U.S. Department of Labor

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

BRB No. 19-0529 BLA

STANLEY VIRES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILLER BROTHERS CONSTRUCTION, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 09/30/2020
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-05178) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 19, 2016.[1]

The administrative law judge credited Claimant with 13.479 years of coal mine employment and therefore found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering whether Claimant established entitlement to benefits without the presumption,[3] the administrative law judge found the new evidence established the existence of clinical[4] and legal pneumoconiosis[5] at 20 C.F.R. §718.202(a)(1), (4) and thus

[1] On April 8, 2003, the district director denied Claimant's prior claim, filed on January 31, 2002, because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant requested a hearing, but Administrative Law Judge Joseph E. Kane dismissed the claim on September 30, 2004, because he failed to attend the hearing without showing good cause. *Id*. Claimant took no further action until filing the current claim on December 19, 2016. 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 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); *see* 20 C.F.R. §718.305.

[3] Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge also found Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 9.

[4] "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 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).

[5] "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

established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).[6] He further found Claimant established a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b), (c) and therefore awarded benefits.

On appeal, Employer argues that 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.[7] It further asserts that the removal provisions applicable to the administrative law judge rendered his appointment unconstitutional. In addition, it challenges the validity of Administrative Law Judge John P. Sellers, III's earlier decision to remand the case for a complete pulmonary evaluation because Claimant neither requested it nor required it. Employer also argues the administrative law judge erred in finding Claimant has clinical and legal pneumoconiosis.

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includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] 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. §725.309(c)(3). The Miner's prior claim was denied because he failed to establish any element of entitlement; therefore, to obtain review of the merits of his claim, Claimant had to establish an element of entitlement. Director's Exhibit 1.

[7] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, contending the administrative law judge had the authority to decide the case and Administrative Law Judge Sellers appropriately remanded the case for a complete pulmonary evaluation. Employer filed a reply brief arguing it did not forfeit[8] its Appointments Clause argument and reiterating its arguments regarding remanding the case for a complete pulmonary evaluation. Claimant has not filed a response brief.[9]

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.[10] 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 different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[11] Employer's Brief at 9-14. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (Department) administrative law judges on December 21, 2017, but maintains the

[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 Housing Services of Chicago*, 138 S.Ct. 13, 17 n.1 (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)).

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25. Claimant, therefore, established a change in an applicable condition of entitlement as a matter of law. *See* 20 C.F.R. §725.309(c).

[10] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13, 22.

[11] *Lucia* involved a challenge to the appointment of an administrative law judge 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 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)).

ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[12] *Id*. at 10-11. The Director contends Employer forfeited its Appointments Clause argument and the Secretary's ratification was proper under the Appointments Clause. Director's Brief at 3-5. Employer acknowledges in its reply brief that it did not raise the Appointments Clause issue before the administrative law judge, but argues it was not required to do so because administrative law judges lack the authority to adjudicate constitutional issues. Employer's Reply Brief at 2-4.

We agree with the Director's position that Employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). *Lucia* was decided over six months before the hearing in this case and over one year before the administrative law judge issued his Decision and Order, but Employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed Employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, Employer waited to raise the issue until after the administrative law judge issued an adverse decision. Because Employer has not raised any valid basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019).

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[12] 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.

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

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges. Employer's Brief at 12-14; Employer's Reply Brief at 4-6. We decline to address this issue, as it is inadequately briefed and Employer did not raise the issue before the administrative law judge. *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 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*. Further, 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. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *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).

Employer refers to the removal provisions for administrative law judges in the Administrative Procedure Act (APA), 5 U.S.C. §7521, and notes the United States Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Employer's Brief at 12-13, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer has not explained, however, how this holding undermines the administrative law judge's authority to hear and decide this case.[13] We agree with the Director's contention

[13] Employer cites the Solicitor General's position and the Supreme Court's decision in *Free Enterprise Fund*, and Justice Breyer's separate opinion in *Lucia*. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); Employer's Brief at 12-13. It notes that in *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with 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 expressly

that Employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 6. Further, Employer failed to raise this issue before the administrative law judge and has therefore forfeited the issue for the same reasons it forfeited its Appointments Clause argument as discussed *supra*. *See Zdanok*, 370 U.S. at 535; *Powell*, 53 BRBS at 15. Thus we decline to address this issue. *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

Complete Pulmonary Evaluation Issue

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The implementing regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-137 (2009) (en banc). Further, the regulation at 20 C.F.R. §725.456(e) mandates:

> If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to §725.406 . . . fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence[.]

20 C.F.R. §725.456(e) (internal citation omitted).

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stated that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 6. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Employer cites Justice Breyer's comments in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members." *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). As the Director accurately notes, "even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, Justice Breyer did not speak for the Court in *Lucia*." Director's Brief at 6.

In his January 25, 2018 Order of Remand, Administrative Law Judge Sellers observed that Dr. Ajjarapu examined Claimant on behalf of the Department on March 1, 2017, and noted that the spirometry results were suboptimal without specifying whether she considered the pulmonary function study valid. Director's Exhibit 14. He further observed that Dr. Gaziano reviewed the pulmonary function study and found it valid, while Dr. Vuskovich reviewed the results and opined the FEV1, FVC, and MVV results were not acceptable. Director's Exhibits 17, 25. He concluded that the conflicting medical opinions regarding the validity of the pulmonary function test rendered it unreliable, and thus remanded the case to the district director for Claimant to undergo a second pulmonary function study, and for Dr. Ajjarapu to review the results and provide a supplemental opinion.

Employer contends Administrative Law Judge Sellers erred in remanding the case for a complete pulmonary evaluation because his finding that the weight of the evidence "invalidated the pulmonary function study performed [by Dr. Ajjarapu] is not a basis on which to find that a medical report does not comply with [the Department's] obligation to provide a complete medical evaluation." Employer's Brief at 14; Employer's Reply Brief at 7. Employer further asserts Administrative Law Judge Sellers erred in remanding the case "for a new pulmonary function study and opinion from Dr. Ajjarapu to rebut the employer's proof," as the regulation does not require the Department to provide Claimant with a "winning opinion." Employer's Brief at 15.

We agree with the Director's position that Employer's arguments ignore 20 C.F.R. §725.456(e), which does not require a claimant to raise an objection that his Department-sponsored pulmonary evaluation was incomplete, before an administrative law judge can act to remedy the defect in the pulmonary evaluation. Director's Brief at 8.

In reviewing an administrative law judge's finding on the issue of whether a claimant received a complete pulmonary evaluation, the standard the Board applies is whether he exceeded his discretion in finding that the physician did not provide the objective evidence outlined in 20 C.F.R. §725.406(a), which includes a valid pulmonary function study. *See* 20 C.F.R. §725.456(e); *Greene*, 575 F.3d at 641-42. Employer has explained what an administrative law judge cannot do (remand so Claimant can win); however, Judge Sellers set forth a different purpose for remand (so that Claimant could obtain the complete pulmonary examination to which he is entitled) and Employer has failed to show that he erred in doing so.[14] Thus, we affirm Administrative Law Judge

[14] Judge Sellers remanded for further testing on the grounds that he could not tell whether Claimant had been provided a valid test. Director's Exhibit 60 at 87 (January 25, 2018 Order of Remand at 2). Employer has stated that an invalid test is not a proper basis

Sellers' decision to remand this case for a second pulmonary function study and a supplemental opinion from Dr. Ajjarapu. *See Greene*, 575 F.3d at 641-42; *Cline v. Director, OWCP*, 917 F.2d 9, 11 (8th Cir. 1990).

Entitlement under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

Employer contends the administrative law judge erred in finding the medical opinion evidence established legal pneumoconiosis. To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The United States Court of Appeals for the Sixth Circuit holds a miner can establish a lung disease or 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 v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014).

The administrative law judge considered the opinions of Drs. Ajjarapu, Broudy, and Jarboe. Dr. Ajjarapu opined that Claimant has legal pneumoconiosis in the form of chronic bronchitis related to coal mine dust exposure and smoking. Director's Exhibits 14; 60 at 5. Dr. Broudy opined that Claimant does not have legal pneumoconiosis but has a severe respiratory impairment related to cigarette smoking. Director's Exhibit 28; Employer's Exhibit 1. Dr. Jarboe opined that Claimant does not have legal pneumoconiosis but has chronic bronchitis and severe obstructive airways disease related to smoking. Director's Exhibit 60 at 32-35; Employer's Exhibit 2. The administrative law judge found Dr. Ajjarapu's opinion well-reasoned, supported by the record, and consistent with the preamble to the 2001 regulatory revisions. Decision and Order at 16. In contrast, he found the opinions of Drs. Broudy and Jarboe inadequately explained and inconsistent with the premises underlying the regulations. *Id*. at 16-19. According greater weight to Dr.

for remand but has not explained why that is the case here. Neither has Employer shown that the stated basis for remand was a pretense.

Ajjarapu's opinion, the administrative law judge found Claimant established legal pneumoconiosis.

Employer argues the administrative law judge misused the preamble by relying "exclusively on 'consistency with the preamble' as a reason" to credit Dr. Ajjarapu's opinion and discount Dr. Broudy's and Dr. Jarboe's opinions.[15] Employer's Brief at 16-20. We disagree. As part of the deliberative process, an administrative law judge may permissibly evaluate expert opinions in conjunction with the Department's discussion of the prevailing medical science set forth in the preamble. *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 (6th Cir. 2012). Moreover, the administrative law judge did not rely exclusively on the preamble in weighing the medical opinions. Decision and Order at 15-19. Rather, he gave multiple reasons for crediting Dr. Ajjarapu's opinion and discounting Dr. Broudy's and Dr. Jarboe's opinions.

We further reject Employer's assertion that the administrative law judge erred in crediting Dr. Ajjarapu's opinion for considering the additive effects of coal mine dust and cigarette smoking, and because her opinion lacks explanation. Employer's Brief at 20-21. Dr. Ajjarapu opined that Claimant's chronic bronchitis is related to coal mine dust exposure and smoking, which both "cause airway inflammation leading to bronchospasm and cause excessive airway secretions and bronchitic symptoms." Director's Exhibit 14 at 6. In her supplemental opinion, she noted Claimant has a ten-year smoking history and a history of coronary artery disease. Director's Exhibit 60 at 5. She opined that Claimant's "work experience and his coal dust exposure …." caused his pulmonary impairment, and that although he may have been exposed to more dust than coal, "there is no adequate way to diminish the effects of coal dust or dust exposure on the strip mines." *Id.* The administrative law judge permissibly found she adequately explained how Claimant's symptoms are caused by coal mine dust exposure and smoking. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 15-16; Claimant Exhibit 4. He also permissibly found her opinion supported by the evidence available to her and bolstered by

[15] Employer also argues the administrative law judge misapplied the preamble, citing *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002), which states that medical reports will not be excluded or ignored if they conclude that a particular miner's obstructive disease was caused by smoking rather than coal mining. Employer's Brief at 21-22. Employer's argument lacks merit because the administrative law judge did not exclude any medical opinions, and he weighed all of the opinions the parties designated.

the CT scan from Claimant's treatment records that showed severe emphysema with bronchitis. *Id*.

We also reject Employer's assertions that the administrative law judge erred in crediting Dr. Ajjarapu's opinion because she relied on an inaccurate smoking history and the administrative law judge improperly substituted his judgment for the medical experts' in finding this discrepancy did not undermine her opinion. *Id.* at 21. The effect of an inaccurate smoking history on the credibility of a medical opinion is a determination for the administrative law judge to make. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The administrative law judge concluded that while Dr. Ajjarapu considered a smoking history less than the 25 to 50-pack years he found, the discrepancy was "not so great as to render her opinion on legal pneumoconiosis invalid" because she still considered a ten-year smoking history and accounted for the additive risks of both smoking and coal mine dust on Claimant's chronic obstructive pulmonary disease (COPD).[16] Decision and Order at 15; *see Sellards*, 17 BLR at 1-80-81; *Bobick*, 13 BLR at 1-54. Employer has failed to explain why Dr. Ajjarapu's opinion was undermined by her consideration of a smoking history shorter than what the administrative law judge found. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next argues the administrative law judge erred in discounting the opinions of Drs. Broudy and Jarboe, in part, for their reliance on the reduction in Claimant's FEV1 to FVC ratio on a pulmonary function study to exclude coal mine dust exposure as a contributing factor in his COPD. Employer's Brief at 17, 22-23.

[16] We note in this regard that Dr. Ajjarapu considered an accurate length of coal mine employment.

The administrative law judge accurately noted that Drs. Broudy[17] and Jarboe[18] concluded Claimant does not have legal pneumoconiosis, in part, because the pulmonary function studies showed an obstructive impairment with large lung volumes and air trapping, and a markedly reduced FEV1/FVC ratio, which they stated are types of impairments that smoking causes but coal dust inhalation does not. Decision and Order 16-17; Director's Exhibits 28 at 4; 60 at 32. In accordance with Sixth Circuit law, the administrative law judge permissibly rejected their opinions as conflicting with the Department's recognition that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio on a pulmonary function study. *See* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; Decision and Order at 16-17. Further, the administrative law judge permissibly discounted Dr. Jarboe's opinion because it was based on generalities rather than Claimant's particular condition. Decision and Order at 17-18; *see Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Knizner v. Bethlehem Mines Corp*., 8 BLR 1-5, 1-7 (1985).

Accordingly, we affirm the administrative law judge's determination that Dr. Ajjarapu's opinion is well reasoned and documented, and sufficient to satisfy Claimant's

[17] Dr. Broudy diagnosed Claimant with severe chronic obstructive pulmonary disease (COPD), coronary artery disease, hypertension, cachexia, and "very early simple coal workers' pneumoconiosis." Director's Exhibit 28 at 4. He opined that Claimant's severe respiratory impairment is due to smoking because his pulmonary function study revealed an obstructive impairment with large lung volumes and air trapping that is characteristic of COPD from smoking, while coal mine dust exposure usually results in a restrictive defect with small lung volumes. *Id.* In his supplemental report, Dr. Broudy stated he strongly disagreed with Dr. Ajjarapu's finding that coal mine dust exposure outweighed other exposures "in view of the exposure to cigarette smoke." Employer's Exhibit 1.

[18] Dr. Jarboe diagnosed Claimant with pulmonary hyperinflation, chronic bronchitis, severe obstructive airways disease, and coronary artery disease. Director's Exhibit 60 at 32. He opined that the March 1, 2017 pulmonary function study showed Claimant has a moderate airflow obstruction and a disproportionate reduction in FEV1 compared to FVC, which Dr. Jarboe stated is the type of functional abnormality seen with cigarette smoking and not the inhalation of coal mine dust. *Id.* at 33-34. He also opined that based on Claimant's job as an oiler, it is highly medically improbable that he was exposed to the levels of coal mine dust that cause airflow obstruction with fifteen years of exposure. *Id.* at 34; Employer's Exhibit 2.

burden of proof to establish the existence of legal pneumoconiosis, and his discrediting of the opinions of Drs. Broudy and Jarboe. *See Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407; Decision and Order at 19. We therefore affirm the administrative law judge's conclusion that Claimant established the existence of legal pneumoconiosis as supported by substantial evidence. 20 C.F.R. §718.202(a)(4); Decision and Order at 19.

Disability Causation

The administrative law judge next found the evidence established Claimant is totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 26. He articulated the proper standard under the regulations for establishing disability causation, i.e., a claimant must establish that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599; Decision and Order at 26. He further recognized pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially 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); Decision and Order at 26.

The administrative law judge considered the opinions of Drs. Ajjarapu, Broudy, and Jarboe and determined they all agreed Claimant's COPD alone is causing his totally disabling respiratory impairment. Decision and Order at 25. Noting he accorded most weight to Dr. Ajjarapu's opinion that Claimant's COPD constitutes legal pneumoconiosis, the administrative law judge found the medical opinions establish "Claimant's legal pneumoconiosis is the sole cause of his impairment." *Id*. He thus found Dr. Ajjarapu's opinion sufficient to establish Claimant's total disability is due to legal pneumoconiosis. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's determination that pneumoconiosis had an adverse effect on the miner's respiratory condition and contributed to the miner's disabling impairment satisfies substantially contributing cause standard); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 26; Director's Exhibits 14; 60 at 5. In addition, he discounted the opinions of Drs. Broudy and Jarboe that Claimant's totally disabling respiratory impairment is not caused by pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to his finding. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d

1063, 1074 (6th Cir. 2013); Decision and Order at 26; Director's Exhibits 28, 60 at 34-35; Employer's Exhibits 1, 2. Employer has not raised any specific allegations of error regarding the administrative law judge's disability causation findings. *See Cox*, 791 F.2d at 446; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge's finding that Claimant established his total disability is due to legal pneumoconiosis as supported by substantial evidence.[19] 20 C.F.R. §718.204(c); Decision and Order at 26. Having affirmed the administrative law judge's determination that Claimant established the requisite elements of entitlement, we further affirm the award of benefits.

[19] Because we affirm the administrative law judge's finding that Claimant is totally disabled due to legal pneumoconiosis, we need not address Employer's arguments related to clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 15-16.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge