U.S. Department of Labor

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

BRB No. 20-0301 BLA

DONNIE DEEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG TRACK COAL COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 09/24/2021
and	)	
	)	
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-06147) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on September 15, 2017.[1]

The ALJ found Big Track Coal Company, Incorporated (Big Track) is the responsible operator. She credited Claimant with at least fifteen 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). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because the removal provisions applicable to Department of Labor (DOL) ALJs fail to comply with the Appointments Clause of the Constitution.[3] Employer also contends the

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[1] Claimant filed a prior claim for benefits on August 10, 2009. Director's Exhibit 1. The Benefits Review Board affirmed ALJ Richard T. Stansell-Gamm's denial of it on June 21, 2013, because Claimant failed to establish pneumoconiosis. *Deel v. Big Track Coal Co., Inc.*, BRB No. 12-0529 BLA (June 21, 2013) (unpub.).

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

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

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

ALJ erred in identifying Big Track as the responsible operator and finding Claimant established fifteen years of underground coal mine employment sufficient to invoke the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the ALJ's removal protections and its argument that Big Track is not the responsible operator. Employer filed a reply brief, reiterating its arguments.[4]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 9-15; Employer's Reply Brief at 1-8 (unpaginated). Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Employer's Brief at 9-10, 12-14; Employer's Reply Brief at 3-7 (unpaginated). Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. ,

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> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment based on the pulmonary function studies and the medical opinions, and the medical evidence overall. 20 C.F.R. §718.204(b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

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

140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 10-14; Employer's Reply Brief at 1-7 (unpaginated).

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs). Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[6] 140 S. Ct. at 2201. It did not address ALJs.

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

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court

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

has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[7] The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

In determining Big Track is the responsible operator, the ALJ considered Claimant's tenure with it and all of his subsequent employment. Decision and Order at 4. Claimant's relevant work history is as follows: Big Track from 1979 to March 16, 1989; Shelton Trucking from July 5, 1996 to November 30, 1997; and Cumberland Trucking,

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Incorporated (Cumberland Trucking) from December 1, 1997 to February 7, 1998.[8] *Id.*; Director's Exhibits 6; 35 at 11. The ALJ credited the district director's determination that Claimant's work with Cumberland Trucking did not last a full year.[9] Decision and Order at 5; Director's Exhibit 35 at 11. The ALJ further found that, although Claimant worked for Shelton Trucking for more than one year, the district director provided a statement verifying this operator was not insured on the last day of Claimant's employment with it, nor was it authorized to self-insure. 20 C.F.R. §725.495(d); Decision and Order at 5; Director's Exhibit 35 at 11. Because the subsequent coal mine operators either employed Claimant for less than one year or did not have insurance on his last day of employment, the ALJ found Big Track is the proper responsible operator. Decision and Order at 5.

Employer does not dispute Big Track meets the criteria for a potentially liable operator, but argues Shelton Trucking should have been designated. Employer's Brief at 15-20; Employer's Reply Brief at 8-9 (unpaginated). Employer asserts the fact that Shelton Trucking did not have insurance does not relieve it of liability because the statute provides benefit payments become the responsibility of the company owners or its officers, including its president, secretary, and treasurer. Employer's Brief at 15, 18, 19. Employer further maintains that because DOL "failed to enforce its insurance requirements" with respect to Shelton Trucking and as there is no justification for imposing liability on "law-abiding" operators, liability for benefits must transfer to the Black Lung Disability Trust Fund (Trust Fund).[10] *Id.* at 15, 17.

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[8] Claimant was self-employed from 1991 to 1996, and last worked for Cumberland Logging, Incorporated from 1998 to 2000. Director's Exhibits 7, 35; *see also* Hearing Transcript at 29. Employer does not challenge the district director's determination that this work was not coal mine employment. Director's Exhibit 35 at 11.

[9] Employer also does not challenge the district director's determination that Claimant worked for Cumberland Trucking for less than one year and, therefore, does not meet the criteria for a potentially liable operator. 20 C.F.R. §725.494(c); Director's Exhibit 35 at 11.

[10] Employer also argues DOL erred by not naming Consolidation Coal Company because it was the owner of the mine site and contracted with Shelton Trucking. Employer's Brief at 16, 18. We decline to address this argument as it was not raised before the ALJ. *See* Employer's Closing Argument at 10-14; *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 586-90 (6th Cir. 2021); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986).

Contrary to Employer's contention, having determined Shelton Trucking was not financially capable of assuming liability, the district director was not further required to consider whether the corporate owners or officers of that company possessed sufficient assets to secure the payment of benefits. 20 C.F.R. §725.495(d). Rather, the designated responsible operator bears the burden of proving a more recent employer possesses sufficient assets, including, if necessary, "presenting evidence" that the owner or partners, or president, secretary, and treasurer, "possess assets sufficient to secure the payment of benefits . . . ." 20 C.F.R. §725.495(c). The ALJ properly found that because the district director satisfied his obligation under 20 C.F.R. §725.495(d), the burden shifted to Employer to prove another employer had the financial capability of paying benefits. 20 C.F.R. §725.495(c)(2); Decision and Order at 4. Moreover, she properly found Employer did not introduce any evidence to support its burden of proof. *Id*. at 5.

Further, we reject Employer's argument that if a subsequent operator fails to obtain the insurance the Act requires, liability must fall to the Trust Fund. Employer does not point to any statute or regulatory language to support this assertion, and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected the contention that the Trust Fund must accept liability if the most recent employer is uninsured. *See Armco, Inc. v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002) (finding no basis for requiring the payment of a claimant's benefits out of the Trust Fund because the regulations require the operator who meets all the criteria as the responsible operator to pay benefits and do not require the Trust Fund to pay if the first potentially liable operator does not meet all the criteria). Thus, because it is supported by substantial evidence, we affirm the ALJ's determination that Employer is the responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 5.

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[11] 20 C.F.R. §725.309(c); *see*

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[11] To establish entitlement without aid of any presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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). Because Claimant's prior claim was denied for failure to establish pneumoconiosis, Claimant had to submit new evidence to establish this element in order to obtain a review of his claim on the merits. 20 C.F.R. §725.309(c). Claimant may establish a change in an applicable condition of entitlement if he invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; *see E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015).

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines" or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's length of coal mine employment determination if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). In making this determination, the ALJ must explain what evidence she credits or rejects and set forth her underlying rationale. *See Shapell v. Director, OWCP*, 7 BLR 1-304, 1-308 (1984).

Employer contends the ALJ erred in invoking the Section 411(c)(4) presumption because she "failed to conduct any independent assessment" of the length of Claimant's coal mine employment. Employer's Brief at 20-21. Employer argues the ALJ failed to consider the evidence and make specific findings, and improperly placed the burden of proof on Employer to disprove fifteen years of coal mine employment. *Id.* Employer also contends the ALJ erred in finding fifteen years of qualifying coal mine employment because ALJ Richard T. Stansell-Gamm found only fourteen years and three months in the prior claim. *Id.* at 21. We agree with Employer that the ALJ erred in failing to determine *de novo* the length of Claimant's coal mine employment.

The ALJ noted the district director's conclusion that Claimant "worked at least [fifteen] years of coal mine employment."[12] Decision and Order at 5, *citing* Director's Exhibit 43 (at 1). She further observed Claimant testified he worked for fifteen years in underground coal mine employment stockpiling coal and operating inside equipment, including a roof bolting machine. Decision and Order at 5, *citing* Hearing Transcript at 11, 17. After determining Employer did "not submit[] any evidence that leads me to believe

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[12] The district director found 15.99 years of coal mine employment from 1975 to February 7, 1998, based on Claimant's Social Security earnings records from 1966 to 2016 and statements from Shelton Trucking and Cumberland Trucking. Director's Exhibit 35 at 10.

that the Claimant was employed as a miner for less than [fifteen] years, or did not work in underground coal mining," the ALJ concluded Claimant worked at least fifteen years in underground coal mine employment. Decision and Order at 5.

The regulation at 20 C.F.R. §725.455(a) provides: "any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge." Therefore, when a party requests a formal hearing after a district director's proposed decision, an ALJ must proceed *de novo* and independently weigh the evidence to reach his or her own findings on each issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985). By failing to provide a substantive discussion and assessment of the relevant evidence, the ALJ gave presumptive effect to the district director's finding of at least fifteen years of coal mine employment, thereby failing to proceed *de novo*.[13] We therefore must vacate her finding that Claimant established at least fifteen years of underground coal mine employment necessary to invoke the Section 411(c)(4) presumption and remand the case for reconsideration of this issue.

Because we vacate the ALJ's findings concerning the length of Claimant's coal mine employment, we also vacate her findings that Claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

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

In the interest of judicial efficiency, we address Employer's assertions concerning the ALJ's rebuttal findings. Once a claimant invokes the Section 411(c)(4) presumption, the burden shifts to the party opposing entitlement to establish the miner has neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] respiratory or pulmonary total

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[13] Employer asserts the ALJ did not acknowledge ALJ Stansell-Gamm's prior length of coal mine employment determination and explain why it was not controlling. Employer's Brief at 21. However, Employer does not adequately brief its argument, and thus we decline to address it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21(1987).

[14] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment 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

disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

The ALJ considered eight readings of five x-rays dated September 27, 2017, February 22, 2018, September 7, 2018, November 9, 2018, and March 11, 2019. Decision and Order at 6-7; *see* Director's Exhibit 15; Claimant's Exhibits 1-3; Employer's Exhibits 1, 3, 4, 6. All of the readers are dually-qualified as B readers and Board-certified radiologists. Dr. Crum read the September 27, 2017 x-ray as positive for pneumoconiosis, while Drs. Adcock and DePonte read it as negative for pneumoconiosis.[15] Director's Exhibit 15; Employer's Exhibit 1; Claimant's Exhibit 3. Dr. Adcock provided the sole reading of the February 22, 2018 x-ray as negative for pneumoconiosis, and Dr. Crum provided the sole reading of the September 7, 2018 x-ray as positive for pneumoconiosis. Employer's Exhibit 4; Claimant's Exhibit 1. Dr. Crum read the November 9, 2018 x-ray as positive for pneumoconiosis, while Dr. Adcock read it as negative for pneumoconiosis. Employer's Exhibit 3; Claimant's Exhibit 2. Dr. Kendall provided the sole reading of the March 11, 2019 x-ray as negative for pneumoconiosis. Employer's Exhibit 6.

In weighing the conflicting x-ray evidence, the ALJ concluded:

> Of the eight interpretations submitted as evidence, the November 2018 interpretations are in equipoise and thus neither support nor dispute a finding of pneumoconiosis. The March 2019 negative finding was interpreted by Dr. Kend[a]ll, a B reader. Because all of the interpreting physicians are dually qualified and Dr. Kendall is not, I give the March 2019 interpretation lesser weight. Based on the positive findings of pneumoconiosis found in the September 2017 and February 2018 chest x-rays, and the negative finding from the November 2018 [x-ray], I find that the chest x-ray evidence submitted supports a finding of clinical pneumoconiosis.

Decision and Order at 11.

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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).

[15] Dr. Gaziano, a B reader, reviewed the September 27, 2017 x-ray for quality purposes only. Director's Exhibit 16.

Employer correctly asserts the ALJ inaccurately described the weight of the readings of the September 27, 2017 x-ray as positive for pneumoconiosis when they are negative because there are two negative readings of the film and only one positive reading.[16] Decision and Order at 10-11; Director's Exhibit 15; Employer's Exhibit 1; Claimant's Exhibit 3; Employer's Brief at 21. Employer also correctly contends the ALJ inaccurately characterized Dr. Kendall as a B reader only, when his resume in the record shows he is also a dually-qualified radiologist. *See* Decision and Order at 11; Employer's Exhibits 6; 8 at 1; Employer's Brief at 21-22.

In addition to these errors, we note the ALJ mischaracterized two x-rays in her final summary of the x-ray evidence. She described the sole reading of the February 22, 2018 x-ray as positive, although it is actually negative, and she characterized the November 9, 2018 x-ray as being negative, although two physicians offered opposing readings of it. Decision and Order at 11; Claimant's Exhibit 2; Employer's Exhibit 3. Thus, because the ALJ failed to accurately characterize the x-ray evidence and did not adequately explain her findings, we vacate her determination that Employer did not disprove Claimant has clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B). *See generally McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand).

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, 1-155 n.8 (2015).

The ALJ credited the opinions of Drs. Raj[17] and Green that Claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to

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[16] The ALJ improperly found Dr. DePonte's 0/1 reading of the September 27, 2017 x-ray constituted a positive interpretation. *See* Decision and Order at 6, 10-11; Director's Exhibit 15. The regulation at 20 C.F.R. §718.102(d)(3) specifically states that "[a] chest radiograph classified under any of the foregoing ILO classification systems as Category 0, including subcategories 0-, 0/0, or 0/1, does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(d)(3); *see Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984); *see also* Decision and Order at 6 n.5.

[17] At the hearing, Employer objected to the admission of Dr. Raj's supplemental report marked as Director's Exhibit 19. Hearing Transcript at 7-8. Employer did not renew

smoking and coal mine dust exposure, and gave "lesser weight" to the opinions of Drs. Fino and Rosenberg that Claimant does not have legal pneumoconiosis because they relate Claimant's emphysema to smoking only. Decision and Order at 12, 14; Director's Exhibits 15 at 3; 17 at 9-16; 19 at 1-2; Claimant's Exhibits 1 at 3-4; 2 at 4; 5; Employer's Exhibits 7 at 6-13; 9 at 1-2. Employer argues the ALJ did not properly determine whether the opinions of Drs. Raj and Green were based on accurate length of coal mine employment and smoking histories and were adequately reasoned. Employer's Brief at 22-24. Employer also argues the ALJ erred in rejecting the opinions of Drs. Fino and Rosenberg without considering the reasoning of their opinions and by imposing an improper burden of proof. *Id.* at 24-26.

We agree with Employer that the ALJ erred in crediting the opinions of Drs. Raj and Green and giving "lesser weight" to the opinions of Drs. Fino and Rosenberg without considering the reasoning underlying their opinions. The determination of whether a report is sufficiently documented and reasoned is a credibility matter for the ALJ. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The ALJ accepted the opinions of Drs. Raj and Green without considering whether they were based on accurate length of coal mine employment and smoking histories.[18] The ALJ erred in giving "lesser weight" to the opinions of Drs. Fino and Rosenberg without considering the reasoning underlying their opinions and relied on an improper legal standard to discredit them in requiring that they

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its objection in its post-hearing brief. The ALJ considered Dr. Raj's opinion in awarding benefits. Decision and Order at 2. In its brief on appeal, Employer asserts the "ALJ did not rule on that objection," which it characterizes as challenging the "legality of the Pilot Program." Employer's Brief at 7 n.1. On remand, if reached, the ALJ must address and rule on Employer's objection to the admission of Dr. Raj's supplemental report.

[18] The ALJ must render a new determination on remand as to Claimant's length of coal mine employment. She must also determine the amount and length of Claimant's smoking. Decision and Order at 4; Hearing Transcript at 31, 33. As Employer correctly argues, the ALJ failed to render any finding on the length of Claimant's smoking history or resolve the conflicting evidence, including what Claimant reported to Drs. Raj and Green, what Claimant testified to at the hearing, and what Claimant represented in his initial claim. Employer's Brief at 22. Drs. Raj and Green reported smoking histories of one-half pack per day for six to seven or eight years, respectively. Director's Exhibit 15 at 2; Claimant's Exhibit 1 at 2. At the hearing, Claimant testified to smoking cigarettes on and off between 1970 and 2010, quitting only to chew tobacco. Hearing Transcript at 31, 33. In the initial claim, ALJ Stansell-Gamm found Claimant smoked between 1973 and April 2010 at the rate of one-quarter to one pack per day, resuming in January 2011. 2012 Decision and Order at 3.

"eliminate coal/rock dust exposure as a contributing factor to Claimant's pulmonary impairment." Decision and Order at 14. Contrary to the ALJ's analysis, Employer is not required to "eliminate" any contribution from coal dust exposure to Claimant's respiratory disease or impairment in order to disprove the existence of legal pneumoconiosis.[19] The proper inquiry is whether Employer has shown by a preponderance of the evidence that Claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[20] 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-155 n.8. In light of the ALJ's errors, we vacate the ALJ's weighing of the medical opinion evidence and remand this case to the ALJ for a reweighing of this evidence. In evaluating the medical opinions on remand, the ALJ should apply the proper legal standard and address the physicians' explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 441 (4th Cir. 1997).

Based on the ALJ's failure to consider the reasoning underlying the opinions of Drs. Raj, Green, Fino, and Rosenberg and her application of the wrong legal standard in considering whether Employer established that Claimant does not have legal pneumoconiosis, we vacate her finding Employer failed to establish rebuttal of the Section 411(c)(4) presumption. If, on remand, the ALJ finds Claimant has invoked the Section 411(c)(4) presumption, the ALJ is instructed to consider whether Employer has disproven that Claimant has legal pneumoconiosis by affirmatively establishing 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*, 25 BLR at 1-155 n.8. The ALJ must weigh the medical opinions in light of the proper rebuttal standard to determine whether Employer's physicians' opinions are reasoned, documented, and sufficient to establish that Claimant's respiratory impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. 20 C.F.R. §718.305(d)(1)(i)(A).

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[19] The "rule out," or "no part," standard applies only to the second method of rebuttal relating to disability causation. 20 C.F.R. §718.305(d)(1)(ii); *see Epling*, 783 F.3d at 502; *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015).

[20] We also note the ALJ rendered findings on the existence of legal pneumoconiosis prior to considering whether the Section 411(c)(4) presumption was invoked and thus conflated the burdens of proof regarding legal pneumoconiosis and disability causation when weighing the evidence.

Disability Causation

The ALJ also found "Employer has failed to rebut the presumption that Claimant's significant history of coal mine employment caused, substantially contributed to, or coal mining activity would substantially aggravate his disabling impairment." Decision and Order at 14. Contrary to the ALJ's finding, whether Claimant's coal mine employment caused, substantially contributed to, or substantially aggravated his disabling impairment is not the applicable legal standard for considering the issue of disability causation. Rather, Employer must establish "no part of the miner'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). Because the ALJ did not apply the correct standard and we vacate her determinations on the existence of pneumoconiosis, which are relevant to whether Employer may disprove disability causation, we also vacate her finding at 20 C.F.R. §718.305(d)(1)(ii).

Remand Instructions

The ALJ must consider all relevant evidence *de novo* and render independent findings as to the length of Claimant's coal mine employment and whether he thereby invokes the Section 411(c)(4) presumption. *See* 20 C.F.R. §725.455(a); *Oggero*, 7 BLR at 1-863. She may use a reasonable method of calculation to determine the length of such employment but must fully explain her findings in accordance with the APA.[21] *See Muncy*, 25 BLR at 1-27; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer is able to rebut it. In addressing the rebuttal issues, the ALJ must accurately characterize the evidence and apply the correct legal standards and burden of proof. 20 C.F.R. §718.305. If Claimant does not establish fifteen years of qualifying coal mine employment, the ALJ must determine whether he can establish entitlement to benefits pursuant to 20 C.F.R. Part 718. In rendering her credibility determinations on

[21] The Administrative Procedure Act provides 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).

remand, the ALJ must explain her findings as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge