALJ found that Employer failed to establish rebuttal by either method.[21] Decision and Order at 45, 49-50.

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

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76, he ultimately opined that Claimant would be considered disabled, although not from a lung disease arising out of coal mine employment. Employer's Exhibit 18 at 12-13.

[20] "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 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).

[21] The ALJ found Employer established that Claimant does not have clinical pneumoconiosis. Decision and Order at 45; 20 C.F.R. §718.305(d)(1)(i)(B).

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Employer relies on the medical opinions of Drs. Farney and Rosenberg to disprove the existence of legal pneumoconiosis. While opining various factors likely contributed to Claimant's hypoxemia, Dr. Farney ultimately opined Claimant has undiagnosed asthma and emphysema caused by smoking, both unrelated to coal mine dust exposure. Director's Exhibits 31, 33, 35; Employer's Exhibit 18. Dr. Rosenberg also diagnosed emphysema, which he attributed to smoking and found unrelated to coal mine dust exposure. Employer's Exhibits 12, 20. The ALJ found neither opinion sufficiently reasoned and thus Employer did not meet its burden. Decision and Order at 46-48.

Employer contends the ALJ erred in discrediting the opinions of Drs. Farney and Rosenberg. Employer's Brief at 29-30. We disagree.

The ALJ found Dr. Farney's opinion undermined by his failure to explain why he believed coal mine dust did not cause, contribute to, or aggravate Claimant's asthma and emphysema. Decision and Order at 46-47. Employer argues that in so finding, the ALJ "misread that proof," but it does not explain how the ALJ erred in making his finding. Employer's Brief at 29. It is the ALJ's purview to weigh the evidence, draw inferences, and determine credibility. *N. Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996). Because the ALJ permissibly found Dr. Farney did not adequately explain why coal mine dust could not have also contributed to or aggravated Claimant's emphysema and asthma, we affirm the ALJ's discrediting of Dr. Farney's opinion. *Pickup*, 100 F.3d at 873; Decision and Order at 46-47.

The ALJ found Dr. Rosenberg's opinion that Claimant's impairment is related solely to smoking undermined by his reliance on a twenty-six to thirty-year smoking history, contrary to the ALJ's finding of an eight pack-year smoking history. Decision and Order at 47-48; Employer's Exhibits 12, 20. Employer does not contest this finding; thus, we affirm it.[22] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion); Employer's Brief at 29-30.

[22] Because the ALJ provided valid bases for finding Drs. Farney's and Rosenberg's opinions unpersuasive, we need not address Employer's other arguments regarding the ALJ's consideration of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 29-30.

Consequently, we affirm the ALJ's finding that Employer failed to disprove legal pneumoconiosis and thus failed to rebut the presence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 49.

Disability Causation

Employer does not specifically challenge the ALJ's finding that it failed to establish no part of Claimant's respiratory total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 50. Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 50. We therefore affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption. Decision and Order at 50.

Accordingly, we affirm the ALJ's Decision and Order - Granting Benefits.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge