U.S. Department of Labor

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

BRB No. 20-0564 BLA

STEVIE HELBERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J K & G COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/28/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting 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 and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2019-BLA-05081) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on May 18, 2017.[1]

The ALJ found Claimant had between 9.13 and 13.1 years of coal mine employment, and thus determined he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical pneumoconiosis and a totally disabling respiratory or pulmonary impairment based on the parties' stipulation. 20 C.F.R. §§718.202(a), 718.204(b). He further found Claimant established legal pneumoconiosis and total disability due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). Thus he awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[3] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Furthermore, Employer asserts he erred in finding it the

[1] Claimant filed a previous claim but withdrew it. Director's Exhibit 1. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2018); *see* 20 C.F.R. §718.305.

[3] 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.

responsible operator. Finally, it argues he erred in finding Claimant established legal pneumoconiosis and disability causation.[4]

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and its responsible operator argument. In a reply brief, Employer reiterates its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief 9-13; Employer's Reply Brief at 1-5. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established between 9.13 and 13.1 years of coal mine employment, clinical pneumoconiosis, and total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2 n.7, 6.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 8.

[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[7] The Secretary of Labor issued a letter to ALJ McGrath on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings

ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 9-13; Employer's Reply at 1-5. The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 5-7. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Contrary to the Employer's argument, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)); *see* Employer's Reply Brief at 5.

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter but rather specifically identified ALJ McGrath and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ McGrath. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of the ALJ "as an Administrative Law Judge." *Id.*

> pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ McGrath. ALJ McGrath did not issue any orders in this case until his notice of hearing and prehearing order on March 27, 2019.

Employer does not assert the Secretary had no "knowledge of all material facts," and generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified the ALJ's appointment. Employer's Brief at 13. Employer therefore has not overcome the presumption of regularity.[8] *Advanced Disposal*, 820 F.3d at 605 ("mere lack of detail in [] express ratification is not sufficient to overcome the presumption of regularity"); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive civil service. Employer's Brief at 19-20; Employer's Reply Brief at 15-16. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of the ALJ's appointment, which we have held constituted a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

Thus we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 13-18. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 15-16; Employer's Reply at 6-7. It also relies on the Supreme Court's

[8] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 14-15, this does not render the appointment invalid. *See, e.g. Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

holdings in *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 14-18; Employer's Reply at 7-8.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an *inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

Responsible Operator

We reject Employer's argument that the ALJ erred in finding it is the 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. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the operator must have employed the miner in coal mine employment for a cumulative period of not less than one year.[10] 20 C.F.R. §725.494(a)-(e). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 7-8. We affirm this finding as Employer does not challenge it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does it allege it is financially incapable of assuming liability for benefits.

[10] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) 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).

Thus, it can avoid liability only by establishing that another financially capable operator more recently employed Claimant for at least one year.

The ALJ found Claimant worked for Employer from 1987 to 1989. Decision and Order at 7. Although Claimant's Social Security Administration (SSA) records show earnings with Jamie Marcus Coal in 1990, the ALJ found the evidence insufficient to establish that it employed Claimant for at least one year. *Id*. at 7-8. Thus he found Employer failed to establish Jamie Marcus Coal is a potentially liable operator that more recently employed Claimant. 20 C.F.R. §725.495(c); Decision and Order at 7-8.

Employer argues the ALJ found a successor relationship between Big Oak Coal, which employed Claimant in 1983, Employer, and Jamie Marcus Coal. Employer's Brief at 18-19; Employer's Reply Brief at 8-12. It asserts the ALJ should have combined Claimant's employment with these three entities and thus found a subsequent potentially liable operator – Jamie Marcus Coal – employed Claimant for at least one year.[11] *Id*. We agree with the Director that Employer mischaracterizes the ALJ's findings. Director's Brief at 12-14.

The ALJ recognized Claimant testified Employer changed names "quite a few times." Decision and Order at 7 n. 19 (quoting Hearing Transcript at 29). The ALJ also noted Claimant's SSA earnings records reflect Big Oak Coal, Employer, and Jamie Marcus Coal all had addresses in Richlands, Virginia. *Id*. Although he acknowledged "Jamie Marcus Coal [] *may be* a successor operator to Employer," he made no finding that a successor relationship actually exists. *Id*. (emphasis added). Further, he made no finding that a successor relationship exists between Big Oak Coal and Jamie Marcus Coal. *Id*. Rather, he explicitly found no "information about [Claimant's] purported employment with Jamie Marcus Coal" other than Claimant's SSA earnings records. *Id*. at 7. Thus he found no basis to conclude Jamie Marcus Coal employed Claimant for at least one year. *Id*. at 7-8.

Moreover, we agree with the Director's position that the record does not support the existence of a successor relationship between these three entities. Director's Brief at 12-13. A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof [.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R.

[11] If a successor relationship is established between two coal mine employers, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

§725.492(b)(1)-(3). Employer cites no evidence that Jamie Marcus Coal "acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof" as the regulations require. Nor does it allege that the prior operators ceased to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. Employer merely asserts that the three entities all operated in Richlands, Virginia. Employer's Brief at 18-19; Employer's Reply Brief at 8-12. The record reflects, however, that these entities have different addresses and Employer Identification Numbers. Director's Exhibit 8. Thus there is no evidence to support the existence of a successor relationship. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014); 20 C.F.R. §725.492(a), (b).

We therefore affirm the ALJ's finding that Employer is the responsible operator.

Entitlement to Benefits

To be entitled to benefits under the Act without the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Legal Pneumoconiosis

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[12] Employer's Brief at 19-27. We disagree.

To establish legal pneumoconiosis, Claimant must demonstrate he has 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). A miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-

[12] "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).

99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment."). The ALJ considered the opinions of Drs. Forehand and Green that Claimant has legal pneumoconiosis and Drs. Fino and Rosenberg that he does not.

Dr. Forehand opined Claimant has a totally disabling obstructive lung impairment due to cigarette smoking and coal mine dust exposure. Claimant's Exhibit 12. Dr. Green diagnosed Claimant with disabling hypoxemia and chronic obstructive pulmonary disease (COPD) caused by smoking, with coal mine dust exposure "contribut[ing] at least in part[.]" Director's Exhibit 14.

In contrast, Dr. Fino opined Claimant has an obstructive ventilatory impairment and diffusion capacity abnormality consistent with emphysema. Employer's Exhibits 5-6, 11-12. He attributed these conditions to cigarette smoking alone, and opined they are unrelated to coal mine dust exposure. *Id*. Dr. Rosenberg diagnosed an obstructive ventilatory impairment, emphysema, and chronic bronchitis due to cigarette smoking and not coal mine dust exposure. Employer's Exhibits 2, 10.

The ALJ found the opinions of Drs. Forehand and Green well-reasoned and documented, and thus credible. Decision and Order at 17-21. He found Drs. Fino's and Rosenberg's explanations for excluding legal pneumoconiosis unpersuasive. *Id*. He also found Dr. Fino relied on two pulmonary function studies taken on February 8, 2016 and March 19, 2018 that are not in the record, and Dr. Rosenberg in turn relied on Dr. Fino's findings and opinion to reach his own conclusion. *Id*. He thus concluded their opinions are not credible. *Id*.

Dr. Fino

We first reject Employer's argument that the ALJ erred in discrediting Dr. Fino's opinion because he relied on evidence outside of the record to exclude legal pneumoconiosis. Employer's Brief at 20-22. An ALJ has discretion to reject a physician's conclusions that are based on evidence not admitted into the record. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004).

Employer does not dispute Dr. Fino referenced two pulmonary function studies that were not admitted into the record. It specifically concedes Claimant "submitted [] treatment notes from Dr. Jawad" and "those records did not include the test results" that Dr. Fino discussed. Employer's Brief at 21 n.5. The ALJ found Dr. Fino relied on those unadmitted studies to exclude legal pneumoconiosis:

> In his initial opinion, Dr. Fino could not rule out either occupational coal mine dust exposure or smoking as a contributing cause of Claimant's

> disabling pulmonary impairment. However, in his first supplemental opinion, Dr. Fino said he could rule out coal mine dust as a significant contributing factor based on evidence that showed variability in Claimant's pulmonary function and arterial blood gas test results. The pulmonary function test data Dr. Fino cited in this supplemental opinion consisted of five tests: those dated August 29, 2017, April 19, 2018, and November 6, 2018, and two tests, ostensibly from Dr. Jawad, dated February 8, 2016, and March 19, 2018, which according to Dr. Fino showed normal or near normal results. However, neither of the Dr. Jawad tests are of record.

Decision and Order at 19 (internal citations omitted). In particular, Dr. Fino concluded Claimant's pulmonary function testing showed "great variability," and thus could not be attributed to coal mine dust exposure, by comparing the reduced FEV1 values between Dr. Jawad's February 8, 2016 test that was not admitted into the record and Dr. Green's August 29, 2017 admitted test, and then comparing the reduced FEV1 values between Dr. Jawad's March 19, 2018 test that was not admitted and his own (Dr. Fino's) April 19, 2018 admitted test. Employer's Exhibit 6. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Fino's opinion because he "based his conclusion on pulmonary function test data which is not of record . . . ." Decision and Order at 19-20; *see Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

We also see no error in the ALJ's additional reason for rejecting Dr. Fino's opinion. Dr. Fino acknowledged Claimant's 2017 arterial blood gas testing was qualifying for total disability. Employer's Exhibit 6 at 4. He noted, however, that the results of the blood gas testing he subsequently conducted on April 19, 2018 are normal and the results of the testing Dr. Rosenberg conducted on November 6, 2018 are normal at rest and with exercise. *Id*. Dr. Fino excluded coal mine dust exposure as a cause of any gas exchange impairment because he would not expect "improvement" in gas exchange "over time if this were due to a coal dust related disease." *Id*. The ALJ found the medical evidence does not support Dr. Fino's conclusion that the exercise blood gas testing results that Dr. Rosenberg obtained are "normal," as Dr. Rosenberg recognized the test results revealed "reduced oxygenation" during exercise. Decision and Order at 19-20. Contrary to Employer's argument, the ALJ permissibly found Dr. Fino's opinion unpersuasive because "his conclusion about the arterial blood gas test data [is] misleading."[13] *Id*.; *see Milburn*

[13] Because the ALJ provided valid reasons for discrediting Dr. Fino's opinion, we need not address Employer's additional argument regarding the weight the ALJ assigned it. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 21-22.

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).

Dr. Rosenberg

The ALJ noted Dr. Rosenberg initially "acknowledged Claimant may have 'a component' of legal pneumoconiosis (meaning that a portion of Claimant's obstructive impairment may be occupationally related)." Decision and Order at 18 (quoting Employer's Exhibit 2). The ALJ found Dr. Rosenberg changed his opinion after reviewing Dr. Fino's opinion and explanation, which was based on evidence not admitted into the record. *Id*. Specifically, he found Dr. Rosenberg "concluded that all of Claimant's pulmonary impairment was due to smoking, based somewhat on Dr. Fino's test results of November 6, 2018, and . . . Dr. Fino's conclusion that variability in test results precluded a coal dust-related impairment." *Id*. The ALJ permissibly found Dr. Rosenberg's opinion unpersuasive because it was based on Dr. Fino's opinion, which itself was based on evidence not admitted into the record. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67; Decision and Order at 18-19.

The ALJ further discredited Dr. Rosenberg's opinion because he "mischaracterized" Dr. Fino's objective testing results as normal when concluding Claimant does not have legal pneumoconiosis. Decision and Order at 18-19. The ALJ noted Dr. Fino opined the November 6, 2018 pulmonary function study revealed a mild obstructive impairment and moderately reduced diffusion capacity, and Dr. Fino ultimately concluded Claimant is totally disabled by a respiratory or pulmonary impairment. *Id*., *citing* Employer's Exhibits 5, 10. As Employer does not challenge this credibility finding, we affirm it. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Skrack*, 6 BLR at 1-711.

Dr. Forehand

Employer argues the ALJ erred in finding Dr. Forehand's opinion sufficient to establish legal pneumoconiosis. Employer's Brief at 22-25. We disagree.

Dr. Forehand noted Claimant has a thirty-six-year cigarette smoking history and nine-year coal mine employment history. Claimant's Exhibit 12. He further noted the pulmonary function testing that Drs. Green and Rosenberg conducted is consistent with a disabling, partially-reversible obstructive ventilatory impairment. *Id*. Dr. Forehand concluded the results of the pulmonary function study Dr. Fino conducted are consistent with a disabling irreversible obstructive ventilatory pattern. *Id*. He disagreed with Dr. Fino that the rate of Claimant's lung function decline is inconsistent with legal pneumoconiosis, as he explained the DOL has recognized legal pneumoconiosis may be a progressive disease. *Id*. Although he agreed with Dr. Fino that the variability in Claimant's lung function is consistent with a cigarette smoke-induced obstructive impairment, he

explained coal mine dust and cigarette smoking can both cause an obstructive impairment. *Id*. He opined Claimant's nine years of coal mine dust exposure significantly contributed to his cigarette smoke-induced lung disease. *Id*.

The ALJ summarized the objective testing that Dr. Forehand relied on and his rationale for diagnosing legal pneumoconiosis. Decision and Order at 11-12, 20-21, *citing* Claimant's Exhibit 12. He noted Dr. Forehand considered the effects of coal mine dust exposure and cigarette smoking on Claimant's lungs. *Id*. at 21. Further, he recognized that Dr. Forehand reviewed Dr. Fino's opinion and identified a "fundamental flaw" in Dr. Fino's exclusion of legal pneumoconiosis. *Id*. at 20-21. Specifically, Dr. Forehand opined Dr. Fino did not address that both smoking and coal mine dust exposure can be potential causative factors in the development of an obstructive impairment. Claimant's Exhibit 12. Based on the objective testing that Dr. Forehand relied on and his underlying explanations, the ALJ permissibly found Dr. Forehand's opinion reasoned and documented.[14] *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Dr. Green

Employer argues the ALJ erred in finding Dr. Green's opinion sufficient to establish legal pneumoconiosis. Employer's Brief at 26-27. We disagree.

Dr. Green noted Claimant worked underground, where his "[c]oal and rock dust exposure was heavy." Director's Exhibit 14. He also noted Claimant has a thirty-six-year cigarette smoking history. *Id*. Dr. Green opined Claimant's pulmonary function testing demonstrates "a moderate degree of chronic airflow obstruction," while his arterial blood gas testing reveals mild hypoxemia at rest that becomes significant with exercise. *Id*. He

[14] We reject Employer's argument that the ALJ selectively analyzed the evidence by faulting Dr. Rosenberg for reviewing Dr. Fino's opinion, but not faulting Dr. Forehand even though he also reviewed Dr. Fino's opinion. Employer's Brief at 22. As discussed above, the ALJ found Dr. Rosenberg changed his opinion and excluded legal pneumoconiosis after reviewing Dr. Fino's explanation, which was based on evidence not admitted into the record. Decision and Order at 18. Thus the ALJ found Dr. Rosenberg relied on Dr. Fino's tainted report. Dr. Forehand, however, did not rely on Dr. Fino's opinion to diagnose legal pneumoconiosis; indeed, the ALJ recognized Dr. Forehand was critical of Dr. Fino's rationale for excluding coal mine dust exposure as an aggravating factor in Claimant's cigarette smoke-induced COPD. Decision and Order at 20-21; Claimant's Exhibit 12. Thus the ALJ permissibly credited Dr. Forehand's opinion notwithstanding his review of Dr. Fino's report. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

based his COPD diagnosis on Claimant's 9.13 years of occupational "exposure to respirable coal and rock dust," in addition to his symptoms of "chronic cough, wheez[ing], shortness of breath, and mucus expectoration." *Id.* Although Dr. Green opined cigarette smoking caused Claimant's COPD and hypoxemia, he concluded he cannot "eliminate the 9.13 year occupational history of exposure to respirable coal and rock dust as contributing at least in part to the findings of [Claimant's] chronic airways dysfunction and hypoxemia." *Id*.

The ALJ summarized the objective testing that Dr. Green relied on and his rationale for diagnosing legal pneumoconiosis. Decision and Order at 10-11, 18. He noted Dr. Green considered the effects of coal mine dust exposure and cigarette smoking on Claimant's lungs. *Id*. at 21. He permissibly found Dr. Green's opinion "well-reasoned and well-documented because it is supported by objective evidence," and thus credible on the issue of legal pneumoconiosis. *Id*. at 18; *see Williams*, 453 F.3d at 622; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant established legal pneumoconiosis based on the opinions of Drs. Forehand and Green. 20 C.F.R. §718.202(a); Decision and Order at 21-22.

Disability Causation

Employer argues the ALJ erred in finding Claimant's total disability is due to legal pneumoconiosis. Employer's Brief at 27. We disagree. To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Dr. Forehand opined Claimant is totally disabled by an obstructive respiratory impairment. Claimant's Exhibit 12. Dr. Green opined Claimant is totally disabled by hypoxemia. Director's Exhibit 14. As discussed above, the ALJ permissibly relied on Dr. Forehand's opinion to conclude Claimant's totally disabling obstructive impairment constitutes legal pneumoconiosis, and Dr. Green's opinion to conclude his totally disabling hypoxemia is also legal pneumoconiosis. Decision and Order at 17-22. We therefore see no error in the ALJ's finding that Claimant established legal pneumoconiosis is a substantially contributing cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry*

v. Monongalia County Coal Co., 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 21.

Similarly, having already rejected the opinions of Drs. Fino and Rosenberg on whether Claimant's totally disabling impairments constitute legal pneumoconiosis, the ALJ did not err in rejecting their opinions that legal pneumoconiosis did not cause Claimant's disability. Decision and Order at 17-22. Further, both opined Claimant's disability is unrelated to legal pneumoconiosis because Claimant does not have the disease, contrary to the ALJ's finding, rendering their opinions not credible on causation. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (citing *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (Where a physician erroneously fails to diagnose pneumoconiosis, his opinion on causation "may not be credited at all" absent "specific and persuasive reasons" for concluding it is independent of the mistaken belief the miner did not have the disease.)); Employer's Exhibits 2, 5-6, 10-12.

As substantial evidence supports the ALJ's finding that the opinions of Drs. Forehand and Green are well-reasoned and documented, and because their opinions establish legal pneumoconiosis substantially contributes to Claimant's disability, we affirm the ALJ's finding of disability causation pursuant to 20 C.F.R. §718.204(c). We therefore affirm the award of benefits.

Accordingly, the ALJ'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