U.S. Department of Labor

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

BRB No. 21-0630 BLA

CAROLE ALLAN (o/b/o THOMAS ALLAN)	)	
Claimant-Respondent	)	
v.	)	
MONTEREY COAL COMPANY	)	DATE ISSUED: 11/29/2022
Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Self-Insured Employer.

William M. Bush (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 appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order on Remand Awarding Benefits (2011-BLA-06329) rendered on a claim filed on October 25, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.[1]

In a Decision and Order Denying Benefits issued on June 20, 2018, ALJ Clement J. Kennington found the parties stipulated that the Miner had twenty-eight years of qualifying coal mine employment. He found, however, the Miner was not totally disabled by a respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2).[2] Thus, he concluded Claimant, the Miner's widow,[3] could neither invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[4] nor establish entitlement at 20 C.F.R. Part 718, and he denied benefits. Claimant subsequently filed a timely motion for reconsideration, which ALJ Kennington denied.

On appeal, the Board agreed with the Director, Office of Workers' Compensation Programs (the Director), that Employer had not contested the issue of total disability when the case was referred to the Office of Administrative Law Judges and had further stipulated that the Miner was totally disabled.[5] Thus, the Board vacated ALJ Kennington's finding

[1] We incorporate by reference the relevant procedural history set forth in the Board's prior decision in this case. *Allan v. Monterey Coal Co.*, BRB No. 18-0592 BLA (Nov. 14, 2019) (unpub.).

[2] ALJ Kennington found the parties stipulated the Miner had twenty-eight years in underground coal mine employment prior to working for fourteen years as a mine inspector for the State of Illinois. Decision and Order Denying Benefits at 2 n.5, 11.

[3] The Miner died on January 4, 2015. Employer's Exhibit 22. Claimant is pursuing the miner's claim on his behalf. Decision and Order Denying Benefits at 1 n.1; Decision and Order on Claimant's Motion for Reconsideration at 1 n.1.

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

[5] The Board noted the ALJ may not consider the issue of total disability absent notice to the parties and a finding that the issue was not reasonably ascertainable before the district director, as well as an explanation as to why Employer's subsequent concession at trial should not be binding. *Allan,* BRB No. 18-0592 BLA, slip op. at 4-5 n.8.

that Claimant failed to establish total disability. *Allan v. Monterey Coal Co.*, BRB No. 18-0592 BLA, slip op. at 4 (Nov. 14, 2019) (unpub.). The Board also agreed with the Director that the ALJ erred in determining the parties stipulated that the Miner had at least fifteen years of qualifying coal mine employment. While they stipulated to at least twenty-eight years of coal mine employment, they did not stipulate that it constitutes qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. *Allan*, BRB No. 18-0592 BLA, slip op. at 4-5 n.7.[6] Accordingly, the Board vacated the ALJ's denial of benefits and remanded the case for the ALJ to reconsider whether Claimant invoked the presumption, and established entitlement to benefits in the miner's claim. *Id.* at 4-6.

On August 27, 2021, ALJ Swank (the ALJ) issued a Decision and Order on Remand Awarding Benefits, which is the subject of this appeal. He found the Miner's twenty-eight years of coal mine employment was performed underground and thus is qualifying for invoking the Section 411(c)(4) presumption. He further found Employer did not contest the Miner's total disability before ALJ Kennington and thus Claimant invoked the presumption. He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[7] It also argues the removal provisions applicable to Department of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. As to the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and that Employer did not rebut it. The

[6] The Board further noted the Miner's work as a state mine inspector does not constitute the work of a miner under the Act. *Allan,* BRB No. 18-0592 BLA, slip op. at 4-5 n.7 (citing *Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47 (6th Cir. 2014)).

[7] 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.

Director filed a response urging the Board to reject Employer's challenges to the ALJ's appointment and removal protections, and his findings on the merits of entitlement. Claimant did not file a response. Employer filed a reply brief reiterating its assertions.[8]

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.[9] 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 Challenge

Employer urges the Board to vacate the award 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).[10] Employer's Brief at 15-26. Although it acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[11] and concedes "the matter was heard following the [ALJ's] ratification," it

[8] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-eight years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

[9] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because the Miner performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[10] *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*, 138 S. Ct. at 2055 (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.

[11] The Secretary of Labor issued a letter to the ALJ 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

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

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Response at 6-7. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 7-9. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 7 (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 Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume 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. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

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 Swank and gave "due consideration" to his appointment. Secretary's

---

> Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

December 21, 2017 Letter to ALJ Swank. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of ALJ Swank "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts" or did not make a "detached and considered judgment" when he ratified the ALJ's appointment, but instead generally speculates he did not provide "genuine consideration" of the ALJ's qualifications. Employer's Brief at 19. It therefore has not overcome the presumption of regularity.[12] *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 25-26. 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 Swank's appointment, which we have held constituted a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

---

[12] While Employer avers the Secretary's ratification letter was a form letter and unaccompanied by any ceremony, Employer's Brief at 18-19, 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").

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 20-25. 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*. In addition, Employer 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), and 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 21-25.

Employer's arguments are not persuasive, as the only circuit court to squarely address this precise issue with regard to DOL ALJs has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs). The Board also rejected this argument in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022).

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

Employer asserts that the Board, in its prior decision in this case, and the ALJ, on remand, mischaracterized the nature of its stipulation on total disability and therefore erred in concluding Claimant was entitled to invoke the Section 411(c)(4) presumption. It alleges it "admitted only to the limited fact that [the Miner] had a total disability [unrelated to a respiratory or pulmonary impairment], not to the legal conclusion that the disability was one that could invoke the presumption." Employer's Brief at 26.[13] The Board's prior

[13] Employer relies on its July 27, 2011 letter requesting the district director forward the case for a hearing, which stated that "[w]hile we might agree that this man is totally disabled, we disagree that he is disabled from a breathing impairment. Along the same lines, we disagree that any coal dust related lung disease has resulted in a breathing impairment sufficient to establish total disability." Employer's Brief at 27 (citing Director's Exhibit 20, Employer's Request for Hearing). However, the Board based its prior holding on Employer's specific concessions before ALJ Kennington. *Allan*, BRB No. 18-0592 BLA, slip op. at 4, citing: Employer's Pre-Hearing Report at 1 (listing the disputed issues as limited to disease, disease causation, disability causation, and death causation); Hearing Transcript at 19 (stating,"[w]e agree that [the Miner] was totally disabled, but we dispute causation"); Aug. 28, 2017 Closing Brief at 3 (stating "the medical evidence seems to clearly establish that [the Miner] was permanently and totally disabled;"

decision accurately held, however, that the district director did not identify total disability as a contested issue in transferring the case to Office of Administrative Law Judges for a hearing *and* that Employer conceded the issue at the hearing before ALJ Kennington. *Allan,* BRB No. 18-0592 BLA, slip op. at 4 (citing 20 C.F.R. §725.463, which confines issues to be resolved at the hearing to those identified by the district director unless the new issue was not reasonably ascertainable at the time the claim was before the district director); *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013) (stipulations of fact fairly entered into are binding on the parties). As Employer has not shown that the Board's holding was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination.[14] *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989).

As Employer conceded the Miner was totally disabled and does not challenge the ALJ's finding that he had twenty-eight years of qualifying coal mine employment, we

---

summarizing the opinion of each medical expert as diagnosing a totally disabling respiratory or pulmonary impairment).

[14] We further reject Employer's assertion that it could not have stipulated to total disability as it argued throughout all proceedings that the Miner's cardiac condition caused his disabling impairment. Employer's Brief at 26-31 (citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) (interpreting 20 C.F.R. §718.204 (1999) as stating that a preexisting non-pulmonary or non-respiratory disability precludes a finding of total disability)); Employer's Reply Brief at 2-3. Dr. Tuteur, Employer's medical expert, specifically opined that the Miner had a "moderately severe obstructive and restrictive abnormality" on pulmonary function testing and concluded he was unable to perform his usual coal mine work. Employer's Exhibits 1, 2. This is a diagnosis of total disability under the regulations and Employer's attempt to distinguish its stipulation conflates the distinct issues of total disability and causation. The DOL explicitly rejected the premise that a non-pulmonary disability precludes entitlement when promulgating the 2001 revised regulations. 20 C.F.R. § 718.204(a) ("any non-pulmonary or non-respiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,920, 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]."). The 2001 revised regulations specifically provide for consideration of chronic respiratory or pulmonary impairments caused by non-pulmonary or non-respiratory conditions. 20 CFR 718.204(a).

affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] 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); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal under either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). Employer relies on the opinion of Dr. Tuteur.

Dr. Tuteur opined the Miner had a disabling restriction with mild obstructive abnormality due to congestive heart failure and not coal dust exposure.[16] Employer's

[15] "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).

[16] Dr. Tuteur stated:

> there is no convincing evidence to indicate the presence of a legal coal workers' pneumoconiosis of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, or impairment of pulmonary [sic]. The impairment demonstrated by pulmonary function studies was limited to a restrictive abnormality that developed late in his

Exhibit 2 at 4-7. The ALJ rejected Dr. Tuteur's opinion as unreasoned because the physician reviewed evidence that was not in the record and failed to explain how he completely excluded the Miner's twenty-eight years of coal mine employment as a factor for both the obstructive and restrictive components of his pulmonary impairment. Decision and Order on Remand at 25. Employer does not identify any error in the ALJ's credibility finding. We therefore affirm, as unchallenged, the ALJ's finding that Dr. Tuteur did not provide a reasoned opinion on the etiology of the Miner's respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As the record contains no other evidence supportive of Employer's burden to disprove legal pneumoconiosis, we affirm the ALJ's conclusion that Employer failed to rebut the presumption of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Minich*., 25 BLR at 1-155 n.8; Decision and Order on Remand at 23-26.

As Employer did not rebut legal pneumoconiosis, we need not address its arguments that the ALJ erred in weighing the biopsy evidence with respect to clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 31-32. Accordingly, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Next, the ALJ considered whether Employer established "no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 27. The ALJ found Employer failed to rule out a causal relationship between the Miner's total disability and his pneumoconiosis. Specifically, he found Dr. Tuteur's opinion, the only opinion supportive of Employer's rebuttal burden, unpersuasive because the physician did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that the Miner had the disease. We see no error in this finding.

> clinical course due to and typical of congestive heart failure. The mild reduction in FEV-1/FVC ratio is similarly consistent with that condition.

Employer's Exhibit 2 at 7. Although Dr. Tuteur opined the Miner did not have clinical pneumoconiosis, he assumed the abnormalities revealed on his x-rays and computed tomography scan constituted coal workers' pneumoconiosis and opined his condition was of "insufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, or impairment of pulmonary function." *Id.* at 6-7.

Contrary to Employer's assertion, the ALJ did not require Employer to establish rebuttal "beyond a reasonable doubt." Employer's Brief at 34. The ALJ explicitly stated Employer can carry its burden "by a preponderance of evidence" and accurately quoted the relevant regulation with regard to Employer's burden to show "no part" of the Miner's total disability was caused by pneumoconiosis. Decision and Order on Remand at 23, 27; *see* 20 C.F.R. §718.305(d)(1)(ii). We therefore reject Employer's assertion that the ALJ applied an incorrect standard in evaluating Dr. Tuteur's opinion with respect to disability causation.

We further see no error in the ALJ's finding that Dr. Tuteur's opinion is not credible on the issue of disability causation since he failed to diagnose legal pneumoconiosis. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *s generally Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (causation opinion that erroneously fails to diagnose pneumoconiosis may not be credited at all, unless the ALJ is able to identify "specific and persuasive reasons" for concluding that the doctor's judgment does not rest upon the predicate misdiagnosis, in which case the opinion is entitled to at most "little weight"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013) (ALJ permissibly discredited physicians' opinions as to disability causation because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that the employer failed to disprove the existence of the disease); Decision and Order on Remand at 28.

Although Employer asserts the ALJ failed to consider that Dr. Tuteur presumed the Miner had legal pneumoconiosis when discussing the cause of his respiratory disability, we see no error in the ALJ's overall conclusion, as explained when weighing the evidence on legal pneumoconiosis, that Dr. Tuteur's opinion is not reasoned and lacks credibility regarding the cause of the Miner's disabling respiratory impairment. *See Poole*, 897 F.2d at 895; *Burns*, 855 F.2d at 501; *see also Burris*, 732 F.3d at 735 (the ALJ "properly discredited" the opinion of a doctor who "had . . . concluded that [the miner] does not have pneumoconiosis, an opinion the ALJ had already rejected" and noting that "[h]aving denied that [the miner] suffered from pneumoconiosis, the doctor was, of course, unable to opine on the cause of a disease that he denied the claimant had"); Decision and Order on Remand at 28.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Poole*, 897 F.2d at 895; *Burns*, 855 F.2d at 501. We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the ALJ's Decision and Order on Remand Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge