U.S. Department of Labor

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

BRB No. 19-0115 BLA

MARGIE M. COOK (Widow of JIMMY C. COOK) Claimant-Respondent v. FRAY RESOURCES, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/19/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

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

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, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05148) of Associate Chief Administrative Law Judge Paul R. Almanza on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim[1] filed on April 15, 2013.

The administrative law judge initially found employer was properly designated as the responsible operator. He found the miner had 25.73 years[2] of underground coal mine employment[3] and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.[4] He also found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge lacked the authority to hear and decide the case because he had not been properly appointed in a manner consistent

[1] Claimant is the widow of the miner, who died on December 11, 2010. Director's Exhibit 14. Claimant cannot benefit from the derivative entitlement provisions at 30 U.S.C. §932(*l*) because the miner's claim was denied. Director's Exhibit 1.

[2] Although the administrative law judge credited the miner with a total of 25.73 years of coal mine employment (8.25, 11.0, and 6.48 years for various time periods), he mistakenly indicated the total was only 24.73 years. Decision and Order at 7-9.

[3] The miner's coal mine employment occurred in Virginia and West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

with the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer also contends the administrative law judge erred in determining it is the responsible operator and in calculating the length of the miner's years of coal mine employment. Employer further contends he erred in finding the miner totally disabled, the Section 411(c)(4) presumption invoked, and the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing employer forfeited its Appointments Clause argument. However, the Director requests that the Board vacate the administrative law judge's responsible operator finding and remand the case for reconsideration of that issue. In separate reply briefs, employer reiterates its contentions of error.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Appointments Clause

Employer urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *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); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019).

Lucia was decided more than four months before the administrative law judge issued his Decision and Order Awarding Benefits, but employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. Because employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the

Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting that they "violate the separation of powers doctrine." Employer's Brief at 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).

Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, 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). The petition for review 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 merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *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 Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

As the Director notes, employer refers to the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, and notes the United States Supreme Court's holding that the two-level removal protection applicable to the Public Company Accounting Oversight Board was unconstitutional. Director's Brief at 9; Employer's Brief at 17-19, *citing Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Employer has not explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[5]

[5] Employer cites the Supreme Court's decision in *Free Enterprise* and Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 17-19. It notes that in *Free Enterprise*, the Supreme Court invalidated a statute that provided the Public Company Accounting Oversight Board with two levels of "for cause" removal protection and thus interfered with the President's duty to ensure the faithful execution of the law. *Id*.

We therefore agree with the Director that employer "cannot simply point to *Free Enterprise Fund* and declare its work done." Director's Brief at 7. Thus we decline to address this issue. *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).

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

Length of Coal Mine Employment

Employer generally contends the administrative law judge's calculation of the length of the miner's coal mine employment is "irrational and unsupported by the underlying record." Employer's Brief at 23. It does not allege, however, that the administrative law judge erred in crediting the miner with at least fifteen years of underground coal mine employment sufficient to invoke the Section 411(c)(4)

Employer does not set forth how *Free Enterprise* applies to the administrative law judge in this case. As the Director notes, the Supreme Court expressly stated that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 9. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Employer cites Justice Breyer's comments in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of Board members." *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). As the Director accurately notes, "even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the Court in *Lucia*." Director's Brief at 10.

presumption;[6] this finding is therefore affirmed.[7] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Substantial evidence supports the administrative law judge's determination that the miner established at least fifteen years of underground coal mine employment. In calculating the miner's pre-1978 coal mine employment, the administrative law judge relied on the miner's Social Security Administration Earnings Record and permissibly credited the miner with coal mine employment for every quarter of a year in which he had earnings from coal mine operators that exceeded $50.00. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Using this method, he credited the miner with 8.25 years of coal mine employment. Decision and Order at 7. Relying on employment records, the administrative law judge next determined the miner worked full calendar years from 1978 to 1983 and from 1988 to 1992. After finding the threshold one-year period was met, he determined the miner worked for at least 125 working days during each of these years. 20 C.F.R. §725.101(a)(32). He therefore credited the miner with an additional eleven years of coal mine employment. Decision and Order at 8. Finally, using specific start and end dates for employment in 1984, 1985, 1986, 1987, 1993, 1994, 1995, 1996, and 1997, the administrative law judge credited the miner with an additional 6.48 years of coal mine employment. *Id.* at 8-9. In responding to employer's appeal, *see* discussion, *infra*, the Director argues that for purposes of the responsible operator determination the administrative law judge failed to consider all relevant evidence in crediting the miner with 1.06 years of coal mine employment with Circle A Mining Company (Circle A) in 1995 and 1996. Director's Brief at 13-14. However, even if this coal mine employment with Circle A were excluded, the administrative law judge properly credited the miner with over fifteen years of underground coal mine employment, criteria sufficient to invoke the Section 411(c)(4) presumption.

[7] Employer generally asserts that the "accuracy of the years of coal mine employment affects the credibility of the medical evidence" regarding rebuttal of the Section 411(c)(4) presumption. Employer's Brief at 23. Employer does not further explain its argument or identify how the finding of 25.73 years impacted the administrative law judge's rebuttal findings. Rather, it acknowledges the administrative law judge rejected its medical experts for reasons unrelated to the specific length of coal mine employment: Dr. Hippensteel for failing to consider the most recent evidence, Dr. Tuteur for failing to adequately explain his reliance on statistical generalities, and Dr. Caffrey for failing to address legal pneumoconiosis. *Id*. at 24-26.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies, qualifying arterial blood gas studies,[8] 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 the relevant evidence supporting a finding of total disability against the 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).

The administrative law judge found the pulmonary function studies, blood gas studies, and medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 20-22. Weighing the evidence together, he found that the miner had a totally disabling respiratory or pulmonary impairment. *Id.* at 22.

Employer argues the administrative law judge erred in finding the pulmonary function studies established total disability. The record contains three studies, two conducted in 2000 and one conducted in 2008. The August 17, 2000 study produced non-qualifying values before the administration of a bronchodilator but qualifying values after the administration of a bronchodilator. Employer's Exhibit 7. The December 4, 2000 study produced qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. The January 3, 2008 study produced qualifying pre-bronchodilator results, but included no post-bronchodilator results. Director's Exhibit 16.

Employer contends the administrative law judge erred in failing to explain why he found the pulmonary function studies established total disability. Employer's Brief at 22. We disagree. After noting that the pulmonary function studies conducted in 2000 produced both qualifying and non-qualifying values, the administrative law judge explained that he credited the more recent qualifying pulmonary function study conducted on January 3, 2008, as more probative of the miner's condition at the time of his death.[9] *See*

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

[9] Employer does not challenge the administrative law judge's reliance on the more recent pulmonary function study.

Consolidation Coal Co. v. Kramer, 305 F.3d 203, 209-10 (3d Cir. 2002); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 21. Substantial evidence supports the administrative law judge's finding that the pulmonary function studies established total disability.[10] 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge next considered three blood gas studies. He noted that while an August 17, 2000 study produced qualifying values, a December 4, 2000 study produced non-qualifying values. Decision and Order at 11, 21; Employer's Exhibits 6, 7. However, he noted the most recent study conducted on April 21, 2009 produced qualifying values. Decision and Order at 11, 21; Director's Exhibit 16. He therefore found the blood gas study evidence supported a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii). Because this finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

Finally, employer argues the administrative law judge erred in finding the medical opinions established total disability. Employer's Brief at 23. We disagree. The administrative law judge considered the medical opinions of Drs. Hippensteel and Tuteur. In a report dated September 26, 2000, Dr. Hippensteel opined that the miner's August 17, 2000 pulmonary function study showed no more than moderate airflow obstruction, with improvement post-bronchodilator showing only mild obstruction. Employer's Exhibit 8. In contrast, Dr. Tuteur reviewed the most recent objective evidence, including the qualifying January 3, 2008 pulmonary function study and the qualifying April 21, 2009 blood gas study. He opined that the miner was totally and permanently disabled due to advanced chronic obstructive pulmonary disease (COPD). Employer's Exhibits 5, 13. The administrative law judge permissibly credited Dr. Tuteur's opinion that the miner was totally disabled because he found it consistent with the most recent qualifying pulmonary function and blood gas study evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 22. We therefore affirm the administrative law judge's finding that the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv). We further

[10] In light of our affirmance of the administrative law judge's crediting of the January 3, 2008 qualifying pulmonary function study, we need not address employer's argument that the administrative law judge erred in determining the miner's height was 71.5 inches. Decision and Order at 10 n.2. Although employer cites evidence in the record supportive of a lower height of 70.5 inches, Employer's Brief at 21, the January 3, 2008 pulmonary function study remains qualifying even if this lower height is utilized. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

affirm his finding that all of the relevant evidence, when weighed together, established total disability. *See Rafferty*, 9 BLR at 1-232.

In light of our affirmance of the administrative law judge's findings that the miner had over fifteen years of underground coal mine employment and was totally disabled, we affirm his determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[11] 20 C.F.R. §718.305(d)(2)(i), or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis,[12] employer must demonstrate the miner did 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 Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Hippensteel and Tuteur.

Dr. Hippensteel attributed the miner's reversible airflow obstruction to asthma and his mild to moderate hypoxemia to asthma and cigarette smoking. Employer's Exhibit 8. Dr. Hippensteel opined the miner did not have any coal mine dust-related lung disease. *Id.* Dr. Tuteur opined that the miner's COPD was due to childhood pneumonia,

[11] "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).

[12] The administrative law judge also found employer failed to establish the miner did not have clinical pneumoconiosis. Decision and Order at 24.

gastroesophageal reflux disease and cigarette smoking,[13] and was not due to coal mine dust exposure. Employer's Exhibits 5 at 5-6; 13 at 4.

The administrative law judge found Dr. Hippensteel's medical opinion did not assist employer in establishing that the miner did not have legal pneumoconiosis because he did not take into account the more recent medical evidence. Employer has not explained how Dr. Hippensteel's 2000 medical report, which predates the evidence the administrative law judge credited to find claimant invoked the rebuttable presumption of death due to pneumoconiosis, is relevant to whether employer has rebutted the presumption. *See Cooley*, 845 F.2d at 624 (it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, the administrative law judge permissibly found Dr. Hippensteel's opinion entitled to no weight.

Dr. Tuteur opined that three major risk factors (childhood pneumonia, gastroesophageal reflux disease and cigarette smoking) were "overwhelmingly more severe than the risk factor of the inhalation of coal dust which will produce such a clinical symptom set in 1% or fewer never smoking miners." Employer's Exhibit 5 at 5. The administrative law judge, however, noted the miner was "not a statistic" and Dr. Tuteur's opinion that "other factors may have put him at greater risk for developing COPD than his coal mine dust exposure does not explain why, in [this miner's] particular circumstances, his significant history of coal mine dust exposure could not be a factor in his airway obstruction." Decision and Order at 27. She also determined that "even if, as claimed by Dr. Tuteur, coal dust induced COPD occurs very infrequently, he did not explain why [the miner] could not be one of those statistically rare cases" of a miner who develops obstruction as a result of coal mine dust exposure. *Id.* The administrative law judge therefore permissibly found Dr. Tuteur's opinion not well-reasoned because it was based on "statistical probabilities" rather than on the miner's specific condition. *Id.*; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). He also permissibly discredited Dr. Tuteur's opinion because the physician failed to adequately explain how he eliminated the miner's 25.73 years of coal mine dust exposure as a contributor to his disabling COPD.[14] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017);

[13] Dr. Tuteur opined that "uncontrolled gastroesophageal reflux disease" also caused claimant's emphysema. Employer's Exhibit 5 at 6.

[14] The administrative law judge noted that Dr. Tuteur did not discuss "any additive effects of coal mine dust exposure, or explain why, even if the primary cause of [the miner's] chronic obstructive pulmonary disease was his cigarette smoking, along with his

Harman Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); Decision and Order at 27.

Because the administrative law judge permissibly discredited the opinions of Drs. Hippensteel and Tuteur,[15] the only opinions supportive of a finding that the miner did not have legal pneumoconiosis, we affirm his finding that employer failed to establish that the miner did not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(2)(i).

The administrative law judge next addressed whether employer established that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). Employer argues the administrative law judge erred in finding Dr. Caffrey's opinion insufficient to satisfy its burden, noting that Dr. Caffrey opined that the miner's "rare lesion" of clinical pneumoconiosis did not cause or contribute to his death. Employer's Brief at 26; Employer's Exhibit 1. The administrative law judge, however, accurately found that Dr. Caffrey did not address whether the miner's disabling legal pneumoconiosis (in the form of COPD) played any part in his death. Decision and Order at 29. He therefore found Dr. Caffrey's opinion did not establish that the miner's legal pneumoconiosis played no part in the miner's death. 20 C.F.R. §718.305(d)(2)(ii). Because employer does not raise any other contention of error, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. We therefore affirm the award of benefits.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R.

[gastroesophageal reflux disease] and his childhood pneumonia, his significant history of coal mine dust exposure did not play a role." Decision and Order at 27.

[15] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Hippensteel and Tuteur, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

[16] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

§725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[17] Once the Director identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another financially capable operator more recently employed the miner for at least one year. *See* 20 C.F.R. §725.495(c). The regulations also provide that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d).

In a Proposed Decision and Order dated September 23, 2014, the district director designated employer, Fray Resources, Incorporated (Fray), as the responsible operator. Director's Exhibit 36. The district director found the miner had subsequent coal mine employment of more than one year with Navaro Mining, Incorporated (Navaro),[18] but found Navaro was not financially capable of assuming liability for the payment of benefits. *Id.* Although the district director noted that Blair & Hatcher Mining, Red Baron Coal Company, and Lone Wolf Mining also employed the miner after he ceased employment with Fray, he found that each of these operators employed the miner for less than one year.[19] *Id.* The district director therefore determined that none of these companies could be designated the responsible operator. *Id.* Having found that Fray was the last potentially liable operator to have employed the miner for at least one year, the district director designated it as the responsible operator. *Id.*

At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 37. Employer continued to challenge its designation as the responsible operator. Director's Exhibit 42.

In his Decision and Order Awarding Benefits, the administrative law judge noted that it is employer's burden to establish that it is not the potentially liable operator that

[17] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have included at least one day after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[18] The miner last worked for Fray on August 21, 1987.

[19] The district director did not address the miner's reported coal mine employment with Circle A in 1995 and 1996. Director's Exhibit 36.

most recently employed the miner. Decision and Order at 9. Because Fray offered no evidence or argument on the issue, the administrative law found that it was properly designated the responsible operator. *Id.*

Fray asserts the administrative law judge erred in failing to designate either Navaro or Circle A Mining Company (Circle A) as the responsible operator when he found that each employed the miner for at least one year more recently than Fray. Employer's Brief at 20-21. Although the Director disagrees with employer's contention that either of these employers should be designated the responsible operator, she agrees that the administrative law judge erred in not addressing whether Navaro or Circle A more recently employed the miner for at least one year and are financially capable of assuming liability for the payment of benefits. Director's Brief at 11-14. The Director, therefore, concedes that "this case must be remanded to the [administrative law judge] for further consideration of liability." *Id.* at 12.

In view of the Director's concession, we vacate the administrative law judge's designation of Fray as the responsible operator. On remand, the administrative law judge is instructed to reconsider whether Fray met its burden to prove that either Navaro[20] or Circle A[21] employed the miner for at least one year after the claimant worked for Fray and

[20] The Director concedes Navaro employed the miner for at least one year after he ceased employment with Fray. Director's Brief at 11-12. However, she asserts the evidence establishes Navaro is not financially capable of assuming liability for the payment of benefits. She notes the district director, in assessing the issue of liability, made such a determination. Director's Exhibit 36. Moreover, we note that the Board, in the adjudication of the miner's 1999 claim for benefits, affirmed an administrative law judge's designation of Fray as the responsible operator. *Cook v. Navaro Mining, Inc.*, BRB No. 02-0431 BLA (Mar. 28, 2003) (unpub.). In that case, the administrative law judge found that Navaro was no longer in existence, it was not insured at the time of the miner's last employment with the company, its assets had been liquidated, and it did not have the financial ability to pay benefits. *Id.*

[21] Employer notes the administrative law judge credited the miner with a total of 1.06 years of coal mine employment with Circle A from February 28, 1995 to March 21, 1996. Decision and Order at 9. The Director contends that the administrative law judge erred in relying on the miner's statement regarding his employment with Circle A to find 1.06 years of employment without addressing that the miner's Social Security Administration Earnings Record does not document this employment. Director's Brief at 13-14. On remand, the administrative law judge is instructed to address all the evidence regarding the length of the miner's employment with Circle A and reconsider the miner's length of coal mine employment with the company. Finally, we agree with the Director

is financially capable of assuming liability for the payment of benefits. *See* 20 C.F.R. §725.495(c)(2).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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that the district director's failure to notify Circle A of its potential liability does not, by itself, mandate that Fray be released from liability. 20 C.F.R. §725.407(b) (providing that the district director *may* identify one or more operators potentially liable for the payment of benefits); *but see* 20 C.F.R. §725.407(d) ("[t]he district director may not notify additional operators of their potential liability after a case has been referred to the Office of Administrative Law Judges . . ."); Director's Brief at 14 n.11.