U.S. Department of Labor

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

BRB No. 19-0474 BLA

LILLIE M. GROVES (Widow of HUBERT R. GROVES) Claimant-Respondent v. SEXTET MINING CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	))	 DATE ISSUED: 09/23/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Timothy J. McGrath's Decision and Order Awarding Benefits on Remand (2013-BLA-05659) 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 survivor's claim[1] filed on May 11, 2012, and is before the Benefits Review Board for a second time.

In its previous decision on Employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's findings that the Miner had 15.56 years of qualifying coal mine employment and was totally disabled. *Groves v. Sextet Mining Corp.*, BRB No. 16-0595 BLA, slip op. at 2 n.3. (Sept. 26, 2017) (unpub.). Thus it affirmed his finding Claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). *Groves*, BRB No. 16-0595 BLA, slip op. at 2 n.3. With respect to rebuttal of the presumption, the Board agreed with Employer that the administrative law judge's bases for discrediting Dr. Rosenberg's opinion on the issue of legal pneumoconiosis did not satisfy the explanatory requirements of the Administrative Procedure Act (APA).[3] *Groves*, BRB No. 16-0595 BLA, slip op. at 7-9; *see* 20 C.F.R. §718.305(d)(2)(i)(A). Thus the Board vacated his finding Employer did not rebut the Section 411(c)(4) presumption,[4] and instructed him to reconsider the medical evidence on legal pneumoconiosis. *Groves*, BRB No. 16-0595 BLA, slip op. at 7-9; *see* 20 C.F.R. §718.305(d)(2)(i). Because the administrative law judge's legal pneumoconiosis determination affected his death causation finding, the Board vacated his conclusion that Employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(2)(ii). *Groves*, BRB No. 16-0595 BLA, slip op. at 8. Further, although the Board held the administrative law judge

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[1] Claimant is the widow of the Miner, who died on November 6, 2011. Director's Exhibit 10. The Miner did not file a lifetime claim for benefits.

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

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

[4] The Board noted Employer established the Miner did not have clinical pneumoconiosis. *Groves v. Sextet Mining Corp.*, BRB No. 16-0595 BLA, slip op. at 7-9 (Sept. 26, 2017) (unpub.); *see* 20 C.F.R. §718.305(d)(2)(i)(B).

did not abuse his discretion by declining to weigh Dr. Crouch's biopsy report because it exceeds the mandatory evidentiary limitations, the Board noted he may address on remand whether Employer established good cause to admit the report. *Id.* at 3-4, n.7; *see* 20 C.F.R. §725.456(b)(1).

In his Decision and Order on remand that is the subject of this appeal, the administrative law judge found Employer did not establish good cause for admitting Dr. Crouch's biopsy report in excess of the evidentiary limitations. He further found Employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also asserts the provisions in the APA for removing administrative law judges, 5 U.S.C. §7521, rendered his appointment unconstitutional. It further contends he erred in excluding Dr. Crouch's biopsy report. Finally, it challenges the constitutionality of the Section 411(c)(4) presumption, and in the alternative contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the awards 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 employer's contention that the Section 411(c)(4) presumption is unconstitutional. Employer filed a reply brief, reiterating its arguments.

The 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

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[5] 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.

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).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 13-17. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id.* Employer first raised this issue on remand.[9]

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

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges 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)).

[8] The Secretary of Labor issued a letter to the administrative law judge 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.

See Secretary's December 21, 2017 Letter to Administrative Law Judge McGrath.

[9] Employer did not raise an Appointments Clause challenge when this case was first before the administrative law judge or in its prior appeal to the Board. On remand, the administrative law judge denied Employer's motion requesting the case be reassigned and

We agree with the Director's position that Employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board. *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. Young*, 947 F.3d 399 (6th Cir. 2020) (upholding forfeiture for failure to raise Appointments Clause challenge pursuant to Board's issue-exhaustion requirements); *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.") (internal citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director's Brief at 3-5.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), is inapplicable here because, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019); *see Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts). Furthermore, Employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Therefore, 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 administrative law judge.

Removal Provisions

Employer also argues the administrative law judge lacked authority to adjudicate this case because the provisions that govern the removal of the administrative law judge "violate [the] separation of powers" doctrine. Employer's Brief at 16. We consider Employer's arguments to be adjunct to its Appointments Clause challenge, which was forfeited. Furthermore, Employer has failed to adequately brief this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for

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heard by a different, constitutionally appointed administrative law judge because it forfeited its Appointment Clause challenge. December 26, 2018 Order.

review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id.* To merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros.*, 898 F.3d at 677, *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

As the Director notes, Employer refers to the removal provisions for administrative law judges contained in the APA and cites the Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Director's Brief at 5-7; Employer's Brief at 16, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer has not explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[10] We therefore agree with the Director's position that Employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 6. Thus we decline to address this issue. *Cox*, 791 F.2d at 446; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

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[10] Employer cites the Supreme Court's decisions in *Free Enterprise* and *Lucia*. Employer's Brief at 16. It notes that in *Free Enterprise,* the Supreme Court invalidated a statutory system that provided the Public Company Accounting Oversight Board (PCAOB) two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. *Id.* Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court stated 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." *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 5-7. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

Constitutionality of the Affordable Care Act and 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 Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 17-18. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

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 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit 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 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.

Evidentiary Issue

We reject Employer's argument the administrative law judge erred in excluding Dr. Crouch's biopsy report on remand. Employer's Brief at 18. An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). A party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish the action represents an abuse of discretion. *See McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer argued on remand that good cause exists to admit Dr. Crouch's biopsy report in excess of the evidentiary limitations because it was relevant to the administrative law judge's credibility findings on the issue of legal pneumoconiosis. Employer's Brief on Remand at 22 n.3. Contrary to Employer's argument, the administrative law judge permissibly found this is not a "persuasive argument to admit the report of Dr. Crouch based on good cause."

Decision and Order at 7 n.10; *see Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d. 278, 297, n.18 (4th Cir. 2007) (relevancy alone is insufficient to establish good cause for admission of evidence in excess of evidentiary limitations into the record); *Brem Coal Co.*, 25 BLR at 1-175.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[11] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii).[12] The administrative law judge found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated 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). The Sixth Circuit holds this standard requires Employer to "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Pursuant to the Board's instructions, the administrative law judge weighed Dr. Rosenberg's opinion.[13] Dr. Rosenberg opined the Miner had emphysema due to cigarette

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[11] "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). "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).

[12] As discussed above, the administrative law judge previously found Employer rebutted the presumption of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(B).

[13] The Board previously affirmed the administrative law judge's finding Dr. Dahhan's opinion that the Miner did not have legal pneumoconiosis is not persuasive and

smoking. Employer's Exhibit 21 at 8-9. He determined the emphysema was not related to coal mine dust exposure based in part on the results of Dr. Oesterling's biopsy report. *Id.* Specifically, he testified Dr. Oesterling interpreted "a left upper [lung] lobe wedge resection" that involved "a very large, significant piece of lung tissue." Employer's Exhibit 44 at 19-20, 42. Because the biopsy of the left upper lung did not reveal "coal mine dust deposition [pathologically] in association with the observed emphysema," Dr. Rosenberg opined the Miner did not have legal pneumoconiosis. Employer's Exhibit 21 at 8-9. He explained "one would expect extensive coal dust deposition to be associated with the emphysema microscopically." *Id.* During his deposition, Dr. Rosenberg conceded the biopsy results only involved the upper lung, but stated "when you look at probabilities . . ., most [coal dust deposition] goes to the upper lung zones." Employer's Exhibit 44 at 53. He stated one would expect a "lesser degree of coal dust in the lower lung zones based on the mechanisms of transport and ventilation within the lungs." *Id.* He acknowledged, however, there "could be" coal dust deposition in the lower sections of the lungs. *Id.*

Contrary to Employer's argument, the administrative law judge permissibly found Dr. Rosenberg's reliance on "probabilities" unpersuasive because the doctor "did not explain why the lower part of [the Miner's] lungs did not contain significant coal dust particles associated with his emphysema." Decision and Order on Remand at 7; *see Young*, 947 F.3d at 408-09; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge also permissibly credited Dr. Dahhan's opinion that the biopsy of the Miner's left upper lung involves "small tissue samples" and thus was "not sufficient to assess what [is] present in the lung." Decision and Order at 6-7, n. 8; *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); Employer's Exhibit 45 at 31. Because Dr. Rosenberg relied on the biopsy evidence to exclude legal pneumoconiosis, the administrative law judge permissibly rejected his opinion.[14] *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 6-7. Thus we affirm the administrative law judge's determination

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is entitled to reduced weight. *Groves*, BRB No. 16-0595 BLA, slip op. at 6-7; *see* 20 C.F.R. §718.305(d)(2)(i)(A).

[14] Because the administrative law judge provided valid reasons for discrediting Dr. Rosenberg's opinion on the issue of legal pneumoconiosis, we need not address Employer's argument that he also erred in finding the opinion inconsistent with the preamble to the 2001 revised regulations. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order on Remand at 6-9; Employer's Brief at 19-24.

that Employer did not disprove the Miner had legal pneumoconiosis.[15] 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order on Remand at 7.

Death Causation

The administrative law judge next addressed whether Employer established that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). He permissibly discredited the opinions of Drs. Rosenberg and Dahhan because neither doctor diagnosed legal pneumoconiosis, contrary to his determination that Employer failed to disprove the Miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order on Remand at 7-8. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii).

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[15] Contrary to Employer's argument, the administrative law judge did not "ignor[e] the Board's instruction[s]" with respect to the Miner's treatment records. Employer's Brief at 25-26. The Board instructed the administrative law judge he "may consider [E]mployer's argument that the treatment records, none of which connected the [M]iner's coal dust exposure to his obstructive lung disease in any way, corroborate Dr. Rosenberg's opinion that the [M]iner did not have legal pneumoconiosis." *Groves*, BRB No. 16-0595 BLA, slip op. at 9 n.14. Because the administrative law judge found Dr. Rosenberg's opinion unpersuasive for other reasons, he was not required to address whether the treatment records corroborate the doctor's conclusion. *See Kozele*, 6 BLR at 1-382 n.4. Nor does Employer explain how the lack of a legal pneumoconiosis diagnosis in the treatment records undermines the administrative law judge's discrediting of Dr. Rosenberg's reliance on the upper lung biopsy.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge