U.S. Department of Labor

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

BRB No. 19-0042 BLA

TRILLIS H. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
M & M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/21/2020
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 in a Subsequent Claim of Carrie Bland, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (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 in a Subsequent Claim (2016-BLA-05839) of Administrative Law Judge Carrie Bland, issued pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed his current subsequent claim on September 5, 2014.[1]

The administrative law judge determined employer is the responsible operator and credited claimant with 34.5 years of underground coal mine employment. She found claimant has a disabling respiratory impairment and thus established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309. The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to hear and decide the case because she had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also challenges the administrative law judge's finding that it is the responsible operator and asserts the Black Lung Disability Trust Fund must assume liability for the payment of benefits. Employer further contends the administrative law judge erred in finding claimant established total disability and invoked the Section 411(c)(4) presumption, and that it did not rebut it. Additionally, employer challenges the date for the commencement of benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting employer forfeited its right

[1] This is claimant's fourth claim for benefits. Director's Exhibit 5. The district director denied his last claim, filed on May 26, 2006, because the evidence did not establish the existence of pneumoconiosis and total disability. Director's Exhibit 1.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption that he is totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment 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.

to challenge the authority of the administrative law judge to decide this case. The Director also contends that employer is the responsible operator. Employer has filed a reply brief.[3]

The Board's scope of review is defined by statute. We must affirm the Decision and Order Awarding Benefits in a Subsequent Claim if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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, 361-62 (1965). The Board reviews questions of law de novo. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

Appointments Clause

Employer asserts the administrative law judge did not have authority to hear and decide this case. It notes the United States Supreme Court held in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), that Securities and Exchange Commission (SEC) administrative law judges were not properly appointed in accordance with the Appointments Clause of the Constitution.[5] Employer's Brief in Support of Petition for Review at 5-7. It argues the

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[3] On November 25, 2019, employer filed a Motion for Leave to File Reply Brief Instanter. We grant employer's motion and accept employer's reply brief as part of the record. 20 C.F.R. §§802.213, 802.217.

[4] Because the administrative law judge determined that claimant's last coal mine employment occurred in Kentucky, 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, 1-202 (1989) (en banc); Decision and Order at 4.

[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.

administrative law judge in this case was similarly appointed improperly. The Director contends, however, that employer forfeited its *Lucia* challenge because it did not raise it before the administrative law judge. We agree.

Appointments Clause issues are "non-jurisdictional" and, as such, are subject to the doctrines of waiver and forfeiture. *See Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018);[6] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also Lucia*, 138 S. Ct. at 2055 ("one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief.") (emphasis added). *Lucia* was decided three months before the administrative law judge issued her Decision and Order Awarding Benefits in a Subsequent Claim, but employer failed to raise its arguments while the claim was pending before her. *See Kiyuna v. Matson Terminals, Inc.*, __ BRBS __, BRB No. 19-0103 (June 25, 2019).

If employer had timely raised the Appointments Clause issue before the administrative law judge, she could have considered it and, if appropriate, provided the relief requested by referring the case back to the Office of Administrative Law Judges for assignment to a different, properly appointed administrative law judge.. *See Energy West Mining Co. v. Lyle*, 929 F.3d 1202 (10th Cir. 2019) (declining to address Appointments Clause issue raised for the first time before the court). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. *See In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (finding an Appointments Clause challenge waived where it could have been raised to the Patent and Trademark Board, but was not); *Kiyuna*, slip op. at 4 (affirming administrative law judge's finding that claimant forfeited the *Lucia* issue by raising it for the first time on reconsideration after an adverse decision). Moreover, the Board has previously rejected the assertion that *Lucia* constitutes a "change in law."

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[6] In *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), the Sixth Circuit held the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief. The court nevertheless considered the argument because petitioner's confusion as to whether the Federal Mine Safety and Health Review Commission had the authority to decide petitioner's constitutional claim was "understandable." 898 F.3d at 678. We reject any suggestion the forfeiture of employer's Appointments Clause challenge should be excused because it was similarly confused as to whether the administrative law judge could reach the constitutional question. *Lucia* was decided months prior to employer's appeal, the Secretary had long conceded the Department's administrative law judges had been improperly appointed, and transfer to a different, properly appointed administrative law judge was available had employer timely raised the issue.

See Luckern v. Richard Brady & Assoc., 52 BRBS 65, 68 n.3 (2018); *see also Lucia*, 138 S. Ct. at 2053 ("*Freytag* says everything necessary to decide this case.") (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

The United States Supreme Court has recognized that, in applying the doctrines of waiver and forfeiture, courts should proceed on a case-by-case basis to determine whether the circumstances of a particular case warrant excusing the failure to timely raise an issue. *See, e.g., Freytag* 501 U.S. at 879 ("We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge."). We decline to excuse employer's forfeiture of the issue, as it has not raised any basis for our doing so. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Accordingly, we deny employer's request to vacate the administrative law judge's decision based on *Lucia*.

Removal Provisions

Employer also generally asserts that 5 U.S.C. §7521, governing the removal of administrative law judges, is unconstitutional because it violates the separation-of-powers doctrine. Employer's Brief in Support of Petition for Review at 15-17. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose threshold requirements for alleging specific error before the Board will consider the merits of an appeal A petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). It must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" "is not to make an argument" and "a party forfeits any allegations that lack [development]." *Jones Bros.* , 898 F.3d at 677, *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of an argument that the FTC is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

Citing *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), employer argues solely that "the status of [administrative law judges as

constitutional 'Officers' implicates whether the statutory restrictions on their removal [set forth at 5 U.S.C. §7521] are consistent with separation-of-powers principles." Employer's Brief in Support of Petition for Review at 16. Employer has not explained how *Free Enterprise Fund* undermines the administrative law judge's authority to decide this case.[7] Thus we decline to address the issue.[8] *Cox*, 791 F.2d at 446-47; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392; 20 C.F.R. §802.211(b).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(e).[9] If the responsible operator the district director designates is not the operator that most recently employed the miner, the district director is required

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[7] Employer notes that in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board two levels of "for cause" removal protection and thus resulted in a "constitutionally impermissible diffusion of accountability." *Id*. Employer does not set forth how *Free Enterprise* applies to the administrative law judge. Further, as the Director notes, the Supreme Court in *Free Enterprise* stated that its holding "does not address that subset of independent agency employees who serve as administrative law judges." Director's Brief at 6, *quoting Free Enter. Fund*, 561 U.S. at 507 n.10. Finally, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

[8] Employer asserts that Executive Order 13843, issued on July 10, 2018, "confirms that [the administrative law judge's] appointment was constitutionally infirm when [his] decision was rendered and remains so today." Employer's Brief in Support of Petition for Review at 17-18. We construe employer's argument to be adjunct to its Appointments Clause challenge, which was forfeited.

[9] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; the operator must have employed the miner for a cumulative period of not less than one year; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*. Once the Director properly identifies a potentially liable operator, it may be relieved of liability only if it proves either that it is financially incapable of paying benefits or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer asserts it is not the responsible operator because claimant last worked for Double M No. 2 Mine, Inc. (Double M) for a cumulative period of one year and the district director did not properly investigate whether it is financially capable of paying benefits. Employer asserts it cannot be held liable for benefits because the record does not contain a statement from the district director indicating that the officers of Double M are incapable of assuming liability for benefits. Employer's argument is without merit.

The district director included a statement in the record indicating that Double M No. 2 Mine, Inc. "was either insured or authorized to self-insure on [claimant's] last date of employment, but 'the insurance carrier became insolvent by the time of the miner's claim.'" Director's Exhibit 6. Contrary to employer's contention, having determined that Double M was not financially capable of assuming liability, the district director was not further required to consider whether the corporate officers of that company possessed sufficient assets to secure the payment of benefits. 20 C.F.R. §725.495(d). Rather, the designated responsible operator bears the burden of proving a more recent employer possesses sufficient assets including, if necessary, "presenting evidence" that the owner, partners, or, president, secretary, and treasurer "possess sufficient assets to secure the payment of benefits . . ." 20 C.F.R. §725.495(c); *see Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999) (en banc) (McGranery, J., dissenting on other grounds); *see also Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999) (en banc) (Nelson and Hall, J.J., dissenting).

The administrative law judge correctly found that because the district director satisfied his obligation under 20 C.F.R. §725.495(d), the burden shifted to employer to prove that another employer had the financial capability of paying benefits pursuant to 20 C.F.R. §725.495(c)(2). Decision and Order at 7. She also correctly found that employer did not introduce any evidence to support its burden of proof. *Id*. at 8. Thus, we affirm the administrative law judge's finding that employer is the responsible operator as it is

supported by substantial evidence.[10] *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 8.

Invocation of the 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. 20 C.F.R. §718.204(b)(1). A miner's total disability may be established 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). Evidence supporting a finding of total disability must be weighed against the contrary probative evidence.[11] *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Employer challenges the administrative law judge's findings that claimant established total disability based on the pulmonary function studies and medical opinions.

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[10] Employer argues that the district director should have named the Kentucky Insurance Guaranty Association (KIGA) as a responsible party. Employer's Brief in Support of Petition for Review at 19. But we will not entertain an argument raised for the first time on appeal. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). Moreover, we reject any assertion by employer that it should be excused because it could not have known of the relevance of KIGA until the administrative law judge "decided that [claimant's] last employment occurred in Kentucky." Employer's Reply Brief at 11. Once the 20 C.F.R. §725.495(d) statement was issued, it was employer's burden to show that Double M could provide for payment of benefits through any means. 20 C.F.R. §725.495(c). That necessarily includes demonstrating that a guarantee fund would be liable for the claim. Employer did not submit any evidence that KIGA (or any other guarantee fund) should be made a party to the district director or the administrative law judge. *Id*. It cannot do so now. 20 C.F.R. §802.301(a), (b).

[11] The administrative law judge found the blood gas study evidence does not establish total respiratory disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 16-17; Director's Exhibits 12, 17; Claimant's Exhibit 6; Employer's Exhibit 5.

The record contains three qualifying[12] pulmonary function studies.[13] The administrative law judge found the September 2, 2014 study invalid. Decision and Order at 16; Director's Exhibit 14. The October 2, 2014 study was obtained as part of the Department of Labor (DOL) pulmonary evaluation. Director's Exhibit 12. Relying on the opinions of Dr. Forehand, who conducted the examination, and Dr. Ranavaya, who reviewed the study for DOL, the administrative law judge found the study invalid due to poor effort.[14] *Id.*

Claimant underwent a repeat pulmonary function study for DOL on December 9, 2014. Director's Exhibit 12. Dr. Ranavaya reviewed and invalidated the study due to poor effort and cooperation. *Id.* Dr. Forehand observed the study's tracings, acknowledged their variability and that claimant gave suboptimal effort, but opined claimant's "shortness of breath prevented him from performing a more acceptable forced vital capacity maneuver." *Id.* He further opined that even if claimant had been able to perform better on the study, "the results would be no more than ten percent better and would still meet the [DOL] disability standard." *Id.*

The administrative law judge relied on Dr. Forehand's opinion and found that while the December 9, 2014 pulmonary function study "depart[ed] in some respects from the quality standards," it was entitled to probative weight and was sufficient to support a finding of total disability. *Id.* Employer asserts the administrative law judge erred in crediting Dr. Forehand's opinion regarding claimant's effort and cooperation over the opinions of its medical experts. Employer's Brief in Support of Petition for Review at 22-23. We disagree.

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[12] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] Dr. Vuskovich invalidated all three studies for poor effort. Director's Exhibit 15; Employer's Exhibits 3; 6.

[14] Dr. Forehand examined claimant on October 2, 2014, and also supervised the study. He indicated it was a "less than optimal study." *Id.* Dr. Ranavaya, who reviewed the study for DOL, opined the results were "unacceptable" and recommended the test be repeated with "better coaching and effort." *Id.* Claimant underwent a second pulmonary function study for the DOL examination on December 9, 2014.

When considering pulmonary function study evidence, the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of the miner's pulmonary function. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (Levin, J., concurring). Moreover, the administrative law judge is required to consider all relevant evidence, including the physicians' opinions, in determining whether claimant has established total disability. *See Defore*, 12 BLR at 1-28-29; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

The administrative law judge noted that both Dr. Hippensteel and Dr. Fino opined claimant did not put forth sufficient effort to generate a valid pulmonary function study and that they "arguably [have] superior qualifications in the field of pulmonary disease" than Dr. Forehand. Decision and Order at 16. She permissibly found, however, that Dr. Forehand "was in a better position, based on his first-hand observations, than the other physicians to determine whether [c]laimant was giving his best efforts in light of his respiratory condition."[15] *Id.*; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Employer notes that a technician performed the December 9, 2014 study but does not point to any evidence to dispute Dr. Forehand's statements that he observed claimant's shortness of breath during the testing. Employer's Brief in Support of Petition for Review at 22.

We consider employer's challenge to the administrative law judge's crediting of the December 9, 2014 qualifying study to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's decision to credit Dr. Forehand's opinion that, while claimant's "shortness of breath prevented him from performing a more acceptable forced vital capacity maneuver," the results of the test "would still meet the [DOL] disability standard" even if claimant had been able to perform better. Decision and Order at 16; *see* 20 C.F.R. §718.204(b)(2)(i).

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[15] Employer notes that a technician performed the December 9, 2014 study but it does not point to any evidence to dispute Dr. Forehand's statements that he observed claimant's shortness of breath during the testing. Employer's Brief in Support of Petition for Review at 22.

Because the administrative law judge permissibly found the December 9, 2014 study credible to assess claimant's respiratory impairment, we affirm her reliance on Dr. Forehand's opinion that claimant is totally disabled based on the results of the study.[16] *See Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185; Director's Exhibit 12. She rationally explained "Dr. Forehand had an adequate basis, as a physician conducting a physical examination of Claimant, to determine whether the [pulmonary function study] represented [c]laimant's best efforts, and whether his overall respiratory condition would allow him to perform either a technically valid [pulmonary function study] or the duties of his last regular coal mine job." Decision and Order at 22; *see Rowe*, 710 F.2d at 255. The administrative law judge also permissibly rejected the contrary opinions of Drs. Fino and Vuskovich that claimant is not totally disabled because they did consider the results of the December 9, 2014 study in rendering their conclusions. *See Napier*, 301 F.3d at 713-714; *Crisp*, 866 F.2d at 185. We therefore affirm the administrative law judge's finding that claimant established total disability based on the medical opinion evidence.[17] 20 C.F.R. §718.204(b)(2)(iv).

Lastly, we reject employer's assertion that the administrative law judge did not adequately consider the contrary blood gas study evidence. She correctly found that the non-qualifying blood gas studies did not refute the qualifying December 9, 2014 pulmonary function study, as they measure different types of impairment. *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); Decision and Order at 25. Thus, we affirm her findings that claimant established total disability when weighing all the relevant evidence together,[18] invoked the Section 411(c)(4) presumption, and established a change in an

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[16] Dr. Forehand opined that claimant has a significant respiratory impairment that would prevent him from performing his usual coal mine job as a roof bolter. Director's Exhibit 12.

[17] The treatment records do not specifically address whether claimant is totally disabled, although they document his treatment for ongoing respiratory conditions. Decision and Order at 24; Claimant's Exhibits 5. 8.

[18] In determining whether claimant established total disability, the administrative law judge reasonably accorded greater weight to the evidence submitted with the current claim as more indicative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 29.

applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b); 718.305; 725.309; Decision and Order at 25.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis[19] 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).

After finding employer disproved clinical pneumoconiosis, 20 C.F.R. §§718.201(a)(1), 718.305(d)(1)(i)(B), the administrative law judge addressed legal pneumoconiosis. Decision and Order at 28-29. 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); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Contrary to employer's contention, the administrative law judge permissibly discredited the opinions of Drs. Vuscovich and Fino that claimant does not have legal pneumoconiosis because they did not address the impairment reflected on Dr. Forehand's December 9, 2014 pulmonary function study or explain why that impairment was "not significantly related to, or substantially aggravated by [c]laimant's long history of occupational coal mine dust exposure." Decision and Order at 28-29; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Napier*, 301 F.3d at 713-714. We therefore affirm the administrative law judge's determinations that employer did not disprove legal pneumoconiosis and therefore is unable to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 30.

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[19] 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 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).

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 permissibly discredited the opinions of Drs. Vuscovich and Fino on the cause of claimant's total disability because they did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove its existence. 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. We therefore affirm the administrative law judge's determination employer did not establish that no part of claimant's respiratory disability was caused by legal pneumoconiosis.[20] 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.

Date for Commencement of Benefits

Once entitlement to benefits is established, the date for the commencement of benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *Lykins v. Director, OWCP*, 12 BLR 1-1 81 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge awarded benefits commencing September 2014, the month of the filing of the subsequent claim. *See Owens*, 14 BLR at 1-50. Employer generally states the administrative law judge erred because the record contains affirmative evidence showing the absence of a disabling respiratory impairment after that date. Employer, however, does not identify the evidence on which it relies, nor does it explain the administrative law judge's alleged error with any specificity. *See* 20 C.F.R.

[20] Employer raises no specific argument regarding the administrative law judge's finding on disability causation, other than to assert the December 9, 2014 pulmonary function study is invalid. Employer's Brief in Support of Petition for Review at 25-26.

§802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987). We therefore affirm the administrative law judge's determination that benefits commence as of September 2014.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge