U.S. Department of Labor

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

BRB No. 21-0041 BLA

DANNY STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RACE FORK COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 9/30/2022
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2017-BLA-06256)[1] rendered on a subsequent claim[2] filed on October 14, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 15.55 years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He 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),[3] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

[1] The Director's Exhibits in the record before us do not correspond with those cited in the ALJ's Decision and Order. Director's Exhibit 1 includes the entire record before the ALJ, but many of those pages are also repeated in individual exhibits in the record. We thus identify the Director's Exhibits using the ALJ's citations while also noting where those citations differ in the record before us.

[2] Claimant filed three previous claims. Director's Exhibits 1-3 (before us as Director's Exhibit 1). His most recent prior claim, filed on April 27, 1998, was denied for failure to establish pneumoconiosis or total disability. Director's Exhibit 3 (before us as Director's Exhibit 1).

[3] 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.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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).

On appeal,[5] Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[6] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, Employer contends the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability and thus erred in finding he invoked the Section 411(c)(4) presumption. Finally, it asserts the ALJ erred in finding it did not rebut that presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional arguments and its argument that Claimant's cardiovascular and spinal conditions preclude entitlement. Employer replies, reiterating its arguments.

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

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Because Claimant failed to establish pneumoconiosis or total disability in his prior claim, he had to submit new evidence establishing either element of entitlement to obtain review of the merits of his current claim. 20 C.F.R. §725.309(c).

[5] Employer filed its Petition for Review and Brief in Support on March 15, 2021. On the same date, Employer field a Revised Petition for Review and Brief in Support. The only change in the Revised Petition for Review and Brief in Support was to correct the "OWCP No." in the heading of the document.

[6] 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.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

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 12-16; Employer's Reply at 2-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 13-16; Employer's Reply at 1-3. 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 Brief at 4-7. We agree with the Director's argument.

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[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 56-57.

[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)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary of Labor issued a letter to ALJ Calianos 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 Calianos.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (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). Contrary to Employer's argument, 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)); *see* Employer's Reply at 2-3.

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 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 Calianos and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Calianos. 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 "thoughtful consideration and deliberation" when he ratified the ALJ's appointment. Employer's Reply at 1. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 605 ("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 of civilian members of the United States Coast Guard Court of Criminal Appeals were 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).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive civil service. Employer's Brief at 20. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of the ALJ's appointment, which we have held constitutes a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different 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 18-19; Employer's Reply at 3, 5. Employer also relies on the Supreme Court's holdings in *Free Enterprise 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's holding 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 16-17, 19; Employer's Reply at 4-5.

Employer's arguments are unavailing, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in rejecting a similar argument regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit, the law that applies in this case, noted that in *Free Enterprise*[10] the

[10] 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

Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10.). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Calcutt*, 37 F.4th at 315. Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Id*. at 315-16. Employer in this case has not specifically explained how the allegedly unconstitutional removal protections caused it any harm.

Nor does *Seila Law* or *Arthrex* support Employer's argument. 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 branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The

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for a Board member's breach of faith." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010). The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" 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.

[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).

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*, 8 F.4th at 1137-38.

Section 411(c)(4) Presumption: Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, 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 of establishing 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 calculation of the length of coal mine employment if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ noted that Claimant alleged nineteen-and-a-half to twenty years of coal mine employment, ending on May 31, 1985. Hearing Transcript at 12, 59. Claimant testified that he started working in 1964, for cash, full-time for at least one year for Rowe Coal Company, which was not reflected on his Social Security Administration (SSA) earnings records. Decision and Order at 4, 9; Hearing Transcript at 12-18. Noting the Director previously found 14.55 years of coal mine employment based on Claimant's SSA earnings records and finding credible Claimant's testimony that he had additional employment beyond that reflected in those records, the ALJ credited Claimant with an additional year of employment, for a total of 15.55 years. Decision and Order at 9.

Employer argues the ALJ failed to consider the facts in the record and did not independently calculate or explain how he came to his conclusion regarding Claimant's length of coal mine employment. Employer's Brief at 20-22. It further points to instances in Claimant's testimony which it argues would lead to a finding of less employment than that determined by the Director and the ALJ. *Id.* at 22-23. We reject Employer's arguments.

While Employer argues before us that Claimant's employment reflected on his SSA earnings report does not amount to 14.55 years, it made no such argument before the ALJ. Rather, Employer explicitly conceded in its closing brief to the ALJ that "the documentary record established Claimant worked 14.55 years." Employer's Closing Brief at 9, 18. It contested only the "off the books" employment Claimant testified to that was not reflected on his SSA earnings record. *Id.* at 7-9. Employer cannot now raise arguments contradictory to those facts it conceded to the ALJ. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (parties forfeit arguments before the Board not first raised to the ALJ); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109 (1985) (a party is bound by its stipulations and concessions).

Moreover, the ALJ permissibly found Claimant's testimony that he had an additional year of employment not reflected in his SSA earning records to be credible. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Employer argues the ALJ's reasoning that Claimant's work before his eighteenth birthday would not have been documented "seems disproven" by records of earnings in the third quarter of 1966. Employer's Brief at 23. The ALJ did not conclude that none of Claimant's employment before his eighteenth birthday would be documented, but rather credited Claimant's explanation that his work for Rowe Coal Company, which occurred before his eighteenth birthday and for which he did not pay taxes, was "off the books" and thus not documented in the SSA records. Decision and Order at 9; Hearing Transcript at 61-62. Employer's argument is a request that we reweigh the evidence, which we are not permitted to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because a miner's credible, uncontradicted testimony may be used to establish the nature and length of his employment, we affirm the ALJ's decision to credit Claimant with one year of coal mine employment with Rowe Coal Company. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984); 20 C.F.R. §725.101(a)(32)(ii) ("dates and length of employment may be established by any credible evidence including . . . sworn testimony"). Thus, we affirm the ALJ's finding that Claimant established 15.55 years of coal mine employment. Decision and Order at 9.

Employer further contends the ALJ erred in finding Claimant established at least fifteen years of his coal mine employment occurred in underground mines or in substantially similar conditions. We disagree.

The ALJ found that Claimant worked in both underground and aboveground coal mine employment. Decision and Order at 9-10. The ALJ found that "virtually all" of Claimant's aboveground employment was at an underground coal mine site. *Id.* at 10. Thus, he determined Claimant had at least fifteen years of underground employment and that it was therefore unnecessary to address whether the conditions of his aboveground employment were substantially similar to those in underground coal mines. *Id.*

Employer argues the ALJ's finding that "virtually all" Claimant's surface work was at underground mine sites is unexplained and unsupported. Employer's Brief at 23-24. Contrary to Employer's argument, the ALJ thoroughly summarized Claimant's uncontradicted testimony regarding the coal mining sites where he worked and permissibly found Claimant's aboveground employment, with the exception of two weeks in 1975 for Royal Mining, was at underground coal mines.[12] Decision and Order at 4-6, 10; *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59 (6th Cir. 2013) (miner working aboveground at an underground mine not required to prove comparable dust conditions); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). The ALJ further provided at the hearing a detailed explanation of his findings concerning both the length and nature of Claimant's employment throughout his coal mining career. Hearing Transcript at 77-80. While the ALJ could perhaps have been somewhat clearer regarding his findings, excluding two weeks of surface employment that was not at an underground mine site would still leave Claimant with more than fifteen years of qualifying coal mine employment; thus, the ALJ was not required to make findings regarding the dust conditions at the aboveground mine site. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (duty of explanation is satisfied if reviewing court can discern what the ALJ did and why he did it). Because substantial evidence supports the ALJ's finding that Claimant worked for more than fifteen years at

[12] The ALJ noted Claimant's testimony that his work with Rowe Coal Company and Lincoln & Harold Rife, Island Creek Coal Company, C.H. & Ada Bennett, South Atlantic Coal Company, and Race Fork Coal was all underground. Decision and Order at 4-6; Hearing Transcript at 17-18, 41-42, 50. Claimant testified his employment with Knox Creek Coal Company, Elk Creek Coal, Gale Coal Company, Five Oaks Coal Company, and Lester Coal Company was at the tipple at underground mines. Decision and Order at 4-5; Hearing Transcript at 20, 25-26, 35-37. In addition, Claimant's testimony regarding Cleve Blankenship and Russell Dewey reflected work underground and aboveground. Decision and Order at 5; Hearing Transcript at 32. Finally, the ALJ indicated that it appeared Claimant's employment with Royal Mining was surface employment. Decision and Order at 5; Hearing Transcript at 43. Employer does not specifically contest these findings.

underground coal mines, we affirm it. *Muncy*, 25 BLR at 1-27; 20 C.F.R. §718.305(b)(1); Decision and Order at 10.

Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). The ALJ found Claimant established total disability based on the arterial blood gas studies and medical opinion evidence, and the evidence as a whole.[13] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 13,18.

Employer does not specifically challenge the ALJ's finding that the arterial blood gas study evidence establishes total disability. We thus affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13. Employer instead asserts the ALJ erred in failing to address that the disabling blood gas studies, which "waxed and waned," were due to non-compensable cardiovascular disease and not a pulmonary process. Employer's Brief at 25-27. We disagree.

Contrary to employer's assertion, the existence of a totally disabling respiratory or pulmonary impairment, and its cause, are separate inquiries. 20 C.F.R. §718.204(b), (c). The regulations specifically state that, "if a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). Therefore, we reject Employer's argument that the ALJ was required to determine whether Claimant's "heart, rather than his lungs,"

[13] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 12-13.

caused his hypoxemia before he could find Claimant established total disability.[14] Employer's Brief at 27.

Before considering whether the medical opinion evidence establishes total disability, the ALJ determined the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 14. The ALJ noted Claimant had various job duties, including picking rock at the tipple, drilling, loading railroad cars, shoveling rock, and building brattices, and that he testified he was required to "duck walk" or crawl for over a mile. *Id.*; Hearing Transcript at 53-54. The ALJ also considered Claimant's CM-913 benefits application form and the DOL examination wherein Claimant indicated he routinely had to lift 50 to 100 pounds at any given time. Decision and Order at 14; Director's Exhibits 5, 14 (before us as Director's Exhibits 7, 16).[15] He further took official notice of the *Dictionary of Occupational Titles* (DOT), which defines heavy work as, among other things, "[e]xerting 50 to 100 pounds of force occasionally." Decision and Order at 14 n. 1 (citing *Dictionary of Occupational Titles*, Appendix C (4th Ed., Rev. 1991)). He thus found Claimant's employment involved heavy manual labor. Decision and Order at 14.

Employer contends the ALJ failed to explain his conclusion that Claimant's usual coal mine employment involved heavy labor. Employer's Brief at 28. We disagree.

While Employer argues Claimant testified only to "duck walking," it fails to acknowledge the exertional duties provided elsewhere in the record, including in

[14] Employer also argues Claimant's disabling back injury precluded entitlement under the Act, given that he was already totally disabled from that injury. Employer's Brief at 28-29. As the Director argues, Employer appears to be advocating for the application of *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994). Director's Brief at 11-12. Initially, the Sixth Circuit, whose law applies here, did not adopt *Vigna* or its reasoning. *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-267 (2003). Moreover, in claims filed after January 19, 2001, a non-pulmonary condition that causes an independent disability unrelated to the 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 Gulley v. Director, OWCP*, 397 F.3d 535, 538-39, 549 (7th Cir. 2005).

[15] Claimant indicated on his CM-913 form that he carried fifty to seventy-five pounds, five or six times per day, and carried sixty pounds at any given time. Director's Exhibit 5 (before us as Director's Exhibit 7). Dr. Raj reported in the DOL examination that Claimant lifted fifty to one hundred pounds at any given time. Director's Exhibit 14 (before us as Director's Exhibit 16).

Claimant's application and his description of his duties during the DOL-sponsored examination. Employer's Brief at 28; Director's Exhibits 5, 14 (before us as Director's Exhibits 7, 16). It further does not challenge the ALJ's notice and use of the DOT in making his determination. *See* 29 C.F.R. §18.84. Thus, based on the definition of heavy work in the DOT compared to Claimant's job duties, the ALJ permissibly found Claimant's usual coal mine employment required heavy manual labor. *See Martin*, 400 F.3d at 305; Decision and Order at 14.

The ALJ next considered the medical opinions of Drs. Raj and Nader that Claimant is totally disabled and those of Drs. Fino and Dahhan that he is not. Decision and Order at 14-18; Director's Exhibits 14-15, 17 (before us as Director's Exhibits 16, 18, 24); Claimant's Exhibits 1-2; Employer's Exhibits 3, 5, 8, 12-13. The ALJ found each physician well-qualified to provide an opinion regarding whether Claimant is disabled, and crediting the opinions of Drs. Raj and Nader over those of Drs. Fino and Dahhan, he concluded the medical opinions establish total disability. Decision and Order at 14, 17-18.

Initially, we affirm, as unchallenged on appeal, the ALJ's finding that Drs. Raj's and Nader's opinions are well reasoned and support a finding of total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17-18; Director's Exhibits 14-15 (before us as Director's Exhibits 16, 18); Claimant's Exhibits 1-2. Employer further does not challenge the ALJ's evaluation of Dr. Dahhan's opinion except for its argument that Dr. Dahhan opined Claimant is not totally disabled because his blood gas impairment is caused by congestive heart failure, Employer's Brief at 25-27, an argument we have already rejected as irrelevant to the existence of a totally disabling impairment.

Employer argues the ALJ incorrectly found Dr. Fino's opinion supports a finding of total disability, as Dr. Fino found "no total disability." Employer's Brief at 24, 26. While Dr. Fino found no disabling respiratory impairment in his initial report, Director's Exhibit 17 (before us as Director's Exhibit 24), the ALJ accurately observed that Dr. Fino stated in his supplemental report that Claimant's condition worsened since the time of his examination. Decision and Order at 18; Employer's Exhibit 13. Dr. Fino indicated the pulmonary function studies showed obstruction that was not present when he examined Claimant, and he stated that Claimant's hypoxemia worsened to "disabling resting hypoxemia," demonstrating a "very rapid decrease in oxygenation between 2017 and 2018." Employer's Exhibit 13 at 2. Thus, contrary to Employer's assertion, Dr. Fino did not simply adopt his prior conclusion of no total disability. Employer's Brief at 24. While he provided no express conclusions regarding Claimant's ability to perform coal mine work in his supplemental report, he acknowledged disabling resting hypoxemia, and concluded "there is no disability *related to* coal mine dust inhalation." Employer's Exhibit 13 at 2-3 (emphasis added). We therefore see no error in the ALJ's finding that Dr. Fino's supplemental opinion supports a finding of total disability. *See Martin*, 400 F.3d at 305;

Jericol Mining, Inc. v. Napier, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 18. Thus, we affirm the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer finally contends the ALJ did not weigh all the contrary probative evidence, specifically the non-qualifying pulmonary function studies, in concluding Claimant satisfied his burden. Employer's Brief at 27-28. We disagree. The ALJ found the arterial blood gas studies and medical opinion evidence established total disability. Decision and Order at 18. While the ALJ found the pulmonary function studies do not support total disability, they measure a different form of impairment and thus do not call into question the qualifying arterial blood gas studies and medical opinions based on those studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). The ALJ both separately considered the pulmonary function study and blood gas study results pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and integrated his consideration of the objective test results into his consideration of the medical opinions. Decision and Order at 11-18. Therefore, he adequately considered all contrary probative evidence.[16] *See Shedlock*, 9 BLR at 1-198.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability, thereby establishing a change in an applicable condition of entitlement, and invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §725.309; Decision and Order at 18.

[16] Employer also argues the ALJ erred in failing to consider contrary evidence in the form of treatment records it alleges showed "no complaints of breathlessness," which "can constitute affirmative evidence of the absence of total disability." Employer's Brief at 28. However, an ALJ is not required to infer the absence of evidence of pulmonary disability in treatment records demonstrates no disability. *Sacolick v. Rushton Mining Co.*, 6 BLR 1-930, 1-933 (1984). Moreover, contrary to Employer's characterization of the evidence, Claimant's treatment records contain multiple notations of complaints of dyspnea. *See* Employer's Exhibit 5 at 21, 23, 31, 34, 43, 47. Thus, Employer has not explained how Claimant's treatment records would constitute contrary probative evidence to outweigh the evidence the ALJ found supportive of total disability. We therefore conclude any error in the ALJ's failure to specifically address the treatment records is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[17] or "no part of [his] 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)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ found Employer failed to establish rebuttal by either method.[18]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). The Sixth Circuit requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

Employer relies on the medical opinions of Drs. Dahhan and Fino.[19] Dr. Fino opined Claimant has hypoxemia of unknown etiology but stated it is unrelated to coal mine

[17] "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 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).

[18] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 22.

[19] The ALJ also considered the opinions of Drs. Raj and Nader. Decision and Order at 23-26. Both doctors diagnosed Claimant with chronic obstructive pulmonary disease, which they attributed to a combination of both coal mine dust exposure and cigarette smoking. Director's Exhibit 14 (before us as Director's Exhibit 16); Claimant's Exhibits 1-2. As these opinions do not assist Employer in establishing that Claimant does not have

dust exposure. Employer's Exhibit 13. Dr. Dahhan diagnosed hypoxemia caused by congestive heart failure and unrelated to coal mine dust exposure. Employer's Exhibits 3, 8, 12. The ALJ found both Drs. Fino's and Dahhan's opinions not credible and thus inadequate to meet Employer's burden. Decision and Order at 25-26.

Employer argues the ALJ failed to adequately explain his discrediting of Dr. Dahhan's opinion. Employer's Brief at 31. We disagree.

Dr. Dahhan opined Claimant does not have chronic bronchitis or other form of legal pneumoconiosis as demonstrated by his variable hypoxemia, which Dr. Dahhan indicated is inconsistent with an impairment caused by coal mine dust exposure. Employer's Exhibits 3 at 4-5; 8 at 2-3; 12 at 2-3. However, as the ALJ observed, Dr. Dahhan failed to address the x-ray evidence demonstrating emphysema, more recent pulmonary function studies showing obstruction, and progressive worsening of the arterial blood gas studies. Decision and Order at 25-26; Director's Exhibit 14 at 22 (before us as Director's Exhibit 16); Claimant's Exhibits 1 at 2; 2 at 3; Employer's Exhibits 13 at 2. Thus, the ALJ reasonably determined Dr. Dahhan did not adequately explain how he excluded coal dust exposure as a cause, or substantially aggravating factor, of Claimant's obstructive impairment[20] or his worsening hypoxemia.[21] *See Martin*, 400 F.3d at 305; *Napier*, 301 F.3d at 713-14; Decision and Order at 26.

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legal pneumoconiosis, we need not address its allegations of error with respect to the ALJ's analysis of Drs. Raj's and Nader's opinions. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011) ("[R]ebuttal requires an affirmative showing . . . that the [Miner] does not suffer from pneumoconiosis . . . ."); *Larioni*, 6 BLR at1-1278; Employer's Brief at 30.

[20] Employer implies there is no evidence demonstrating an obstructive impairment. *See* Employer's Brief at 32. While Dr. Dahhan does not diagnose obstruction, Dr. Fino acknowledged that Claimant's more recent pulmonary function studies demonstrated mild obstruction and Drs. Raj and Nader also diagnosed obstruction. Employer's Exhibit 13; Claimant's Exhibits 1-2; Decision and Order at 23-24. In addition, as the ALJ notes, some of the x-ray interpretations noted the presence of emphysema. Decision and Order at 20-21; Director's Exhibit 14 (before us as Director's Exhibit 16); Claimant's Exhibits 1-3.

[21] As noted above, Dr. Fino acknowledged that Claimant's oxygenation rapidly decreased from 2017 to 2018. Employer's Exhibit 13.

Because the ALJ permissibly discredited Drs. Dahhan's and Fino's opinions,[22] the only opinions supportive of Employer's burden, we affirm his determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1).

Disability Causation

Employer argues that the ALJ used an incorrect rebuttal standard by requiring its experts "to establish that pneumoconiosis played 'no part' in" Claimant's disabling hypoxemia to rebut the presumption. Employer's Brief at 31-32. However, the standard Employer identifies as erroneous is, in fact, the rebuttal standard imposed by the regulations, which require that, to disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

The ALJ permissibly discounted the opinions of Drs. Fino and Dahhan because they did not diagnose pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Employer raises no specific challenge to this determination but instead only argues that the opinions of Drs. Fino and Dahhan are sufficient to rebut the presumption. Employer's Brief at 31-32. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Thus, we affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-28. Consequently, we affirm the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption and affirm the award of benefits.

[22] Employer does not specifically challenge the ALJ's credibility determinations regarding Dr. Fino's opinion; thus, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge