U.S. Department of Labor

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

BRB No. 20-0289 BLA

RAY JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RACHEAL MINING COMPANY, INCORPRATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 10/29/2021
	)	
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 Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

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

Cynthia Liao (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, BUZZARD and JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven B. Berlin's Decision and Order Awarding Benefits (2016-BLA-05119) rendered on a subsequent claim filed on February 2, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 14.63 years of coal mine employment and thus could not invoke the 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 entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical pneumoconiosis, but established legal pneumoconiosis in the form of a respiratory impairment arising out of coal mine employment. 20 C.F.R. §718.202(a). Therefore he found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found Claimant established a totally disabling respiratory impairment due to pneumoconiosis and awarded benefits. 20 C.F.R. §718.204(b)(2), (c).

On appeal, Employer argues the ALJ lacked the 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.[3] It also argues the removal provisions applicable to

[1] This is Claimant's fourth claim for benefits. Director's Exhibits 1-3. ALJ Christine L. Kirby denied the most recent prior claim because Claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 3. Claimant took no further action until filing the current claim. Director's Exhibit 5.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[3] 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

ALJs rendered his appointment unconstitutional. It further contends he erred in finding Racheal Mining Co., Inc. (Racheal) is the responsible operator. In addition, it contends the ALJ erred in finding Claimant established the existence of legal pneumoconiosis and total disability due to pneumoconiosis.[4]

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment. He concedes, however, that remand is necessary because the ALJ did not consider relevant evidence when finding Racheal is the responsible operator. Employer has filed a reply brief reiterating 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 10-14; Employer's Reply Brief at 3-5. It acknowledges the

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> 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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 17.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3 at 124; 23 at 9-10, 12, 16-17.

[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to 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. Commissioner*, 501 U.S. 868 (1991)). The Department of Labor

Secretary of Labor (Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 11-14; Employer's Reply Brief at 3-5.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 11-13. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* at 13. We agree with the Director's positions.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume 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).

(DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] The Secretary of Labor (Secretary) 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 [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] 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 Berlin.

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 Judge Berlin and gave "due consideration" to his appointment.[8] Secretary's December 21, 2017 Letter to ALJ Berlin. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Berlin "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified Judge Berlin's appointment. 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 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 civil service. Employer's Reply Brief at 10-11. 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 Judge Berlin's appointment, which we

[8] While Employer notes correctly the Secretary signed the ratification letter by autopen, 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"); Employer Brief at 13.

have held constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

Thus we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 15-19; Employer's Reply Brief at 5-9. 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*. *Id.* 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) 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). *Id.*

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 [ALJs]" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. U.S. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 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."[9] 140 S. Ct. at 2201. It did not address ALJs.

[9] 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

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.

Although Employer generally summarizes these cases, it has not explained how or why these legal authorities should apply to 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 "'[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) (a 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 either facially or as applied. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(a)(1). The district director is initially charged

relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

[10] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability must have arisen at least in part out of employment with the operator, the operator or its successor must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, at least one working day of the employment must have occurred after December 31, 1969, and 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).

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 that it is financially incapable of assuming liability for benefits or another potentially liable operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). Where an operator is considered a successor operator, any employment with a prior operator "is deemed to be employment with the successor." 20 C.F.R. §725.493(b)(1).

Before the ALJ, Employer asserted Racheal should be dismissed as the responsible operator because two coal mine operators, DBH Coal and DM&M Coal, more recently employed Claimant. Employer's Post-Hearing Brief at 56-57. It argued DBH Coal was a successor to DM&M Coal and thus Claimant's employment with each company should be combined to establish a cumulative period of at least one year of employment. *Id*. Rejecting this argument, the ALJ found the evidence is insufficient to establish a successor relationship between DBH Coal and DM&M Coal. Decision and Order at 4. We find no merit in Employer's argument that the ALJ erred in rendering this finding. Employer's Brief at 19-21.

The ALJ correctly noted Claimant testified that DBH Coal and DM&M Coal were "owned by the same person, Donnie Newsome," but he also testified these were "two different mining companies." Decision and Order at 4, *citing* Director's Exhibit 3 at 139. He found this testimony did not establish a successor relationship, and only established these were "separate mine[s] owned by the same person." Decision and Order at 4. Because there was no other evidence of a successor relationship, the ALJ rationally found Employer failed to establish DBH Coal was a successor to DM&M Coal. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 4.

Employer does not contest that it meets these requirements. Thus we affirm it is a potentially liable operator. *Skrack*, 6 BLR at 1-711.

Citing *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555 (6th Cir. 2002), Employer argues that common ownership between two mines is sufficient to establish a successor relationship. Employer's Brief at 20-21. We agree with the Director's assertion that Employer's reliance on *Hall* is misplaced. Director's Brief at 10-11. In *Hall*, the United States Court of Appeals for the Sixth Circuit reversed an ALJ's finding that there was no successor relationship between two mines owned by one individual. 287 F.3d at 564-66. The court held the ALJ erred in finding there was "no evidence regarding a mine acquisition or a transfer of assets." *Id*. It explained the record is clear the common owner therein moved "all of the equipment from one mine to another mine, and operat[ed] it under a different name or corporate structure," and this evidence "would qualify as a transfer of assets, even if there were no written purchase agreement or other documentation facilitating the transfer." *Id*.

Employer does not allege there is evidence in the present case reflecting a mine acquisition or transfer of assets between DBH Coal and DM&M Coal; nor does it allege there is evidence Donnie Newsome moved equipment from one mine to another or operated one mine under different names.[11] Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish a successor relationship between DBH Coal and DM&M Coal. *Karst Robbins Coal Co. v. Director, OWCP* [*Rice*], 969 F.3d 316 (6th Cir. 2020) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Hall*, 287 F.3d at 564-66; Decision and Order at 4.

The ALJ further found Employer failed to establish that either DBH Coal or DM&M Coal individually employed Claimant for at least one year, separate from whether there was a successor relationship. Decision and Order at 2-5. In calculating the length of Claimant's employment with these operators, the ALJ applied the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[12] He divided Claimant's annual earnings for these

[11] Employer generally argues the ALJ erred in failing to discuss Claimant's Social Security Administration earnings records, which reflect that DBH Coal and DM&M Coal have the same mailing address. Employer's Brief at 19-20. Employer has not explained how this evidence undermines the ALJ's finding that the same individual may have owned two separate mines, but there is no evidence DBH Coal was a successor to DM&M Coal. *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); Decision and Order at 4.

[12] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the

operators as set forth in his Social Security Administration (SSA) earnings records by the yearly average wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.*[13] Decision and Order at 2-5. Where Claimant's wages exceeded the 125-day average, the ALJ credited him with a full year of coal mine employment. *Id*. Where Claimant's earnings fell below the 125-day average, the ALJ credited him with a fractional year. *Id*. Applying this method of calculation, he found Claimant worked for 0.28 of a year in 1991 with DM&M Coal and 0.17 of a year in 1992 with both DM&M Coal and DBH Coal. Decision and Order at 2-5.

Employer argues the ALJ failed to address relevant evidence on the responsible operator issue, which it maintains contradicts the SSA earnings records and establishes Claimant worked for each of these entities for at least one year. Employer's Brief at 19-21. Employer notes Claimant testified in his third claim that Donnie Newsome "paid him by personal check and did not pay taxes on that income, making the earnings reported on the [SSA earnings record] incomplete." Employer's Brief at 19-21, *citing* Director's Exhibit 3 at 139-141. Further, Claimant testified he worked "everyday" in 1991 and 1992 for DM&M Coal and DBH Coal, specifically stating he worked at least 125 days in 1991 for DM&M Coal and at least 125 days in 1992 for both DM&M Coal and DBH Coal. Director's Exhibit 3 at 139-141. On three CM-911a employment history forms submitted in connection with his second, third and current claim, Claimant stated he worked for DM&M Coal from February 1991 to July 1991, and then worked for DBH Coal from December 1991 to December 1992. Director's Exhibits 2 at 700; 3 at 818; 6; *see also* Director's Exhibit 21 at 14.

The Director responds that the evidence Employer highlights is contradicted by other hearing and deposition testimony, along with documentary evidence, and thus is insufficient to establish Claimant worked for these entities for at least one year. Director's Brief at 9-10. Specifically, Claimant testified he did not know the percentage of time Donnie Newsome paid him by personal check. Director's Exhibit 3 at 140. Further, Claimant testified in his second claim he did not work for any company after Employer for a year. Director's Exhibit 2 at 143-44. When Claimant filed his third claim, he submitted pay stubs from DM&M Coal and DBH Coal, along with a written statement that he "never

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average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics.

[13] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and yearly earnings for those who worked 125 days during a year, and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

worked a full year" for these entities.[14] Director's Exhibit 3 at 804-08. At an April 3, 2009 deposition, Claimant testified he did not "think he worked for DBH for a year," and could not remember why he indicated on his employment history forms that he worked there from December 1991 to December 1992.[15] Director's Exhibit 3 at 605. Finally, in a June 8, 2015 deposition, Claimant stated he could not remember the names of the mines he worked for after Employer, but he worked for these entities for no more than a couple of months. Director's Exhibit 23 at 10.

Notwithstanding his position that the evidence Employer highlights is insufficient to establish that Claimant worked for either DM&M Coal or DBH Coal for at least one year, the Director concedes that the ALJ erred by failing to consider this relevant evidence when rendering his responsible operator finding. Director's Brief at 9-11. In view of the Director's concession,[16] we vacate the ALJ's finding that Racheal is the responsible operator and remand this case for further consideration of this issue.[17] 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We instruct the ALJ to reconsider

[14] Claimant's wife testified she completed this statement as she made notations based on his paystubs. Director's Exhibit 3 at 606-610.

[15] Claimant's wife also testified at this deposition that she took notes of his employment "as he was working" at specific mines. Director's Exhibit 3 at 606-10. She stated he never worked a full year for DM&M Coal and DBH Coal, but acknowledged she was "having trouble getting the dates." *Id.*

[16] Employer argues in its Reply Brief that Claimant's "recent work for Spud Mining makes Spud the proper responsible operator." Employer's Reply at 2-3. Employer has forfeited this argument by failing to raise it in its opening brief. *Island Creek Coal Co. v. Wilkerson,* 910 F.3d 254, 256 (6th Cir. 2018).

[17] Employer urges the Board to reverse the ALJ's responsible operator finding. We decline to do so. The ALJ is tasked with evaluating the credibility of the documentary evidence Employer submitted and resolving the conflicts in the evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (Board lacks the authority to render factual findings to fill in gaps in the ALJ's opinion).

whether Employer[18] met its burden to prove that either DM&M Coal or DBH Coal more recently employed Claimant for one year.[19] *See* 20 C.F.R. §725.495(c)(2).

Entitlement - 20 C.F.R. Part 718

To be entitled to benefits under the Act, 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).[20] 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. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis,[21] Claimant must prove he has a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust

[18] The ALJ should address if Employer designated Claimant as a liability witness when this case was before the district director. If no party provides notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c).

[19] As this case arises within the jurisdiction of the Sixth Circuit, the ALJ should give effect to all provisions and options set forth in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-05 (2019), when calculating Claimant's employment with DM&M Coal or DBH Coal. *See* 20 C.F.R. §725.101(a)(32). As Employer correctly argues, the Sixth Circuit explained in *Shepherd* that "[r]egardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year, if the miner worked for at least 125 days, the miner will be credited with one year of coal mine employment." *Shepherd*, 915 F.3d at 401-02; *see* Employer's Brief at 19-21.

[20] The ALJ determined there was no evidence of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 14.

[21] "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

exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).[22] The Sixth Circuit holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the opinions of Drs. Forehand and Castle. Decision and Order at 14-16. He found Dr. Forehand diagnosed legal pneumoconiosis in the form of a respiratory impairment significantly related to, or substantially aggravated by, coal mine dust exposure. *Id.*; *see* Director's Exhibit 15. He concluded Dr. Forehand's opinion is well-reasoned and documented. Decision and Order at 14-16. In contrast Dr. Castle diagnosed Claimant with chronic airflow obstruction due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibit 6. He further opined Claimant's disabling hypoxemia is due to his cigarette smoking-related emphysema. *Id*. The ALJ discredited Dr. Castle's opinion as inadequately explained and inconsistent with the scientific evidence cited in the preamble to the 2001 revised regulations.[23] Decision and Order at 14-16.

We reject Employer's argument that the ALJ erred in weighing Dr. Castle's opinion. In excluding legal pneumoconiosis, Dr. Castle explained coal mine dust exposure causes a "minimally reduced FEV1/FVC ratio," while smoking causes a "very significant reduction in the FEV1/FVC ratio." *Id*. at 15-16. Because Claimant has a "severe reduction in the FEV1/FVC ratio," he opined the impairment is not consistent with coal mine dust-induced airway obstruction. *Id*. The ALJ permissibly discredited Dr. Castle's opinion as

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[22] The ALJ found Claimant did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1)-(4); Decision and Order at 13-14.

[23] The ALJ also considered Dr. Dahhan's opinion. Decision and Order at 14-16. Dr. Dahhan observed Claimant has "moderate resting hypoxemia signifying alteration in his blood gas exchange mechanisms at rest," but did "not know if it is due to pulmonary or other causes" because of Claimant's refusal to undergo objective testing. Director's Exhibit 16. The ALJ concluded Dr. Dahhan did not address whether Claimant has legal pneumoconiosis. Decision and Order at 15. We affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711.

inconsistent with the studies cited by the DOL in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 15-16; Employer's Brief at 25-27.

Dr. Castle also opined Claimant's obstructive impairment is unrelated to coal mine dust exposure because "there was some degree of bronchoreversibility on at least one" pulmonary function study, which is "inconsistent with coal mine dust-induced airway obstruction." Employer's Exhibit 6 at 16. The ALJ permissibly found Dr. Castle did not adequately explain why this factor necessarily eliminated coal mine dust exposure as a contributing cause of the impairment that remained after bronchodilators were administered.[24] *See Young*, 947 F.3d at 405-09; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 16.

We agree, however, with Employer's argument that the ALJ erred in finding Dr. Forehand's opinion establishes *legal* pneumoconiosis. Dr. Forehand diagnosed Claimant with "coal workers' pneumoconiosis with a respiratory impairment." Director's Exhibit 15 at 16. He based this diagnosis on Claimant's "history of occupational exposure to toxic silica and coal dust, shortness of breath, chest x-ray, [and] arterial blood gas study." *Id*. He opined Claimant has a respiratory impairment evidenced by insufficient gas exchange on arterial blood gas testing. *Id*. When asked to address the etiology of the cardiopulmonary diagnosis, he opined:

> Claimant's history of occupational exposure to silica and coal dust for fourteen years as a scoop operator, coal shooter, belt work[er], gob man, and general inside laborer was a sufficient length of time to substantially cause and contribute to claimant's COAL WORKERS' PNEUMOCONIOSIS WITH RESPIRATORY IMPAIRMENT. Claimant's history of smoking cigarettes could cause damage to his airways, which would contribute to claimant's respiratory impairment but not to his coal workers' pneumoconiosis. Overall the most likely cause of [C]laimant's COAL WORKERS' PNEUMOCONIOSIS WITH RESPIRATORY IMPAIRMENT *is a fibrotic reaction in [C]laimant's lungs from inhaling*

[24] Because the ALJ provided valid reasons for discrediting Dr. Castle's opinion, any error in discrediting it for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

> *fibrogenic silica and coal dust working at the face*, which in turn scarred and disrupted the normal architecture of the bronchovascular bundles, which interfered with the transfer of oxygen through the lungs into the body causing arterial hypoxemia. I believe this process with [sic] further aggravated by the effects of cigarette smoke on the airways. Cigarette smoking on the other hand does not have an effect on the bronchovascular bundle.

Id. (emphasis added). When asked to address the extent to which Claimant's coal workers' pneumoconiosis with respiratory impairment contributed to the hypoxemia he diagnosed, Dr. Forehand opined the "respiratory impairment was substantially contributed to by the effects of *inhaling fibrogenic coal and silica dust into his lungs, which caused a fibrotic reaction (coal workers' pneumoconiosis)* and scarring around the bronchovascular bundles in his lungs, interfering with oxygen transfer through the lungs into [C]laimant's body and leading to arterial hypoxemia." *Id*. He further stated the "role [C]laimant's smoking played cannot precisely be determined because he was unable to perform spirometry to measure damage to the airway." *Id*.

The ALJ did not adequately explain his basis for finding Dr. Forehand's opinion constitutes an independent diagnosis of legal pneumoconiosis rather than a diagnosis that Claimant has clinical pneumoconiosis, and clinical pneumoconiosis is a substantially contributing cause of a disabling respiratory impairment. 20 C.F.R. §§718.201(a)(2), (b), 718.204(c). The regulations set forth that clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconiosis, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis*, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1) (emphasis added). As discussed above, Dr. Forehand twice stated that he is diagnosing coal workers' pneumoconiosis with a respiratory impairment because Claimant's clinical picture reflects "a fibrotic reaction in [C]laimants lungs from inhaling fibrogenic silica and coal dust." Director's Exhibit 15 at 16. Dr. Forehand also cited Claimant's positive chest x-ray as a basis for his diagnosis. *Id*.

The ALJ found Claimant failed to establish clinical pneumoconiosis based on the x-ray, biopsy, CT scan, and medical opinion evidence. Decision and Order at 13-14. Thus to the extent Dr. Forehand's opinion constitutes a diagnosis of clinical pneumoconiosis and not an independent diagnosis of legal pneumoconiosis, the ALJ's conclusion that Dr. Forehand diagnosed legal pneumoconiosis is inconsistent with his determination relating to clinical pneumoconiosis and does not comply with the explanatory requirements of the

APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. 932(a); *see Rowe*, 710 F.2d at 255; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of the foregoing, we vacate the ALJ's finding that Claimant established legal pneumoconiosis through Dr. Forehand's opinion. 20 C.F.R. §718.202(a)(4). We further vacate his finding that Claimant established a change in an applicable condition of entitlement and the award of benefits. 20 C.F.R. §725.309. Because we have vacated the ALJ's finding that Claimant established legal pneumoconiosis, we must also vacate his finding that Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c).

On remand, the ALJ, as necessary,[25] must reconsider whether Dr. Forehand's opinion establishes Claimant has legal pneumoconiosis and is totally disabled due to the disease. 20 C.F.R. §§718.202(a)(4), 718.204(c). He should address the physician's explanations for his conclusions, the documentation underlying his medical judgement, and the sophistication of, and bases for, his diagnoses.[26] *See Rowe*, 710 F.2d at 255.

[25] The ALJ found all of Claimant's employment was underground, and we affirm this finding as unchallenged. *Skrack*, 6 BLR at 1-711; Decision and Order at 2. We note Claimant will have established at least fifteen years of underground coal mine employment if the ALJ finds he worked at least 0.37 of a year for DM&M Coal, DBH Coal, or both. Thus he will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b). In this instance, the burden will shift to the party opposing entitlement to establish Claimant has neither legal nor clinical pneumoconiosis, or "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).

[26] The ALJ weighed Dr. Forehand's diagnosis of clinical pneumoconiosis in finding Claimant failed to establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 14.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the ALJ's finding that Claimant established the existence of legal pneumoconiosis based on Dr. Forehand's opinion. I would reject Employer's assertion that Dr. Forehand diagnosed clinical but not legal pneumoconiosis, Employer's Brief at 23, and affirm the ALJ's finding that Claimant is entitled to benefits.

Legal Pneumoconiosis

The regulations define legal pneumoconiosis as "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). As the majority acknowledges, this standard can be met "by showing that [the miner's] disease was caused 'in part' by coal mine employment."[27] *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th

[27] As the ALJ cited and applied the correct legal standard in finding that Claimant has legal pneumoconiosis, Decision and Order at 14, I would reject Employer's argument to the contrary. *See* Employer's Brief at 24-25, 28-29.

Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

Employer is correct that Dr. Forehand diagnosed clinical pneumoconiosis when he stated Claimant has "coal workers' pneumoconiosis with respiratory impairment (history of occupational exposure to toxic silica and coal dust, shortness of breath, chest x-ray, arterial blood gas study)." Director's Exhibit 15; *see* 20 C.F.R. §718.201(a)(1) (the term "coal workers' pneumoconiosis" is included within the definition of "clinical pneumoconiosis"); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821 (4th Cir. 1995) ("[C]oal workers' pneumoconiosis [is] only one of several possible ailments which could satisfy the legal definition of pneumoconiosis."). Employer ignores, however, that Dr. Forehand also diagnosed legal pneumoconiosis when he opined that Claimant has a totally disabling gas exchange impairment, evidenced by a reduced "pO2 [of] 52," and such impairment "was substantially contributed to by the effects of inhaling fibrogenic coal and silica dust into his lungs." Director's Exhibit 15. Because Dr. Forehand clearly attributed Claimant's disabling respiratory impairment, in part, to coal mine dust exposure, his opinion satisfies the definition of legal pneumoconiosis. 20 C.F.R. §718.201(b).

Moreover, Dr. Forehand explicitly differentiated between clinical and legal pneumoconiosis[28] such that there is no question he diagnosed both diseases. He explained that Claimant's coal mine dust inhalation caused both clinical pneumoconiosis, i.e., "a fibrotic reaction (coal workers' pneumoconiosis)," *and* legal pneumoconiosis, i.e., "scarring around the bronchovascular bundles in his lungs, interfering with oxygen transfer through the lungs into [C]laimant's body and leading to arterial hypoxemia" – the latter being yet another reference to Claimant's coal-dust-induced impairment. Director's Exhibit 15.

The ALJ did not overlook any aspect of Dr. Forehand's opinion. Rather, he accurately noted "Dr. Forehand based his diagnosis of legal pneumoconiosis on Claimant's history of exposure to coal dust" and accurately found Dr. Forehand diagnosed legal pneumoconiosis in the form of a respiratory impairment caused by coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); *see Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d

[28] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, 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). "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).

at 407; Decision and Order at 14. Thus, I would reject Employer's assertion that the ALJ erred in finding Dr. Forehand diagnosed legal pneumoconiosis.

I would also reject Employer's assertion that Dr. Forehand's opinion is not reasoned and documented. Employer's Brief at 22. The ALJ permissibly found Dr. Forehand's opinion well-reasoned and entitled to significant weight because he based his opinion on Claimant's physical examination and arterial blood gas study results, accurately considered Claimant's history of coal mine dust exposure and smoking, and explained why both coal mine dust exposure and smoking contributed to his respiratory impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 7-9, 14.

Employer unpersuasively alleges that the ALJ errantly relied on the preamble to the 2001 regulations to "supply an explanation that was otherwise missing from Dr. Forehand's opinion." Employer's Brief at 28. To the contrary, the ALJ permissibly found Dr. Forehand's opinion consistent with the Department of Labor's (DOL) recognition that the risks of smoking and coal dust exposure are additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 14; Employer's Brief at 23, 28-29.

Employer's assertion that the ALJ erred in discrediting Dr. Castle's opinion that Claimant does not have legal pneumoconiosis is also unconvincing. Employer's Brief at 24-28. Dr. Castle opined that coal mine dust exposure causes a "minimally reduced FEV_1/FVC ratio," while smoking causes a "very significant reduction in the FEV_1/FVC ratio" like that demonstrated by Claimant. Employer's Exhibit 6 at 17. The ALJ permissibly discredited Dr. Castle's opinion as inconsistent with the DOL's position in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV_1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Adams*, 694 F.3d at 801-02; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012); Decision and Order at 15-16.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight.[29] *See Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*,

[29] The ALJ accurately noted Dr. Dahhan did not address whether Claimant has legal pneumoconiosis. Decision and Order at 15. Dr. Dahhan opined Claimant has "moderate resting hypoxemia signifying alteration in his blood gas exchange mechanisms at rest."

710 F.2d 251, 255 (6th Cir. 1983). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, I would affirm the ALJ's finding that Claimant established the existence of legal pneumoconiosis based on Dr. Forehand's opinion. 20 C.F.R. §718.202(a)(4).

Disability Causation

Finally, I would affirm the ALJ's finding that Claimant established total disability due to pneumoconiosis based on Dr. Forehand's opinion. 20 C.F.R. §718.204(c).

To establish disability causation, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Dr. Forehand opined "Claimant has a significant respiratory impairment, which would prevent him from returning to his last coal mining job." Director's Exhibit 15. As previously discussed, his attribution of Claimant's disabling respiratory impairment, in part, to coal mine dust exposure constitutes an opinion that the total disability *is legal pneumoconiosis*; thus, by definition, legal pneumoconiosis is a substantially contributing cause of that disability. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's opinion that a miner has a totally disabling pulmonary impairment supports disability causation if that impairment is found to be legal pneumoconiosis); Director's Exhibit 15. As the ALJ permissibly relied on Dr. Forehand's opinion to find Claimant's disabling impairment constitutes legal pneumoconiosis, *see Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407; Decision and Order at 14, 16, he rationally found Dr. Forehand's opinion establishes disability causation. 20 C.F.R. §718.204(c); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790

Director's Exhibit 16. He stated he did "not know if it is due to pulmonary or other causes." *Id*.

F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 21.

Therefore, I would affirm the award of benefits.

GREG J. BUZZARD
Administrative Appeals Judge