U.S. Department of Labor

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

BRB No. 19-0457 BLA

GEORGE T. KIDD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COVENANT COAL CORPORATION	)	DATE ISSUED: 09/18/2020
	)	
and	)	
	)	
LIBERTY MUTUAL 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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

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

R. Luke Widener (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer/Carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, 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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Morris D. Davis's Decision and Order Awarding Benefits (2016-BLA-06008) rendered on a claim pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 23, 2014.[1]

The administrative law judge credited Claimant with 15.06 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] thereby demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] The administrative law judge further determined Employer did not rebut the presumption and awarded benefits.

[1] On February 1, 2010, the district director deemed as abandoned Claimant's first claim, filed on March 26, 2009. Director's Exhibit 1. Claimant filed another claim on April 22, 2011, which the district director denied based on Claimant's failure to establish pneumoconiosis arising out of coal mine employment. Director's Exhibit 2. Claimant did not take any further action prior to filing his current claim. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he or she has at least fifteen years of underground or substantially similar 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.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "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.

On appeal, Employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, Employer contends the administrative law judge erred in finding Claimant established fifteen years of qualifying coal mine employment and therefore also erred in finding he invoked the Section 411(c)(4) presumption. It further argues the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting Employer forfeited its Appointments Clause challenge and urging the Board to reject its contention the Section 411(c)(4) presumption is unconstitutional.[5]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge'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

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§725.309(c)(3). The district director denied Claimant's prior claim because, although he established total respiratory disability, he failed to establish pneumoconiosis arising out of coal mine employment. Director's Exhibit 2. Consequently, to obtain review on the merits of his current claim, Claimant had to submit new evidence establishing pneumoconiosis or causality. *See* 20 C.F.R. §725.309(c).

[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 administrative law judge's finding Claimant established total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer urges the Board to remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 6-9. Employer specifically contends the administrative law judge took significant actions while not properly appointed and the Secretary of Labor's ratification of his appointment on December 21, 2017, does not cure the Appointments Clause violation. *Id*. The Director asserts Employer forfeited its Appointments Clause challenge by failing to timely respond to the administrative law judge's Order requiring Employer to indicate if it sought reassignment to a different administrative law judge pursuant to *Lucia*. Director's Brief at 4-5.

The Appointments Clause issue is "non-jurisdictional" and thus is subject to ordinary rules 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). Following the issuance of the United States Supreme Court's decision in *Lucia* and in response to Employer's Appointments Clause challenge, the administrative law judge expressly ordered Employer to "file a statement indicating whether it seeks reassignment . . . to a different [administrative law judge]" within fourteen days. September 11, 2018 Notice and Order at 1-2. He further stated "[i]f a response is not timely filed, the remedy of reassignment and a new hearing in this matter will be deemed waived and the case will proceed before the undersigned." *Id*. at 2.

Employer did not file a response. Had Employer timely responded to the administrative law judge's order, he could have considered the issue and, if appropriate, provided the relief Employer now requests. *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Based on these facts,

[7] In *Lucia*, the United States Supreme Court held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a different and properly appointed administrative law judge. *Id*.

we conclude Employer waived its Appointments Clause challenge.[8] Employer offers no valid reason why the Board should excuse its waiver.[9] *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge to discourage "sandbagging"). We therefore deny the relief requested.[10] *See Wilkerson*, 910 F.3d at 256.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the entirety of the Affordable Care Act (ACA), including its provisions reinstating the Section 411(c)(4) presumption, is unconstitutional, and therefore, this case should be remanded to the administrative law judge to determine whether Claimant is entitled to benefits without the benefit of the Section 411(c)(4) presumption. *See* Pub. L. No. 111-148, §1556 (2010); Employer's Brief at 5-6. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the issue. *Id.* at 6.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted,* U.S. , No. 19-1019, 2020 WL 981805

[8] "[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 Hous. Servs. of Chi.*, 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)).

[9] Employer asserts it did not respond to the administrative law judge's Notice and Order "[i]n light of the [administrative law judge's] inability to decide constitutional issues." Employer's Brief at 8. To the extent it asserts a timely response was therefore not required, we note Employer's challenge to the administrative law judge's appointment is an "as-applied" challenge that can be waived or forfeited. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018). Moreover, the administrative law judge expressly provided Employer the opportunity to seek the remedy of re-assignment and a new hearing. *See In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge).

[10] Employer also waived its related argument that the Secretary of Labor's December 21, 2017 ratification of the administrative law judge's appointment was invalid because it also had the opportunity to raise this issue in response to the administrative law judge's Notice and Order, but failed to do so.

(Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Invocation of the Presumption - Length of Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In calculating the length of Claimant's coal mine employment, the administrative law judge considered his employment history summaries, Social Security Administration (SSA) earnings records, and hearing and deposition testimonies. Decision and Order at 6-11; Director's Exhibits 1, 8; Hearing Transcript at 14-18. For the years from 1972 to 1977, he credited Claimant with a full quarter of coal mine employment for each quarter in which Claimant earned at least fifty dollars from coal mine operators as reflected in the SSA records. Decision and Order at 9. Doing so resulted in eighteen quarters, or 4.5 years, of coal mine employment. *Id*.

Beginning in 1978, for the years in which the beginning and ending dates of Claimant's coal mine employment could not be ascertained or his employment lasted less than a calendar year, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[11] to determine the number of days of employment. *Id*. at 8-10. He

[11] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, an administrative law judge may determine

then divided the number of days by 250 to calculate the length of Claimant's coal mine employment for that calendar year.[12] *Id*. at 9-10. Based on these calculations, the administrative law judge initially found Claimant had a total of fourteen years of coal mine employment from 1972 to 1995. *Id*. Relying on Claimant's 2009 deposition testimony, however, the administrative law judge revised his calculations for 1994 and 1995[13] and ultimately concluded Claimant had a total of 15.06 years of underground coal mine employment. *Id*. at 11.

Employer has not challenged the administrative law judge's determination Claimant established 13.73 years of coal mine employment from 1972 to 1993, and we therefore affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-10. Rather, Employer contends the administrative law judge erred in giving dispositive weight to Claimant's June 8, 2009 deposition testimony when crediting Claimant with one year of coal mine employment in 1994 and 0.33 of a year in 1995. Employer's Brief at 10-11. Employer also avers the administrative law judge failed to reconcile the conflict between the SSA records, the November 29, 2017 hearing testimony, and the June 8, 2009 deposition testimony. *Id*. We disagree.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility of the evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Assessing the credibility of witness testimony is within the administrative law judge's discretion in his role as fact-finder, and the Board will not disturb his findings

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the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii).

[12] The administrative law judge explained he believes using 250 days as a divisor is "a reasonable method of computation" because, presuming a 50-week work year and a five-day work week, a miner whose earnings equal 250 days of average daily earnings from coal mine employment will usually have worked for a full calendar year. Decision and Order at 9.

[13] Based on the SSA records, the administrative law judge initially listed Claimant's earnings as "none" for 1994 and as "$10,000.00" for 1995 and therefore calculated no employment for 1994 and 0.27 year for 1995. Decision and Order at 10. After reviewing Claimant's 2009 deposition testimony, he credited Claimant with a full year of coal mine employment in 1994 and .33 of a year for 1995. *Id*. at 10-11.

unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

Contrary to Employer's contention, the administrative law judge acknowledged the SSA records showed "no reported earnings . . . for J R & R [Coal Corporation] from 1993 until its bankruptcy and acquisition by Claimant." Decision and Order at 11. The administrative law judge then considered Claimant's November 29, 2017 hearing testimony that he started working in the coal mines in 1972 and stopped in April 1995, but permissibly found it to be "vague and confusing" concerning the details of his employment.[14] *See Tackett*, 12 BLR at 1-14; Decision and Order at 10; Hearing Transcript at 14-18.

Next, the administrative law judge considered Claimant's June 8, 2009 deposition testimony, filed in conjunction with his initial claim in 2009. Decision and Order at 10-11. As the administrative law judge noted, Claimant explained he bought out the owners of J R & R Coal Corporation in August 1994 because they wanted to retire. Decision and Order at 10; Director's Exhibit 1 - June 8, 2009 Deposition Transcript at 10-13. The administrative law judge observed Claimant testified that, from 1993 until August 1994, he "was doing basically the same kind of work . . . plus administrative duties" and received his salary from J R & R Coal Corporation. Decision and Order at 10; *see* Director's Exhibit 1 – June 8, 2009 Deposition Transcript at 45-47. After he purchased J R & R Coal Corporation in August 1994, Claimant testified he received a "coal check" for the coal he mined and, after he paid for employees' salaries, supplies, insurance, and fines, he would pay himself; he paid himself $10,000.00 for the nine-month period of August 1994 to April 1995. *Id.* at 12, 44. Thus, the administrative law judge permissibly found Claimant's more detailed deposition testimony supports the conclusion he worked for J R & R Coal Corporation from January 1994 to April 1995.[15] *See Tackett*, 12 BLR at 1-14; Decision

[14] At the hearing, Claimant generally testified his coal mine employment spanned the period from 1972 to April 1995 in various jobs and explained the exertional requirements of his positions. Hearing Transcript at 14-18. He stated at the end of his coal mine employment he "was working for my - - myself." *Id*. at 17. He explained he "went and bought in with J R & R [Coal Corporation]. And what resources I had, I took." *Id.* He also testified he then "bought them out" and ran the corporation "for the last year or last six months." *Id*. Claimant was not otherwise questioned in detail concerning the exact dates of his coal mine employment.

[15] Employer implies the administrative law judge could not rely on Claimant's 2009 deposition testimony because "[the administrative law judge] did not personally observe [it]." Employer's Brief at 10. However, Claimant was under oath when he testified and

and Order at 10-11. Consequently, the administrative law judge permissibly determined Claimant had a full year of coal mine employment in 1994 and four months of coal mine employment in 1995, resulting in 1.33 years. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (administrative law judge evaluates the credibility of the evidence of record, including witness testimony); *Tackett*, 12 BLR at 1-14; Decision and Order at 11. As this determination is rational and supported by substantial evidence, we affirm the administrative law judge's ultimate finding of more than fifteen years of underground coal mine employment. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

Because we affirmed the administrative law judge's findings Claimant had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we also affirm his conclusion that Claimant invoked the Section 411(c)(4) presumption of disability due to pneumoconiosis. *See* 20 C.F.R. §718.305(b); Decision and Order at 20-21. Consequently, we also affirm his finding Claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); Decision and Order at 19-20.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[16] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

Employer has not offered any evidence it objected to that testimony. *See* Director's Exhibit 1 – June 8, 2009 Deposition Transcript. Thus, we reject this contention.

[16] 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). This definition encompasses 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).

in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer did not establish rebuttal by either method.[17]

Existence of 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); *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting). On this issue, the administrative law judge considered the opinions of Drs. Vernon, Nader, and Habre, diagnosing legal pneumoconiosis, and the contrary opinions of Drs. Sargent and Fino. Decision and Order at 24-26; Director's Exhibits 12, 13; Claimant's Exhibit 3, 5; Employer's Exhibits 2, 4. He found Dr. Vernon's opinion was well-reasoned and well-documented but accorded little weight to the opinions of Drs. Nader and Habre because they did not consider all possible causal factors of Claimant's respiratory impairment. Decision and Order at 24-26. He found the opinions of Drs. Sargent and Fino are insufficient to rebut legal pneumoconiosis because they did not sufficiently explain why coal dust could not also have contributed to Claimant's respiratory impairment.[18] *Id*. at 25-26.

Employer contends the administrative law judge erred in his consideration of the opinions of Drs. Sargent and Fino. Employer's Brief at 13-14. We disagree.

Dr. Sargent excluded coal mine dust exposure as a cause of Claimant's restrictive ventilatory impairment based on the absence of x-ray changes consistent "with advanced simple or complicated pneumoconiosis."[19] Director's Exhibit 12; *see also* Employer's

[17] The administrative law judge found Employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 23-24.

[18] The administrative law judge also considered the medical opinions from Claimant's two prior claims but gave them less weight as "Claimant's condition has been worsening," and thus, they are not demonstrative of Claimant's current condition. Decision and Order at 25; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 491 (6th Cir. 2003) (pneumoconiosis is recognized as a latent and progressive disease); Director's Exhibits 1-2.

[19] In his May 7, 2015 report, Dr. Sargent opined while coal dust exposure can result in a restrictive ventilatory defect, such a defect is accompanied by changes consistent "with advanced simple pneumoconiosis or complicated pneumoconiosis on [radiographic] studies." Director's Exhibit 12. When asked during his deposition whether coal workers' pneumoconiosis can cause a disabling restrictive impairment, such as in this case, Dr.

Exhibit 4. Thus, contrary to Employer's contention, the administrative law judge did not mischaracterize Dr. Sargent's opinion or reject it as hostile to the Act. He instead permissibly discredited it as inconsistent with the Department of Labor's recognition that a physician can credibly diagnose pneumoconiosis "notwithstanding a negative x-ray" and that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (the regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that '[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray'"); Decision and Order at 25. Further, the administrative law judge permissibly discredited Dr. Sargent's opinion that while Claimant's disabling respiratory impairment was caused by obesity, paralysis of his right hemidiaphragm, and sleep apnea, Dr. Sargent did not adequately explain why Claimant's multiple years of coal mine dust exposure was not also a significantly contributing or substantially aggravating factor in his respiratory impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; *Hicks*, 138 F.3d at 533; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 25. Consequently, we affirm the administrative law judge's determination Dr. Sargent's opinion is insufficient to rebut the presumption that Claimant suffers from legal pneumoconiosis.

Employer next argues the administrative law judge failed to consider Dr. Fino's opinion in its entirety because he did not consider his November 2, 2017 report filed in the current claim in conjunction with his previous January 11, 2012 report filed in Claimant's prior 2011 claim. Employer's Brief at 14. Employer avers Dr. Fino's prior opinion that the significant improvement in Claimant's resting blood gas studies between August and December 2011 was "quite consistent with a lung disease secondary to obesity but not

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Sargent replied, "It is possible, but unlikely." Employer's Exhibit 4 at 21. He further testified, "Generally when you get a restrictive impairment this bad, it is associated with either major category 2 or 3 simple pneumoconiosis or complicated pneumoconiosis." *Id*. Although Dr. Sargent explained that Claimant's elevated hemidiaphragm, obesity, and sleep apnea were responsible for his restrictive impairment, he excluded any role for coal dust exposure in his impairment (and thus pneumoconiosis) solely based on the absence of x-ray evidence. Director's Exhibit 12; Employer's Exhibit 4 at 21, 23.

consistent with coal workers' pneumoconiosis" substantiates his most recent opinion.[20] *Id.*, *citing* Director's Exhibit 2.

When considering the medical evidence associated with the prior claims, the administrative law judge permissibly found the new medical opinions filed in the 2014 claim demonstrate a steady deterioration in Claimant's pulmonary condition, and thus, are more reliable of Claimant's current condition than the previously submitted medical opinions. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992). The administrative law judge therefore permissibly determined Dr. Fino's opinion is insufficient to rebut legal pneumoconiosis: although he opined Claimant's massive obesity and paralyzed, elevated right diaphragm accounted for his disabling respiratory disease, he did not explain why Claimant's multiple years of coal mine dust exposure could not also be a significantly contributing or substantially aggravating factor. *See Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 313-14; *Hicks*, 138 F.3d at 533; Decision and Order at 25; Employer's Exhibit 2.

Because the administrative law judge permissibly discredited the opinions of Drs. Sargent and Fino, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding Employer did not disprove legal pneumoconiosis.[21] *See Owens*, 724 F.3d at 558; *Clark*, 12 BLR at 1-155; Decision and Order at 25-26. Employer's failure to disprove legal pneumoconiosis precludes a finding it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

B. Total Disability Causation

The administrative law judge next considered whether Employer established that "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer argues the administrative law judge erred in finding the opinions of Drs. Sargent and Fino insufficient to satisfy its burden. Employer's Brief at 16-18.

[20] In his November 2, 2017 report, Dr. Fino stated "[t]he degree of obesity noted in this gentleman along with the elevation in the diaphragm can explain all of his respiratory complaints and findings consistent with disability." Employer's Exhibit 2.

[21] Because Dr. Vernon diagnosed legal pneumoconiosis, and his opinion therefore cannot satisfy Employer's burden to disprove legal pneumoconiosis, we need not address Employer's contentions regarding the administrative law judge's weighing of his opinion. Employer's Brief at 15-16.

Contrary to Employer's argument, the administrative law judge permissibly found the same reasons for discrediting the opinions of Drs. Sargent and Fino that Claimant does not suffer from legal pneumoconiosis also undercut their opinions that Claimant's disability was unrelated to pneumoconiosis.[22] 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); *Clark*, 12 BLR at 1-155; Decision and Order at 26-27. Therefore, we reject Employer's contention and affirm the administrative law judge's finding that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

In view of the foregoing, we affirm the administrative law judge's determinations Employer did not rebut the Section 411(c)(4) presumption and Claimant is entitled to benefits. *See* 30 U.S.C. §921(c)(4).

[22] Neither physician offered an opinion ruling out a role for pneumoconiosis in claimant's disability independent of his opinion that Claimant does not have pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge