U.S. Department of Labor

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

BRB Nos. 21-0393
and 21-0394

TAMMY WILLIAMS (o/b/o RALPH A. PATRICK, deceased miner)	)	
and	)	
DARREN A. PATRICK (survivor of RALPH PATRICK)	)	
Claimants-Respondents	)	
v.	)	DATE ISSUED: 9/27/2022
VIRGIL RALEIGH COAL COMPANY, INCORPORATED	)	
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 Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for the Claimants.

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), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal the Decision and Order Awarding Benefits (2013-BLA-06129 and 2019-BLA-06258) of Administrative Law Judge (ALJ) Jason A. Golden rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent miner's claim[1] filed on May 13, 2012, and a survivor's claim[2] filed on October 26, 2018.

Because there was no evidence the Miner had complicated pneumoconiosis, the ALJ found Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). 20 C.F.R. §718.304. The ALJ credited the Miner with 13.92 years of coal mine employment and therefore found Claimant also could not invoke 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]

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[1] The Miner filed a prior claim on October 29, 1998, which the district director denied on January 29, 1999, because he failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. Tammy Williams (Claimant) is the daughter of the Miner, who died on August 15, 2018, and is pursuing his claim on behalf of his estate. Decision and Order at 2; Survivor's Claim (SC) Director's Exhibit 3; Claimant's November 28, 2018 letter to the district director.

[2] Darren Patrick, a dependent child of the Miner, filed the survivor's claim. SC 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

Considering entitlement under 20 C.F.R. Part 718, the ALJ found the Miner had legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Thus, he concluded Claimant established a change in applicable condition of entitlement and further awarded benefits.[4] 20 C.F.R. §§718.202(a), 718.204(b)(2), (c); 20 C.F.R. §725.309(c).

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. On the merits, it asserts the ALJ erred in finding Claimant established legal pneumoconiosis and disability due to legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits

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substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary 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 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); *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 failed to establish any element of entitlement, Claimant was required to submit new evidence establishing at least one of the elements to warrant a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; MC Director's Exhibits 1, 3.

[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.

Review Board to reject Employer's constitutional challenges. Employer filed a reply brief, reiterating its contentions.

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.[6] 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 ALJ's Decision and Order[7] and remand this 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 2-9; Employer's Reply Brief 1-8. It 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

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[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. *Shupe v. Director,* OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 396.

[7] This case was initially assigned to ALJ Steven B. Berlin who issued a Decision and Order Awarding Benefits on June 18, 2018. Employer filed a Motion for Reconsideration, challenging ALJ Berlin's authority to adjudicate the case in light of *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Because he took substantive action prior to the Secretary's December 21, 2017 appointment, ALJ Berlin granted Employer's Motion for Reconsideration and Reassignment and the case was reassigned to ALJ Golden (the ALJ).

[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to the 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 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,

ratification was insufficient to cure the constitutional defect in ALJ Golden's prior appointment. Employer's Brief at 2-9; Employer's Reply Brief at 1-9.

The Director responds asserting the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 3-10. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* We agree with the Director's positions.

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 Hosp. Co.*, 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 demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress 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. Rather, he specifically identified ALJ Golden and indicated he gave "due consideration" to his appointment in his December 21, 2017 Letter to ALJ Golden. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying

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> 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 Golden.

the appointment of ALJ Golden "as an Administrative Law Judge." *Id.* In so doing, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment.[10]

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates he did not make a "detached and considered affirmation" when he ratified ALJ Golden's appointment. Employer's Brief at 2-9; Employer's Reply Brief at 1-8. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[11] *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 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*" its earlier actions was proper).[12]

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[10] Employer's assertion that the Secretary, in his December 21, 2017 letter to ALJ Golden, "did not approve the appointment as his own" ignores that the Secretary explicitly approved the ALJ's prior appointment "in [his] capacity as head of the Department of Labor." Employer's Brief at 15; *c.f.* Secretary's December 21, 2017 Letter to ALJ Golden.

[11] While Employer asserts the Secretary's ratification letter was "signed with a robo-pen" and the ALJ's ratification was unaccompanied by any ceremony, Employer's Brief at 15-16; Employer's Reply at 3-4, 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"). We agree with the Director's position: "Employer's argument that the appointment was invalid because the exact wording of the letter varied from internal government guidance and that the Secretary's action lacked sufficient pomp and circumstance is unpersuasive." Director's Brief at 6 n.7; *see* Employer's Brief at 15.

[12] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 22-23, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Golden's appointment,

Moreover, although Employer filed a Motion to Hold Claim in Abeyance in light of *Lucia* on October 6, 2020, the ALJ properly denied Employer's motion as he took no action on the claims before his appointment was ratified on December 21, 2017. Decision and Order at 3. Unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, here the ALJ took no action that could affect his ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S. Ct. at 2055. We thus decline to remand this case for a new hearing before a different ALJ. *Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020).

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 18-22; Employer's Reply Brief at 5-8. Employer generally asserts 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*. *Id.* It 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. , 140 S. Ct. 2183 (2020), as well as 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). *Id.*

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality with respect to DOL ALJs. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-1138 (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 noted that in *Free Enterprise*[13] the Supreme Court "took care to omit

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which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

[13] 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 [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather

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 alleged it suffered any harm due to the ALJ's removal protections.

Nor do *Seila Law* or *Arthrex* support Employer's argument. In *Seila Law*, the Supreme 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 because the CFPB was an "independent agency led by a single Director and vested with significant executive power."[14] 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 Administrative Patent Judges 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 the legal authorities it cites 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 Supreme Court has long recognized "'[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,

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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.

[14] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau 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 (June 29, 2020).

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.

Miner's Claim

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis);[15] disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment);[16] 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. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis [17]

To establish legal pneumoconiosis, Claimant must prove the Miner had 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). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment

[15] "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).

[16] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner was totally disabled. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§ 718.204(b), 725.309(c); Decision and Order at 14.

[17] The ALJ found Claimant failed to prove the existence of clinical pneumoconiosis. 20 C.F.R. §§718.201(a)(1), 718.202(a); Decision and Order at 12.

is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (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.'").

The ALJ considered three medical opinions. Decision and Order at 27-37. Dr. Rasmussen diagnosed the Miner with chronic obstructive pulmonary disease (COPD)/emphysema due to coal dust exposure, smoking, and Crohn's disease. MC Director's Exhibit 15. Drs. Jarboe and Rosenberg diagnosed the Miner with COPD in the form of emphysema and chronic bronchitis, but opined it was unrelated to coal dust exposure. MC Director's Exhibit 16; Employer's Exhibits[18] 1, 5, 11, 12. The ALJ found Dr. Rasmussen's opinion reasoned and documented and consistent with the preamble to the revised 2001 regulations, while rejecting the opinions of Drs. Jarboe and Rosenberg as not well-reasoned and inconsistent with the preamble. Decision and Order at 29-37.

As an initial matter, we reject Employer's contention that the ALJ erred in consulting the preamble in weighing the medical opinions. Employer's Brief at 24, 29-33. An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). We also reject Employer's general assertion that the preamble "has been superseded by modern studies Dr. Rosenberg applied to [the Miner's] case." Employer's Brief at 30. Medical literature more recent than the preamble is only significant if it addresses "scientific innovations that archaized or invalidated the science underlying the Preamble." *See Westmoreland Coal Co. v. Cochran,* 718 F.3d 319, 324 (4th Cir. 2013); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (quoting *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490 (7th Cir. 2004)) (Argument that the science in the preamble has been misinterpreted or superseded by subsequent studies requires courts "to engage the substance of that scientific dispute," thus requiring a party to submit "'the type and quality of medical evidence that would invalidate' the DOL's position in that scientific dispute."). Employer has not identified any such literature.

Regarding the ALJ's specific credibility determinations, Employer contends Dr. Rasmussen's opinion is legally insufficient to establish legal pneumoconiosis because he

[18] Employer's Exhibits 1-5, 7, 8, 11-13 were admitted into evidence in both claims. Decision and Order at 2; *see* Hearing Transcript 20-21.

stated he could not apportion the effects of smoking and coal mine dust exposure in the Miner's COPD. Employer characterizes Dr. Rasmussen's opinion as merely concluding that coal mine dust exposure could not be excluded as a significant contributor to it. It further asserts the ALJ's crediting of Dr. Rasmussen's opinion flipped the burden of proof to Employer to disprove the disease and "misstates" the regulations and preamble. Employer's Brief at 23-29. We disagree.

Contrary to Employer's contention, a physician need not apportion the causes of a miner's lung disease to establish the existence of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). Rather, the physician need only credibly diagnose a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Dr. Rasmussen conducted the DOL's complete pulmonary evaluation and observed the Miner had "several possible risk factors" for his COPD/emphysema, which included twenty years of "significant [coal] dust exposure," a "significant history of cigarette smoking," and Crohn's disease. MC Director's Exhibit 15. Noting the risks of smoking and coal dust "can clearly be additive" in the development of emphysema, he opined coal dust exposure "was a material contributing cause of [the Miner's] disabling lung disease." *Id.* In a supplemental report, prepared at the request of the district director, Dr. Rasmussen reconsidered his opinion, assuming the Miner had only twelve years of coal mine employment, and stated that coal dust exposure was a "significant contributing cause" of the Miner's disabling impairment. *Id.* Because Dr. Rasmussen's diagnosis meets the regulatory definition of legal pneumoconiosis, his opinion is sufficient to support Claimant's burden of proof.[19] *Id.*

Further, applying the correct burden of proof, the ALJ permissibly determined that Dr. Rasmussen's opinion was reasoned and documented because he found it was based on

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[19] Employer asserts Dr. Rasmussen mischaracterized that the Miner had "significant" coal dust exposure to the extent he "assumed (incorrectly) that [the Miner] worked a dusty job at an auger for at least half of his career." Employer's Brief at 24. We disagree. Dr. Rasmussen found the Miner "work[ed] for 7-8 years on auger operations with significant dust exposure" and also had ten additional years of coal dust exposure. Director's Exhibit 15. In his supplemental report, Dr. Rasmussen relied on a twelve-year coal dust exposure history. *Id.* This is consistent with the ALJ's finding that the Miner had 13.92 years of coal mine employment. Decision and Order at 9. Employer does not challenge this finding but rather generally asserts the ALJ "did not deduct the time [the Miner] spent hauling already processed coal to end users, work which is not qualifying coal mine employment under the Act." Employer's Brief at 24 n.4.

an accurate understanding of Claimant's smoking and coal mine dust exposure histories and is supported by objective medical evidence. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 27-29, 37; MC Director's Exhibit 15. We further affirm the ALJ's permissible finding that Dr. Rasmussen's opinion is consistent with DOL's position in the preamble that the effects of smoking and coal mine dust exposure are additive.[20] *See Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407; 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see also Banks*, 690 F.3d at 489; Decision and Order at 23-25, 27-29. Thus, we affirm the ALJ's reliance on Dr. Rasmussen's opinion to find that the Miner had legal pneumoconiosis.

We also reject Employer's assertion that the ALJ erred in discrediting its medical experts. Dr. Jarboe diagnosed the Miner with "a moderate degree of airflow obstruction." Employer's Exhibit 1. As the ALJ noted, Dr. Jarboe excluded coal dust exposure as a contributing factor to the Miner's COPD, in part, because the Miner had no respiratory impairment eight years after his last coal dust exposure. Decision and Order at 30-31; Employer's Exhibit 1.

Dr. Rosenberg similarly opined that the Miner's COPD was due solely to smoking because "he had normal ventilatory function and normal gas exchange" "many years after he left his coal mine employment." Employer's Exhibit 5. He acknowledged the latent and progressive nature of legal pneumoconiosis but indicated that "when coal dust exposure is below 2mg/m3, . . . it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust exposure years after the last exposure." *Id.* In a supplemental report, Dr. Rosenberg further noted chronic bronchitis related to coal dust exposure "dissipates within months after exposure ceases[,]" and therefore the Miner's respiratory impairment was unlikely to be due to his coal mine employment, which ended in 1990. Employer's Exhibit 11.

Contrary to Employer's contention, we see no error in the ALJ's determination that the opinions of Drs. Jarboe and Rosenberg are inconsistent with the regulations which recognize pneumoconiosis as "a latent and progressive disease which may first become

[20] Contrary to Employer's contention, the ALJ did not "equate the recognition that coal dust exposure 'can cause' a respiratory impairment with the conclusion that coal dust exposure 'did cause' an impairment in an individual claim." Employer's Brief at 24. Rather, as explained previously, he permissibly consulted the preamble in determining the credibility of medical opinions and specifically noted that "the issue of whether a miner's disability is due to coal mine employment or smoking must be resolved on a claim-by-claim basis." Decision and Order at 24, 27-29.

detectable only after the cessation of coal mine dust exposure."[21] 20 C.F.R. §718.201(c)(1); *see* 65 Fed. Reg. 79,971 (Dec. 20, 2000) ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 30-31, 33-34; MC Director's Exhibit 16; Employer's Exhibits 1, 5, 11, 12. Thus, the ALJ permissibly found their opinions inconsistent with DOL's recognition that coal mine dust-induced diseases may be progressive in nature despite the amount of time that has passed since a miner was last exposed to coal dust exposure. 20 C.F.R. §718.201(c).

The ALJ also accurately noted that Drs. Jarboe and Rosenberg excluded a diagnosis of legal pneumoconiosis based on the Miner's pulmonary function studies which they concluded showed a disproportionate reduction of FEV1 compared to FVC (the FEV1/FVC ratio). The ALJ permissibly found their rationale inconsistent with DOL's position in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Sterling*, 762 F.3d at 491-92; Decision and Order at 30, 34-35. Further, the ALJ permissibly discredited Dr. Jarboe's opinion because he found Dr. Jarboe did not adequately explain how he was able to exclude coal dust as a contributing factor to Claimant's impairment.[22] *See Banks*, 690 F.3d at 489; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 31; Employer's Exhibit

[21] Employer asserts the ALJ's analysis "ignores . . . the Secretary['s] clarifi[cation] that the regulation meant only that some forms of the disease (not the most common forms (legal and clinical) could be latent and progressive." Employer's Brief at 33, citing *Nat'l Mining Ass'n. v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002) (*NMA*). But the Board has held a physician's opinion that only simple clinical or complicated pneumoconiosis, and not legal pneumoconiosis, may be latent and progressive, cannot be reconciled with the Act or its implementing regulations. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-34-35 (2004), *citing National Mining Ass'n v. Dep't of Labor,* 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). Further, contrary to Employer's characterization, the ALJ did not state that pneumoconiosis must be latent and progressive, only that it *can* be. Decision and Order at 30-31, 33-34.

[22] The ALJ found that although Dr. Jarboe addressed the etiology of the Miner's COPD, he did not "offer any creditable explanation how or why he was able to exclude coal dust as a contributing factor to the Miner's totally disabling impairment of gas exchange with exercise." Decision and Order at 31.

1. Employer has not challenged these findings and we therefore affirm them. *See Skrack*, 6 BLR at 1-711. Consequently, we affirm the ALJ's discrediting of Drs. Jarboe's and Rosenberg's opinions concerning legal pneumoconiosis.[23]

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Banks*, 690 F.3d at 482-83; *Crisp*, 866 F.2d 179, 185. Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Rasmussen's opinion is the most credible and establishes the Miner had legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 835-36 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); Decision and Order at 37.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of the Miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it had "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599 (6th Cir. 2014).

Employer raises the same arguments on disability causation that it did regarding legal pneumoconiosis. Employer's Brief at 23-34. As discussed above, however, the ALJ permissibly relied on Dr. Rasmussen's opinion in finding the Miner's totally disabling pulmonary impairment constitutes legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 27-29, 37. We therefore see no error in the ALJ's finding his opinion is also sufficient to establish the Miner's legal pneumoconiosis is a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 37-38.

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[23] Because the ALJ provided valid reasons for discrediting Drs. Jarboe's and Rosenberg's opinions, we need not address Employer's additional arguments regarding the weight the ALJ assigned their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 29-33.

Additionally, the ALJ permissibly discounted the opinions of Drs. Jarboe and Rosenberg on the cause of the Miner's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding legal pneumoconiosis was established.[24] *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (ALJ may discount a physician's opinion as to disability causation because he erroneously failed to diagnose pneumoconiosis); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 38-39. As substantial evidence supports the ALJ's finding that the Miner is totally disabled due to legal pneumoconiosis, we affirm it. 20 C.F.R. §718.204(c). Consequently, we affirm the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that the Miner's dependent child, Darren Patrick, is derivatively entitled to

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[24] Drs. Jarboe and Rosenberg did not address whether legal pneumoconiosis caused the Miner's total respiratory disability independent of their conclusion that the Miner did not have the disease.

survivor's benefits. 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 40.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge