U.S. Department of Labor

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

BRB No. 20-0421 BLA

MARCELLA TERRY (Administrator and o/b/o the Estate of HOMER MULLINS)	)	
Claimant-Respondent	)	
v.	)	
INCOAL, INCORPORATED	)	
and	)	DATE ISSUED: 09/16/2021
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 on Modification of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

William M. Bush (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: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits on Modification (2019-BLA-05094) 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 request for modification of a miner's subsequent claim, filed March 30, 2015.[1] Director's Exhibit 3.

In a Decision and Order Denying Benefits issued January 5, 2018, ALJ Richard M. Clark found Claimant[2] established the Miner had a totally disabling respiratory impairment, but failed to establish he had pneumoconiosis. Director's Exhibit 88. Accordingly, he denied benefits. *Id.*

Claimant timely requested modification. Director's Exhibit 91. In his June 29, 2020 Decision and Order Awarding Benefits on Modification, the subject of this appeal, ALJ Temin credited the Miner with 12.25 years of coal mine employment, and therefore found Claimant could not invoke the Section 411(c)(4) presumption the Miner was totally

[1] On October 19, 1981, the district director denied the Miner's prior claim, filed on March 8, 1978, for failure to establish total disability. Director's Exhibit 1 at 14, 50. Where a miner files a claim for benefits more than one year after the denial of a previous claim became final, the ALJ must also deny the subsequent claim unless he finds that "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)(1); *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 the Miner did not establish total disability in his most recent prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. Director's Exhibit 1.

[2] The Miner died on January 3, 2018. Director's Exhibit 91; Hearing Transcript at 16-17. Claimant, the Miner's daughter and the administrator of his estate, is pursuing his claim on the estate's behalf. *Id.*

disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, he found Claimant did not establish clinical pneumoconiosis but established legal pneumoconiosis,[4] 20 C.F.R. §718.202(a), and therefore established a mistake of fact in the prior denial. 20 C.F.R. §725.310. The ALJ further found Claimant established the Miner was totally disabled due to pneumoconiosis, 20 C.F.R. §718.204(b), (c), and that granting modification would render justice under the Act. Accordingly, he awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[5] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. On the merits, Employer argues benefits are precluded because the Miner had a pre-existing totally disabling non-pulmonary impairment. It further argues the ALJ erred in finding Claimant established the Miner had

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

[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 the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). 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).

[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.

legal pneumoconiosis, and thus erred in finding she established a mistake of fact in the prior denial.[6] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's constitutional challenges to the ALJ's appointment and removal protections. The Director further urges the Benefits Review Board to reject Employer's argument that benefits are precluded. Employer filed a reply reiterating its arguments on the issues the Director addressed.

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.[7] 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).

An ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, the ALJ may correct any mistake, including the ultimate issue of benefits eligibility. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 12-13, 19; Employer's Reply at 6. It

[6] We affirm, as unchallenged on appeal, the ALJ's findings that the Miner had 12.25 years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 23.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 14; Director's Exhibits 5, 10.

[8] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in ALJ Temin's prior appointment. Employer's Brief at 13-15; Employer's Reply at 2-4. The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 3-5. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be

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[9] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an 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 ALJ Temin. The ALJ did not issue any orders in this case until his notice of hearing and prehearing order on January 10, 2019.

ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter but rather specifically identified ALJ Temin and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Temin. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of the ALJ "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," and generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified the ALJ's appointment. Employer's Brief at 15. Employer therefore has not overcome the presumption of regularity.[10] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 16-19. 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*. Employer's Brief at 17-18; Employer's Reply at 4. It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 16-19; Employer's Reply at 5-6.

[10] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 14-15, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

The removal argument is subject to issue preservation requirements, however, and Employer forfeited its argument by not raising it before the ALJ. *See, e.g.*, *Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion, and because petitioners "did not raise the dual for-cause removal provision before the agency," court was "powerless to excuse the forfeiture"). Regardless, 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 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, 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."[11] 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. at 1988. 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.* at 1985 (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

[11] 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).

branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized 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. Fla. 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 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.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act,[12] 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).[13] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one precludes an award of

[12] Employer argues the ALJ failed to consider that the Miner had a disabling non-pulmonary condition that prevented him from returning to work. Employer maintains that a pre-existing disability or co-existing non-respiratory impairment precludes Claimant from receiving benefits under the Act. Employer's Brief at 20-21 (citing, inter alia, *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994)). Contrary to Employer's argument, the Board has declined to apply *Vigna* outside of the jurisdiction of the United States Court of Appeals for the Seventh Circuit; further, other circuits, including the Sixth Circuit, have held that a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See, e.g., Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 216-17 (6th Cir. 1996). Moreover, in claims such as this one, filed after January 19, 2001, the applicable regulation states that a non-pulmonary condition that causes an independent disability unrelated to a miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see Ward*, 93 F.3d at 216-17.

[13] The ALJ found Claimant failed to establish clinical pneumoconiosis. Decision and Order at 16.

benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a "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). The United States Court of Appeals for the Sixth Circuit has held that a miner can satisfy this burden by showing that his disease was caused "in part" by coal dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a de minimis contribution' and instead 'a contributing cause of some discernible consequence.'").

In determining whether Claimant established legal pneumoconiosis, the ALJ considered the medical opinions of Drs. Werchowski, Raj, Rosenberg, and Vuskovich. Decision and Order at 16-22. Dr. Werchowski opined the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure, cigarette smoking, and possible asbestos exposure. Director's Exhibit 15. Dr. Raj diagnosed the Miner with legal pneumoconiosis in the form of COPD due to cigarette smoking and coal mine dust exposure. Director's Exhibit 68. Conversely, Dr. Rosenberg opined the Miner had COPD due to cigarette smoking. Director's Exhibit 66; Employer's Exhibit 1. Dr. Vuskovich opined the Miner had COPD due to cigarette smoking, age, and life-long asthma. Director's Exhibit 66; Employer's Exhibit 2.

The ALJ found the opinions of Drs. Werchowski and Raj well-reasoned and well-documented, and consistent with DOL's acceptance of medical science set forth in the preamble to the 2001 revised regulations. Decision and Order at 17-19. The ALJ gave less weight to the opinions of Drs. Rosenberg and Vuskovich as inadequately reasoned and inconsistent with the science that the DOL endorsed in the preamble. *Id*. at 19-21. He therefore found the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 22.

Initially, we reject Employer's argument that the ALJ shifted the burden of proof to Employer to rebut the existence of legal pneumoconiosis. Employer's Brief at 23. The ALJ correctly stated that, to establish legal pneumoconiosis, Claimant must prove the Miner's pulmonary impairment was "significantly related to, or substantially aggravated by" coal mine dust exposure. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 16; 22. In analyzing the evidence, the ALJ properly considered whether the medical opinion

evidence establishes the existence of legal pneumoconiosis. 20 C.F.R. §718.202; Decision and Order at 17-21.

We further reject Employer's arguments that the ALJ erred in his consideration of the medical opinion evidence. Employer's Brief at 22-29. Contrary to Employer's arguments, ALJs may evaluate medical opinions in conjunction with the discussion of the prevailing medical science set forth in the preamble to the amended regulations.[14] *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d at 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Brief at 25-28.

The ALJ accurately noted Drs. Werchowski and Raj diagnosed the Miner with legal pneumoconiosis based on the Miner's history of coal mine employment, his symptoms of productive cough, dyspnea and wheezing, severe obstructive lung disease on pulmonary function studies and moderate hypoxemia on arterial blood gas studies. Decision and Order at 9, 11; Director's Exhibits 15, 68. He permissibly found both physicians well-qualified to offer opinions on the Miner's condition, and found they relied upon an accurate understanding of the Miner's employment, personal, and medical histories, and considered all of his exposure histories.[15] *See Jericol Mining, Inc. v. Napi*er, 301 F.3d 703, 713-14

[14] We similarly reject Employer's assertion that the ALJ violated its due process rights by relying on the preamble without providing it notice of his intent to do so. Employer's Brief at 29. The Sixth Circuit has explicitly held that the preamble does not constitute evidence outside the record requiring the ALJ to give notice and an opportunity to respond. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

[15] Employer argues the ALJ should have found the opinions of Drs. Werchowski and Raj undermined as they were unaware of the Miner's more recent treatment records, including those addressing the diagnosis of lung cancer. Employer's Brief at 25. However, an ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). Moreover, the medical experts of record agree the Miner had totally disabling COPD. In finding the Miner had legal pneumoconiosis, the ALJ permissibly credited the medical opinions attributing his COPD in part to coal mine dust exposure over those that did not. That the Miner was also later diagnosed with cancer does not preclude that finding.

(6th Cir. 2002); *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); Decision and Order at 18-19.

Contrary to Employer's argument, the ALJ did not substitute his opinion for that of Drs. Werchowski and Raj when he consulted the preamble. Employer's Brief at 25-28. Rather, he permissibly credited their conclusions that both coal mine dust and smoking contributed to the Miner's impairment because it is consistent with DOL's acceptance in the preamble of scientific studies indicating that the risks of smoking and coal mine dust exposure are additive. 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-75 (4th Cir. 2017); Decision and Order at 17-18.

Nor is there any merit to Employer's argument that the opinions of Drs. Werchowski and Raj are legally insufficient to establish legal pneumoconiosis. Employer's Brief at 23-25. A physician need not apportion a specific percentage of a miner's lung disease or impairment to coal mine dust exposure as opposed to cigarette smoke to establish the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). The physician need only credibly diagnose the disease or impairment as "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §718.201(b). Here, as discussed above, the ALJ permissibly credited the opinions of Drs. Werchowski and Raj that Claimant's coal mine dust exposure is a substantial contributory cause of his disabling respiratory impairment. Decision and Order at 17-18; Director's Exhibits 15, 68.

The ALJ further accurately noted Drs. Rosenberg and Vuskovich supported their opinions by citing studies that show smoking causes greater reductions in the FEV1 on pulmonary function testing per year in comparison to coal mine dust exposure. Decision and Order at 19; Director's Exhibit 66; Employer's Exhibits 1-2. He acted within his discretion in finding that, as applied to the Miner's specific case, neither physician adequately addressed the additive effects of smoking and coal mine dust exposure or explained why the Miner was not among those miners who have significant decrements in pulmonary function due to coal dust. Decision and Order at 22; 65 Fed. Reg. at 79,940; *Adams*, 694 F.3d at 802-03; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19.

The ALJ further accurately noted Dr. Rosenberg eliminated coal mine dust exposure as a source of the Miner's COPD, in part, because he found a reduction in the Miner's FEV1/FVC ratio on pulmonary function testing which, in his opinion, was inconsistent with obstruction due to coal mine dust exposure. Decision and Order at 20; Director's Exhibit 66; Employer's Exhibit 1. The ALJ permissibly discredited his opinion because

his reasoning conflicts with the medical science that the DOL accepts, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; Decision and Order at 20.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012). Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the ALJ's finding that Claimant established legal pneumoconiosis.[16] 20 C.F.R. §718.202(a)(4); *see Groves*, 761 F.3d at 597-98; Decision and Order at 22.

Finally, we reject Employer's argument that the ALJ erred in finding a mistake of fact established based upon what Employer characterizes as a "legal error" in the prior denial. Employer's Brief at 22. In reviewing the record on modification, "[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact . . . ." *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743 (6th Cir. 1997), *citing Worrell*, 27 F.3d at 230. The ALJ properly reconsidered all of the evidence, old and new, to determine Claimant established the existence of legal pneumoconiosis. *Hunt*, 124 F.3d at 743; Decision and Order at 22. Consequently, he permissibly found Claimant established a mistake of fact in the prior denial. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Hunt*, 124 F.3d at 743; Decision and Order at 22.

As Employer raises no specific allegations of error regarding disability causation, we affirm the ALJ's finding that Claimant established the Miner's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.204(c); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

[16] As the ALJ gave valid reasons for discrediting the opinions of Drs. Vuskovich and Rosenberg on legal pneumoconiosis, we need not address Employer's arguments regarding the additional reasons the ALJ gave for discrediting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1993).

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge