U.S. Department of Labor

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

BRB No. 20-0133 BLA

MICHAEL C. FITZPATRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
W&B COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 10/20/2021
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Tracy A. Daly's Decision and Order Awarding Benefits (2016-BLA-05937) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on September 28, 2015.[1]

The ALJ credited Claimant with 11.75 years of coal mine employment and found Employer is the responsible operator. Because Claimant established fewer than fifteen years of coal mine employment, he was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established total disability due to pneumoconiosis and therefore a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.202(a), 718.203(b),

[1] Claimant filed a prior claim on September 8, 1997, and the district director denied it on February 27, 1998, for failure to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305(b).

[3] 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). The district director denied Claimant's prior claim because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, he had to submit new evidence establishing at least one of those elements in order to have his claim reviewed on the merits. 20 C.F.R. §725.309(c).

718.204(b), (c), 725.309. Accordingly, he awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, Employer asserts the ALJ erred in finding it is the responsible operator and that Claimant worked less than one year in coal mine employment for Alminco, Incorporated (Alminco) after working for Employer. It also alleges the ALJ erred in finding Claimant established the existence of clinical and legal pneumoconiosis and that he is totally disabled due to pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting Employer's Appointments Clause challenges should be rejected, but concedes the case must be remanded for further consideration because the ALJ did not adequately explain his findings regarding the length of Claimant's coal mine employment with Alminco and whether Employer is the responsible operator. Employer replied to Claimant's and the Director's briefs, reiterating its contentions on appeal.[5]

The Benefits Review 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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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] We affirm as unchallenged the ALJ's finding that Claimant established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The ALJ found that Claimant had worked in coal mine employment in West Virginia and Kentucky, but appears to have credited Claimant's hearing testimony that he last worked in West Virginia. We will therefore apply the law of the United States Court

Appointments Clause

Employer urges the Board to vacate the Decision and Order 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).[7] Employer's Brief at 10-18. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] *Id.* at 10-14; Employer's Reply Brief to the Director's Response at 2-4. We reject Employer's argument, as the Secretary's ratification was a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to

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of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[7] *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)).

[8] 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 Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

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

be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint 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 single letter. Rather, he specifically identified Judge Daly and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Judge Daly. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Daly "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified Judge Daly's appointment. Employer's Brief at 13. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the ALJ's appointment.[10] *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).

[10] While Employer notes correctly that the Secretary's ratification letter was signed by an "autopen," Employer's Brief at 12, 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").

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 18. The Executive Order does not state the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Daly'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.

Moreover, we agree with the Director that Employer waived its right to a *Lucia* remedy in this case. Director's Brief at 9. Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

A hearing in this case was held on June 30, 2017, and October 4, 2017, by ALJ Patrick M. Rosenow, prior to the decision in *Lucia* and prior to the Secretary's ratification. On September 19, 2018, Judge Rosenow issued an Order directing the parties to inform him whether they sought reassignment to a different ALJ based on the holding in *Lucia*. In response, Employer filed a motion on October 2, 2018, requesting Judge Rosenow reassign the case to a different ALJ. The Director supported Employer's motion. Subsequently, Judge Rosenow issued an Order on February 15, 2019, returning the case for reassignment to a different ALJ, and the case was reassigned Judge Daly. On March 28, 2019, Judge Daly ordered Employer to file its request to hold a new hearing within fifteen days. The ALJ specifically informed Employer that if it did not respond, he would issue a decision based on the record. March 28, 2019 Order at 1-2. Employer did not respond to the ALJ's Order, and he issued his Decision and Order Awarding Benefits on December 11, 2019. Decision and Order at 6 n.13.

Had Employer responded to the Order and requested a new hearing, the ALJ could have referred the case for assignment to a different, properly appointed ALJ to hold a new hearing and issue a decision. Based on these facts, Employer waived its Appointments Clause challenge.[11] *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse

[11] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood*

waived Appointments Clause challenge to discourage "sandbagging"); *Powell v. Service Employees Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 11 (2019). We therefore deny the relief requested.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 14-18; Employer's Reply Brief to the Director's Response at 4, 11-16. 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 15-17; Employer's Reply Brief to the Director's Response at 11-15. Employer 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), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and 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 14-17; Employer's Reply Brief to the Director's Response at 15-16.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*,

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Housing Services of Chicago, 138 S.Ct. 13, 17 n.1 (2017) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Employer also waived its related argument that the Secretary of Labor's December 21, 2017 ratification of the ALJ's appointment was invalid because it had the opportunity to also raise this issue in response to the ALJ's March 28, 2019 Order, but failed to do so.

138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[12] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11.

Responsible Operator

To be a potentially liable operator, a coal mine operator must meet certain requirements, including that it have employed the miner for a period of one year.[13] 20

[12] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

[13] 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

C.F.R. § 725.494(c). Once an operator is identified as the responsible operator, it bears the burden of proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016). To avoid liability the named operator must prove that a more recent employer of the miner employed him for at least one year.

Relevant Facts and Procedural History

Employer asserts it is not the responsible operator based on Claimant's allegation that he worked for Alminco from December 1992 to May 1997 in coal mine construction. Employer's Brief at 19-21; *see* Director's Exhibits 1 at 76 (Claimant's Employment History Form); 17 (Claimant's Answers to Interrogatories); 27 (Employer's Motion to Dismiss). Claimant's Social Security Administration (SSA) earnings records do not include wages from Alminco for this period but include wages from the Commonwealth of Kentucky.[14] Director's Exhibits 1 at 75; 9.

On September 12, 1997, in conjunction with Claimant's initial claim, a DOL claims examiner requested additional information from Alminco regarding Claimant's employment for the period 1992-1997. Director's Exhibit 1 at 20. In a September 19, 1997 letter, Mr. L. Pat Flanagan, general manager of Alminco, stated: "Mr. Fitzpatrick has been a 'safety advisor' only to this company. He has never been an employee, nor has he done any work for us in the capacity of mining, construction or manufacturing. Alminco, Inc. is a manufacturer and a construction company; we do not and have never mined coal." Director's Exhibit 1 at 19. In the current claim, the district director

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must have arisen at least 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).

[14] On his 1993 tax return, Claimant reported $8,841.00 in income from Alminco for "contract labor." Director's Exhibit 1 at 44; Director's Exhibit 6 at 4. On his 1996 tax return, Claimant reported $3,088.00 in "other income" from Alminco. Director's Exhibit 1 at 47. On his 1994 IRS Form 1099 for miscellaneous income, Claimant had non-employee compensation from Alminco in the amount of $11,409.94. Director's Exhibit 1 at 48. Claimant's Social Security Administration (SSA) earnings records shows $5,025.00 in self-employment income for 1993; $4,131.00 in self-employment income in 1994; and $2,852.00 self-employment income in 1996. Director's Exhibit 1 at 73; Director's Exhibit 9.

apparently relied on Alminco's statement that Claimant's work for it did not involve coal mine employment, and named Employer as the responsible operator. Director's Exhibit 41 (Proposed Decision and Order Awarding Benefits). The district director awarded benefits and at Employer's request the case was referred to the Office of Administrative Law Judges for a hearing on the responsible operator issue and the merits of Claimant's entitlement to benefits. Director's Exhibit 49.

The ALJ's Findings and the Parties' Arguments

Claimant alleged seventeen years of coal mine employment, while Employer stipulated to ten years. Decision and Order at 29; June 30, 2017 Hearing Transcript at 26; Employer's Post-Hearing Brief at 11. The ALJ credited Claimant with 11.75 years of coal mine employment, including .25 year of coal mine employment with Alminco working as "a contracted construction safety advisor who was present in the closed coal mines on a sporadic basis." Decision and Order at 28. The ALJ's calculation of Claimant's coal mine employment with Alminco was based on his determination that Claimant "is not entitled to the rebuttable presumption [at 20 C.F.R. §725.202(b)(1)] that he was exposed to coal mine dust for the entire [length] of employment with Alminco," and thus only credited him with time that "[Claimant] was actually exposed to coal mine dust." *Id.* at 27. He concluded Employer was properly designated as the responsible operator because it was the last operator to employ Claimant for at least one year and otherwise met the criteria for assuming liability. 20 C.F.R. §725.494; Decision and Order at 41.

Employer argues the ALJ's finding must be vacated and the case remanded. It contends the ALJ did not adequately explain his finding that Claimant did not work regularly around a coal mine site during his employment with Alminco, asserting the company's "blanket denial" that Claimant was its employee cannot outweigh Claimant's "uncontradicted" testimony that establishes seven years of coal mine construction work from 1990-1997 under the presumption that 20 C.F.R. §725.202 provides. Employer's Brief at 19-21.

The Director agrees the case must be remanded, because the ALJ did "not explain his reasoning," and because his entire analysis "is rife with contradictions." Director's Brief at 10-12. But, contrary to Employer's characterization, he further contends Claimant's testimony is "wholly contradictory" and uncorroborated by the documentary evidence -- and that the record as a whole "does not credibly support a finding of any coal mine construction employment for Alminco." *Id.*, at 10, 11. He thus asserts Employer's contention that Claimant is entitled to the Section 725.202 presumption is "beside the

point" because these "fundamental" flaws establish Claimant never worked in coal mine construction work with Alminco.[15] Director's Brief at 11, n15.

We agree with both parties that the ALJ's finding does not satisfy the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The ALJ did not resolve fundamental conflicts in the evidence. Without sufficiently addressing the initial material dispute regarding the existence of Claimant's alleged employment with Alminco, he simply noted the days that he presumed Claimant worked at Alminco, and pronounced that work was not regular. Decision and Order at 28. Since the ALJ did not conduct the proper analysis and did not adequately explain his findings, we vacate his determinations that Claimant established .25 year of coal mine employment with Alminco and that Employer is the responsible operator, and remand this case for him to make further findings consistent with this opinion. *See Wojtowicz,* 12 BLR at 1-165.

Merits of Entitlement

Without the benefit of the Section 411(c)(3) [16] and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v.*

[15] Among other things, the Director asserts Claimant changed his testimony regarding Alminco each time he was asked about it, claiming at different times that he worked as a safety inspector, a mine foreman, a general laborer, and a welder and repairman. Director's Brief at 11. The Director further notes Claimant's testimony is contradicted by the documentary evidence he submitted showing he was a full time mine and safety maintenance instructor at the same time he claimed to be working full time for Alminco. *Id.*

[16] Because it is unchallenged on appeal, we affirm the ALJ's finding that Claimant did not establish complicated pneumoconiosis and therefore is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *See Skrack,* 6 BLR at 1-711; Decision and Order at 34.

Director, OWCP, 9 BLR 1-1 (1986) (en banc).

Clinical Pneumoconiosis

The ALJ considered ten interpretations of four x-rays, dated November 17, 2015, March 9, 2016, March 11, 2017, and May 13, 2017. 20 C.F.R. §718.202(a)(1); Decision and Order at 11-14, 32-35; Director's Exhibits 13, 15; Claimant's Exhibits 1-4; Employer's Exhibits 1, 2, 4, 7. He accurately noted all of the physicians interpreting the chest x-rays are dually qualified as Board-certified radiologists and B readers. *Id*.

Drs. Crum and Miller read the November 17, 2015 x-ray as positive for simple pneumoconiosis, while Dr. Tarver read it as negative.[17] Director's Exhibit 13; Claimant's Exhibit 3; Employer's Exhibit 1. Dr. Crum read the March 9, 2016 x-ray as positive for both simple and complicated pneumoconiosis, Category A, while Drs. Seaman and Tarver read it as negative for both diseases. Director's Exhibit 15; Claimant's Exhibit 2; Employer's Exhibit2. Dr. Crum read the March 11, 2017 x-ray as positive for both simple and complicated pneumoconiosis, Category A, while Dr. Seaman read it as negative for both diseases. Claimant's Exhibit 1; Employer's Exhibit 4. Dr. DePonte read the May 13, 2017 x-ray as positive for simple pneumoconiosis only, and Dr. Seaman read it as negative. Claimant's Exhibit 4; Employer's Exhibit 7.

The ALJ stated he gave less weight to the negative x-ray readings by Drs. Seaman and Tarver because they failed "to report 'any other abnormalities' that were reported by all the other dually qualified radiologists as well as the radiologists reviewing the different CT scans."[18] Decision and Order at 34. He also noted that "[w]hile Drs. Crum and Tarver disagree on the presence of small opacities indicating the presence of pneumoconiosis on the March 9, 2016 chest x-ray, a CT scan taken 19 days earlier disclosed a 'stable small irregular density in the right upper lobe that was probably inflammatory in nature.'" *Id*. The ALJ summarily concluded: "Upon review of the clinical evidence of record, consideration of the qualifications of the physicians involved, and the [eighteen] month span of coverage involved, Claimant has establish[ed] by a preponderance of the clinical evidence that he suffers from simple [clinical] pneumoconiosis." *Id.*

[17] Dr. DePonte additionally reviewed the November 17, 2015 x-ray to assess its film quality only. Director's Exhibit 13.

[18] The record contains CT scans dated December 11, 2011, November 5, 2015, and February 18, 2016. Employer's Exhibits 3, 5, 6. These CT scans did not reflect simple or complicated pneumoconiosis, but rather granulomatous disease. *See* Decision and Order at 33.

Initially, the ALJ erred in failing to resolve the conflict in the readings of each individual x-ray and render a finding, supported by a rationale, as to whether that x-ray is positive or negative for pneumoconiosis. 20 C.F.R. §718.202(a)(1). We also agree with Employer that the ALJ did not rationally explain why the presence of "other abnormalities" on Claimant's x-rays necessarily undermined the negative x-ray readings for pneumoconiosis. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Moreover, the ALJ's rationale is wholly unexplained since the CT scans did not identify either simple or complicated pneumoconiosis. *Id.* Because we are unable to discern the ALJ's reasoning and he failed to make necessary findings supported by an adequate rationale, we vacate the ALJ's determination that Claimant established the existence of clinical pneumoconiosis. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's decision).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate he has 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(b). The ALJ credited the opinions of Drs. Everhart, Green, and Raj that Claimant has legal pneumoconiosis over Dr. Dahhan's contrary opinion. Decision and Order at 35-36. We agree with Employer that the ALJ's analysis of the medical opinions also fails to satisfy the APA. After summarizing the opinions of Drs. Everhart, Green, and Raj, the ALJ summarily concluded they were reasoned and documented.[19] Decision and Order at 35-36. In discrediting Dr. Dahhan's opinion as "not well-reasoned," the ALJ stated the physician "failed to address the [twenty-one] year smoking history or the occupational exposure to coal and rock dust in reaching his opinion."[20] Decision and Order at 37. However, Dr. Dahhan specifically reported what he understood to be Claimant's smoking and coal mine employment histories in his report

[19] Drs. Everhart and Green diagnosed Claimant with a restrictive lung disease due in part to his ten years of coal mine dust exposure. Director's Exhibit 13 at 29; Claimant's Exhibit 1 at 4. Additionally, Dr. Green diagnosed Claimant with an obstructive lung disease to which coal mine dust exposure is a significant contributing and aggravating factor. Claimant's Exhibit 1 at 4. Dr. Raj diagnosed Claimant with an obstructive lung disease and stated Claimant's coal mine dust exposure had a "substantial and significant role in" that diagnosis. Claimant's Exhibit 4 at 4.

[20] Dr. Dahhan diagnosed Claimant with a restrictive lung disease and related it to Claimant's obesity and not his seventeen year coal mine employment history. Director's Exhibit 14 at 4.

but explained that he attributed Claimant's restrictive impairment to obesity and not those exposures. Director's Exhibit 14 at 3, 4. The ALJ failed to consider Dr. Dahhan's specific rationale and determine whether it was credible.

Because the ALJ failed to critically analyze the medical opinions and explain the bases for his credibility determinations, we vacate his finding that Claimant established the existence of legal pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.202(a)(4).

Disability Causation

A miner is totally disabled due to pneumoconiosis if it substantially contributes to a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). In determining Claimant is totally disabled due to pneumoconiosis, the ALJ cited 20 C.F.R. §718.302. *See* Decision and Order at 40 n.58. Employer correctly asserts the ALJ did not conduct the proper analysis at 20 C.F.R. §718.204(c). Although the ALJ found Claimant established total disability due to pneumoconiosis, he considered only whether Claimant's pneumoconiosis arose out of his coal mine employment, confusing the legal standards at 20 C.F.R. §718.203 and 20 C.F.R. §718.204(c).[21] Employer's Brief at 25-26. Because we vacate the ALJ's clinical and legal pneumoconiosis findings, we must also vacate the ALJ's determination that Claimant is totally disabled due to pneumoconiosis and remand the case for consideration under the proper legal standard. *See* 20 C.F.R. §718.204(c)(1); *Wojtowicz*, 12 BLR at 1-165.

Remand Instructions

The ALJ must consider all the relevant evidence and resolve whether Claimant worked for one year in coal mine employment with Alminco in coal mine construction.[22]

[21] The regulation at 20 C.F.R. §718.203 provides a rebuttable presumption that a miner's pneumoconiosis arose out of his coal mine employment if he establishes ten or more years of coal mine employment, whereas 20 C.F.R. §718.204(c) requires a miner to establish his pneumoconiosis substantially contributes to his totally disabling respiratory impairment. 20 C.F.R. §§718.204(c), 718.302.

[22] The Director maintains the record does not credibly support a finding of any coal mine construction employment for Alminco because the company's statement denies it, and Claimant's 1099-MISC showing non-employee earnings from the company is silent as to what work Claimant actually did. Director's Brief at 11. The Director asserts Claimant's testimony regarding his work with Alminco changed each time he was asked about it and is contradictory: "At different points in these proceedings, he claimed he worked for the

If Claimant establishes that he was a miner who was a coal mine construction worker, the ALJ must reconsider whether the evidence is sufficient to rebut the presumption that he was regularly exposed to coal mine dust. The ALJ must resolve whether Claimant worked as a miner for at least one year in coal mine employment for Alminco, and determine if Employer is the responsible operator.

Regarding the merits of Claimant's entitlement to benefits, the ALJ must resolve whether Claimant has at least fifteen years of qualifying coal mine employment to invoke the Section 411(c) (4) presumption.[23] If the presumption is invoked, the ALJ must determine whether it has been rebutted. If Claimant is unable to invoke the presumption, the ALJ must reconsider Claimant's entitlement pursuant to 20 C.F.R. Part 718. The ALJ may render separate findings as to whether the x-rays, CT scan evidence or medical opinions would be sufficient, standing alone, to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) or (4). Thereafter, the ALJ must weigh together the evidence as a whole to determine if Claimant satisfied his burden to establish that he has clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Dixie Fuel Co., LLC v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881 (6th Cir. 2012). Similarly, he must reconsider all of the evidence with respect to legal pneumoconiosis, taking into consideration the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

The ALJ must also consider whether Claimant is able to establish total disability due to either clinical or legal pneumoconiosis or both, applying the correct legal standard at 20 C.F.R. §718.204(c). In rendering all of his credibility determinations on remand, the ALJ must explain his rationale for crediting or discrediting all the evidence and set forth

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company as a safety inspector, a mine foreman, a general laborer, and a welder and repairman. The Director further contends the daily schedule Claimant describes while working for Alminco is unbelievable given the distances between the alleged jobs, the hours he claimed to work, and the state of his health at the time" as shown by hospitalization records. *Id*. The Director thus asserts Claimant's "variable testimony is uncorroborated" and lacks support in the documentary evidence submitted "which shows he was a full-time mine safety and maintenance instructor at the same time he claimed to be working full-time for Alminco." *Id*.

[23] We affirm, as unchallenged, the ALJ's crediting of Claimant with 11.5 years of coal mine employment from July 1972 to December 31, 1983. *See Skrack*, 6 BLR at 1-711; Decision and Order at 28-31.

the bases for his findings of fact and conclusions of law as the APA requires. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge