U.S. Department of Labor

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

BRB No. 18-0561 BLA

JOE HALL, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BULLION HOLLOW MINING	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 12/16/2019
	)	
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 Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05421) of Administrative Law Judge Jennifer Gee, rendered on a claim filed on February 21, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment. Thus, she found he invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] Alternatively, employer challenges the award of benefits, asserting the administrative law judge erred by issuing an evidentiary ruling in her Decision and Order Awarding Benefits. Employer also asserts she erred in finding claimant invoked the Section 411(c)(4) presumption by establishing at least fifteen years of underground coal mine employment and total disability. In addition, employer contends the administrative law judge erred in finding the presumption unrebutted. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption claimant is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] 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.

employer did not timely raise its Appointments Clause challenge. Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc).

Appointments Clause Challenge

Employer urges the Board to vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044 (2018).[4] Employer specifically contends that the Secretary of Labor's ratification of the administrative law judge's appointment on December 21, 2017 does not satisfy the Appointments Clause.[5] Employer's Brief In Support of Petition for Review at 12-16. In response, the Director asserts employer forfeited its Appointments Clause challenge by failing to timely raise the issue before the administrative law judge and that exceptional circumstances do not exist to excuse its failure to timely raise this issue. Director's Response Brief at 3-7. Employer replies that "it is not clear that a party can waive a challenge to the constitutionality of [Department of Labor administrative law

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[3] Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). In *Lucia*, the United States Supreme Court held that, similar to the Special Trial Judges at the Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[5] On July 20, 2018, the Department of Labor (DOL) expressly conceded that the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

judges], given that [they] have no authority to determine their own constitutionality and the Board's authority is limited to the [administrative law judge's] decision." Employer's Reply Brief at 4 (unpaginated). Employer maintains it is sufficient that an Appointments Clause challenge is raised before the Board. *Id*. Employer's arguments are without merit.

The Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture.[6] *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). *Lucia* was decided on June 21, 2018, giving employer more than six weeks to raise the issue to the administrative law judge prior to her August 7, 2018 Decision and Order Awarding Benefits. Had employer timely raised its Appointments Clause challenge to the administrative law judge, she could have considered the issue and, if appropriate, provided the relief employer is requesting, i.e., she could have referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision based on the record developed at that hearing. *Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna v. Matson Terminal Inc.*, __ BRBS __, BRB No. 19-0103, slip op. at 4-5 (June 25, 2019). Based on these facts, we conclude that employer forfeited its Appointments Clause challenge by not timely raising it before the administrative law judge. *See Powell*, BRB No. 18-0557 BLA, slip op. at 4*; Kiyuna*, BRB No. 19-0103 BLA, slip op. at 4.

Furthermore, employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). We reject employer's argument that *Freytag v. Commissioner*, 501 U.S. 868 (1991), mandates consideration of its Appointments Clause argument. Employer's Reply Brief at 3 (unpagingated). In *Freytag*, the Supreme Court excused waiver of the Appointments Clause issue as it pertained to Special Trial Judges (STJs) appointed by the United States Tax Court. The Court stated "this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge," because to do otherwise would leave unresolved "important questions . . . about the Constitution's structural separation of powers." 501 U.S. at 873,

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[6] Because the issue can be waived or forfeited, we reject employer's contention that its Appointments Clause argument must be addressed regardless of whether it was timely raised below. *See Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); Employer's Reply Brief at 4-7 (unpaginated).

879. The same rationale for excusing waiver or forfeiture is not present in this case because, as the Supreme Court determined in *Lucia*, the analysis in *Freytag* for determining that STJs are inferior officers subject to the Appointments Clause applies a fortiori to administrative law judges. *Lucia*, 138 S.Ct. at 2053-2054. As the Court observed, existing case law provided "everything necessary to decide this case." 138 S.Ct. at 2053.

Thus, we hold that employer forfeited its Appointments Clause challenge and deny the relief requested. We will therefore consider employer's arguments on the merits of the administrative law judge's Decision and Order Awarding Benefits.

Evidentiary Challenge

Employer next argues the administrative law judge erred in excluding Dr. Broudy's medical report. Section 725.414, in conjunction with Section 725.456(b)(1), set limits on the amount of specific types of medical evidence the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Employer may submit, in support of its affirmative case, "no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). A medical report "is a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a)(1).

On its evidence summary form, employer designated Dr. Dahhan's written report and Dr. Jarboe's deposition testimony as affirmative medical reports. Under the heading of the evidence summary form titled "Other Medical Evidence" pursuant to 20 C.F.R. §718.107(b),[7] employer listed Dr. Broudy's medical report. The administrative law judge found Dr. Broudy's opinion was "not properly characterized" and constituted a medical report because he reviewed medical evidence and offered his opinions on whether [claimant] is totally disabled due to pneumoconiosis . . . ." Decision and Order at 6; *see* 20 C.F.R. §725.414(a)(1). Because employer had already designated two affirmative medical reports, the administrative law judge found that Dr. Broudy's opinion exceeded the evidentiary limitations and therefore did not consider it. Decision and Order at 6.

[7] Section 718.107(b) provides for the admission of "any medically acceptable test or procedure reported by a physician," which is not specifically addressed in the regulations for diagnosing pneumoconiosis or total disability. 20 C.F.R. §718.107(b). This regulation does not apply to medical reports. *Id*.

Citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), employer argues the administrative law judge erred in first notifying it that Dr. Broudy's opinion was excluded in her Decision and Order Awarding Benefits rather than by issuing a separate evidentiary order.[8] Employer's Brief in Support of Petition for Review at 20. Employer contends the administrative law judge violated its due process right to a full and fair hearing because it did not have the opportunity to make a good cause showing for admission of Dr. Broudy's report or "choose which report to rely on if it were required to make a choice." *Id.* Employer's arguments are without merit.

As an initial matter, the party seeking to admit evidence beyond that enumerated in Section 725.414 has an obligation to raise its good cause arguments to the administrative law judge. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006) (administrative law judge not required to raise the issue sua sponte). Employer did not do so in this case. Moreover, employer's reliance on *Preston* is misplaced. There, the Board held an administrative law judge violated a party's due process rights by excluding cross-examination testimony from a physician whose opinion was otherwise admissible under the evidentiary limitations,[9] resulting in an award without considering evidence relevant to that physician's credibility. *See Preston*, 24 BLR at 1-62. Thus, the Board's advisement that an administrative law judge "should" render evidentiary rulings before issuing a decision and order was premised on concerns regarding the need for "[c]onsisten[cy] with the principles of fairness and administrative efficiency." *Id.* at 1-63. The administrative law judge's actions in this case satisfy those principles. *Id.* Employer does not dispute Dr. Broudy's opinion constitutes a medical report that exceeds the evidentiary limitations or that employer mischaracterized the report as "other medical evidence" on its Evidence Summary Form. Employer therefore bore the risk, as part of its litigation strategy, of designating Dr. Dahhan's and Dr. Jarboe's opinions as its two affirmative medical reports, and in submitting Dr. Broudy's report as "other evidence," rather than arguing to the administrative law judge that good cause existed for its admission in excess of the evidentiary limitations. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003);

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[8] Although claimant did not object to the admission of Dr. Broudy's report at the hearing, the administrative law judge is obligated to enforce the evidentiary limitations even if no party objects to the evidence. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations in 20 C.F.R. §725.414 are mandatory and thus are not subject to waiver).

[9] The Board stated the physician's opinion was contained in the miner's treatment records and admissible under 20 C.F.R. §725.414(a)(4). *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-59 n.4, 1-63 (2008) (en banc).

Chaffin v. Peter Cave Coal Co., 22 BLR 1-294, 1-298-99 (2003); *see also Brasher*, 23 BLR at 1-145. Remanding this case to allow employer to now argue good cause or to re-designate its evidence impedes, rather than promotes, fairness and administrative efficiency. *Preston*, 24 BLR at 1-63. We therefore reject employer's evidentiary challenge.

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

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years in "underground coal mines, or substantially similar surface coal mine employment." 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on the length of coal mine employment if based on a "reasonable method" and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer argues the administrative law judge did not rationally explain her finding that claimant established at least fifteen years of underground coal mine employment. We disagree.

Claimant indicated he started working in coal mine employment in 1974 and stopped working in 1992. Director's Exhibit 2; Hearing Transcript at 17-18. The administrative law judge found that claimant established "just over" seventeen years of underground coal mine employment from 1974 until 1992. Decision and Order at 6.

For the years 1974 to 1978, the administrative law judge considered claimant's employment history form, his testimony, and his Social Security Administration (SSA) earnings statement. Decision and Order at 5; Director's Exhibits, 3, 6, 20 at 21-23. She credited claimant with a full quarter of coal mine employment for each quarter in which the SSA record showed earnings from coal mine operators exceeding $50.00, for a total of thirteen quarters, or three years and one quarter. Employer argues that it is not reasonable for an administrative law judge to credit a miner for each quarter of pre-1978 coal mine employment in which he had earnings from coal mine operators that exceeded $50.00. Employer's Brief at 9-11. Contrary to employer's contention, the Board and the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has upheld this method of calculation as reasonable. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (administrative law judge may

apply the *Tackett* method unless the beginning and ending dates of the miner's coal mine employment reveal "the miner was not employed by a coal mining company for a full calendar quarter").[10] The Sixth Circuit has cautioned that "as quarterly income approaches th[e] floor of $50.00, it seems reasonable to conclude that the miner did not work in the mines most days in the quarter." *Shepherd*, 915 F.3d at 406. Here, however, the miner earned at least $739.71 during each quarter in which he was credited with employment, which is greater than the $282.00 earnings the court credited in *Shepherd* as establishing a full quarter of coal mine employment. *Id*. We therefore affirm the administrative law judge's finding that claimant established thirteen quarters or three years and one quarter of coal mine employment from 1974 to 1977. *See Muncy*, 25 BLR at 1-27; Decision and Order at 5.

For the years 1978 to 1992, the administrative law judge calculated claimant's employment by dividing his earnings for each year by the yearly average wage as reported in Exhibit 610 of the *BLBA Procedure Manual*.[11] Decision and Order at 5-6. Using this method, she credited claimant with a full year of coal mine employment in 1978, 1979, 1980, 1981, 1982, 1984, 1985, 1987, 1988, 1990 and 1991, for a total of eleven years of coal mine employment. *Id*. She also credited him with 0.65 of a year in 1983, 0.97 of a year in 1986, 0.75 of a year in 1989, and 0.41 of a year in 1992. *Id*. Thus she found claimant established 13.78 years of coal mine employment from 1978 through 1994. *Id*.

Employer argues that the administrative law judge's method of calculating claimant's post-1977 coal mine employment is irrational because she credited him with a full year of coal mine employment for each year he worked more than 125 days, or partial years based on a 125-day divisor. Employer's Brief in Support of Petition for Review at 17-18. We disagree. The United States Court of Appeals for the Sixth Circuit specifically held in *Shepherd* that a claimant need not establish a full calendar year of employment under the formula at 20 C.F.R. §725.101(a)(32)(iii). *Shepherd*, 915 F.3d at 402. Rather, if the result of the formula "yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for

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[10] Employer does contest that claimant earned income as a coal miner during one quarter of 1974 and all four quarters in 1975, 1976, and 1977; it argues only that because his income levels varied per quarter he should not be credited with a full three months of employment during certain quarters.

[11] The table at Exhibit 610, titled Average Earnings of Employees in Coal Mining, contains, by year, the average daily earnings of miners and yearly earnings for miners who worked 125 days during a year.

the year." *Id*. If the results yield less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." *Id*. Because the administrative law judge's method of calculating claimant's post-1977 coal mine employment is consistent with *Shepherd*, we affirm it.[12]

We further affirm the administrative law judge's finding that claimant established "just over" seventeen years of coal mine employment as supported by substantial evidence. Decision and Order at 6. In addition, we affirm, as unchallenged on appeal, the administrative law judge's finding that all of claimant's coal mine employment was in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

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). A claimant may establish total disability by 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 administrative law judge 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). We affirm, as unchallenged, the administrative law judge's finding that claimant established total disability based on

[12] Employer maintains that claimant had only 9.24 years of post-1978 coal mine employment and created a chart in its brief showing its estimate of claimant's total days and years of coal mine employment between 1978 and 1992. *Id*. Even if we were to rely on employer's chart, claimant would still establish at least twelve years of post-1979 coal mine employment because he worked for more than 125 days in each of twelve calendar years, as well as partial periods during another three calendar years. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 407 (6th Cir. 2019). Adding that twelve-plus years to his three years and one quarter employment established prior to 1978 still establishes greater than the requisite fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption.

the valid, qualifying pulmonary function studies.[13] *Skrack*, 6 BLR at 1-711; Decision and Order at 17. The administrative law judge also credited the medical opinions of Drs. Habre and Dahhan that claimant is totally disabled.[14] *Id*. at 18. Employer asserts their opinions are not adequately reasoned to support claimant's burden of proof. However, based on our affirmance of the administrative law judge's finding that claimant established total disability by a preponderance of the pulmonary function studies, and the absence of contrary probative evidence, it is not necessary that we address employer's arguments on the medical opinions.[15] *See* 20 C.F.R. §718.204(b)(2). We therefore affirm the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment[16] and that he invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis[17] or that "no

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[13] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values in Appendix B of 20 C.F.R Part 718. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[14] The administrative law judge found claimant did not establish total disability based on the blood gas studies and that there is no evidence claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 17.

[15] We affirm, as unchallenged, the administrative law judge's finding that Dr. Jarboe's opinion does "not provide any useful information on [c]laimant's respiratory capabilities." Decision and Order at 18; *see Skrack*, 6 BLR 1-710. Because there is no evidence to refute the qualifying pulmonary function studies, Decision and Order at 18, any error by the administrative law judge in crediting the opinions of Drs. Habre and Dahhan that claimant is totally disabled would be harmless. *See Larioni*, 6 BLR 1-1276, 1-1278 (1984).

[16] Employer asserts the administrative law judge erred in not weighing the non-qualifying blood gas studies against the qualifying pulmonary function studies. Employer's Brief in Support of Petition for Review at 23. We reject employer's assertion of error as these tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 798 (1984).

[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). "Clinical

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). The administrative law judge found employer failed to rebut the presumption under either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish that 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); *see* 20 C.F.R. §718.305(d)(1)(i)(A). Drs. Dahhan and Jarboe opined claimant has obstructive respiratory disease related solely to smoking and does not have legal pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 2. The administrative law judge found that their opinions are not adequately reasoned to satisfy employer's burden of proof. Contrary to employer's contention, we see no error in the administrative law judge's credibility findings.

As the administrative law judge correctly noted, Dr. Dahhan excluded a diagnosis of legal pneumoconiosis because he found claimant's respiratory impairment is purely obstructive. Decision and Order at 23; Director's Exhibit 13. The administrative law judge rationally found Dr. Dahhan's opinion inconsistent with the regulatory definition of legal pneumoconiosis, which includes purely obstructive respiratory impairments significantly related to or, substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 23.

The administrative law judge also permissibly rejected Dr. Dahhan's and Dr. Jarboe's opinions because she found that they relied on "statistical generalities."[18] *See*

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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] Dr. Dahhan opined that claimant's FEV1 loss exceeded the average annual loss of five to nine cubic centimeters attributed to coal dust exposure in the medical literature. Director's Exhibit 13. Dr. Jarboe excluded a diagnosis of legal pneumoconiosis based on studies indicating that: miners who do not smoke are less likely to have a clinically significant respiratory impairment; only 6.6 percent of coal miners who smoke develop a clinically significant, non-disabling loss of FEV1; and the majority of coal miners,

Crockett Colleries, Inc. v. Barrett, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 23, 25. She also rationally found that neither physician persuasively explained why claimant does not have legal pneumoconiosis, even if "from a statistical standpoint his smoking [] put him at greater risk for developing [chronic obstructive pulmonary disease] than his coal mine dust exposure."[19] Decision and Order at 24; *see Barrett*, 478 F.3d at 356.

Employer generally contends the administrative law judge's credibility findings ignore that a physician must rely on statistical probabilities in order to render a "differential diagnosis" regarding causation. Employer's Brief in Support of Petition for Review at 23-27. An administrative law judge's credibility determinations will be upheld, however, where the adjudicator has adequately examined "the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge adequately explained her rationale, we affirm her permissible determination that the opinions of Drs. Dahhan and Jarboe are not adequately reasoned to disprove legal pneumoconiosis.[20] 20 C.F.R. §718.305(d)(1)(i)(A); *see Rowe*, 710 F.2d at 255.

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regardless of whether they smoke, do not get clinically significant airflow obstruction. Employer's Exhibit 2.

[19] Contrary to employer's contention, the administrative law judge permissibly considered the preamble to the 2001 revised regulations in weighing the medical opinions and we affirm her determination that neither Dr. Dahhan nor Dr. Jarboe adequately addressed the additive effect of coal dust exposure on claimant's respiratory impairment. Decision and Order at 24; Employer's Brief in Support of Petition for Review at 29; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (holding that an administrative law judge permissibly rejected a physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments).

[20] Employer's failure to disprove legal pneumoconiosis precludes it from rebutting the Section 411(c)(4) presumption by establishing claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next addressed whether employer established that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). She again permissibly discredited the opinions of Drs. Dahhan and Jarboe on the cause of claimant's total disability because they did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove the disease. 20 C.F.R. §718.305(d)(1)(ii); *see Ogle*, 737 F.3d at 1074; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 26. Thus, we affirm the administrative law judge's determination employer did not establish that no part of claimant's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26. We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge