U.S. Department of Labor

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

BRUCE N. ARP Claimant-Respondent Cross-Petitioner v. PEABODY NEW MEXICO SERVICES Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**BRB Nos. 21-0464 BLA, 22-0221 BLA, 22-0221 BLA-A**
BRUCE N. ARP Claimant-Petitioner Cross-Respondent v. PEABODY NEW MEXICO SERVICES Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**BRB Nos. 22-0117 BLA, 22-0117 BLA-A** DATE ISSUED: 02/09/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor, and Appeals and Cross-Appeals of the September 7, 2021 and the December 9, 2021 Proposed Orders Supplemental Award Fee for Legal Services of Deborah Brunger, Claims Examiner, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for Claimant.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), 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 appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Awarding Benefits (2018-BLA-05424) rendered on a claim filed on September 25, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer also appeals and Claimant cross-appeals the September 7, 2021 Proposed Order Supplemental Award Fee for Legal Services of Claims Examiner Deborah Brunger (the district director). Finally, Claimant appeals and Employer cross-appeals the district director's December 9, 2021 Proposed Order Supplemental Award Fee for Legal Services.

ALJ's Decision and Order Awarding Benefits

The ALJ found Employer is the correctly named responsible operator. He further found Claimant established twenty-five years of qualifying surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] The ALJ further found Employer did not rebut the presumption and awarded benefits.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to ALJs violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also challenges the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment and that it failed to rebut the presumption. Claimant responds in support of the awards of benefits.

The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's challenges to the constitutionality of the ALJ's appointment, the validity of 20 C.F.R. §718.305(b)(2), and the ALJ's reliance on the preamble to the 2001 revised regulations. Employer replies, reiterating its arguments.[3]

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.[4] 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).

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substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718. 204(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 39.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant performed his coal mine employment in New Mexico. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 49. We therefore reject Employer's assertion that this case arises within the jurisdiction

Appointments Clause Challenge

Employer requests the Board vacate the ALJ's Decision and Order and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Appeal Brief at 16-18; Employer's Reply Brief at 1-3. It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.*

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 Brief at 5-6. He also maintains Employer failed to demonstrate that the Secretary's actions ratifying the appointment were improper. *Id.* at 6-7. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response Brief at 4 (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

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of the United States Court of Appeals for the Seventh Circuit. Employer's Appeal Brief at 23.

[5] *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 the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[6] The Secretary of Labor (the Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Clark.

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). 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)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

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. He specifically identified ALJ Clark and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Clark. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of Judge Clark "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts" or did not make a "detached and considered judgement" when he ratified ALJ Clark's appointment, but instead argues the Secretary ratified "someone else's invalid choice." Employer's Appeal Brief at 17-18, 20-22. It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient 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 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 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 service. Employer's Appeal Brief at 3

n.3; Employer's Reply Brief at 1-2. 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 ALJ Clark's appointment, which we have held constitutes a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Appeal Brief at 18-23; Employer's Reply Brief at 3-5. It generally argues the removal provisions for ALJs contained 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 Appeal Brief at 18-19, 21-22; Employer's Reply Brief at 3-5. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of 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 Appeal Brief at 16, 19; Employer's Reply Brief at 2-3. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014); *see also Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-

90 (6th Cir. 2014); *Bonner v. Apex Coal Corp.*, 25 BLR 1-279, 1-282-84, *recon. denied*, (May 24, 2022) (Order) (unpub.).

The ALJ found Claimant's Social Security Earnings Statement establishes he worked at least twenty-five years in surface coal mine employment in 1984-1990 and 1994-2012. Decision and Order at 7. In addressing whether Claimant was regularly exposed to coal mine dust in his surface work,[7] the ALJ considered Claimant's testimony, the dust exposure history he reported to his examining physicians, the Pre-Shift Inspection worksheets Claimant submitted, Claimant's Employment History form, and his spouse's testimony. *Id.* at 7-9.

Claimant testified that he worked for Lee Ranch Coal Corporation (Lee Ranch) from December 1984 to November 1990. Hearing Transcript at 30, 36. He started working as a laborer and described the working conditions as "dusty everywhere, … the offices, parking lots, everything is just a cloud of dust." *Id.* at 30; Director's Exhibit 76 at 24-25. After working as a laborer for six months, Claimant began working on Lee Ranch's blasting crew, "priming holes to be blasted and shoveling the dirt back in, real fine cuttings," which he described left him "[t]otal[ly] black. . . . [coal dust] was in my ears, in my hair, I mean your clothes, everything [was] just covered." Hearing Transcript at 31-32; Director's Exhibit 76 at 39-40. He spent his last year and a half with Lee Ranch working as a "belly-dump, coal haul, truck driver." Hearing Transcript at 31-32. He testified coal dust entered the enclosed cab of his truck and his face was "black" at the end of his shift. *Id.* at 33. From March 1994 to June 2013, Claimant worked for Employer as a bulldozer operator. *Id*. at 34-37. He stated this was the dustiest position he worked in and at the end of the shift he was "covered black . . . ." *Id.* at 35, 43-44.

The ALJ found Claimant's testimony regarding his dust exposure to be credible, uncontradicted, and consistent with the working conditions he reported to his examining physicians,[8] the Pre-Shift Inspection worksheets noting the cab of the equipment Claimant operated for Lee Ranch was "dirty" or "very dusty," Claimant's Employment History form noting Claimant was exposed to dust and fumes in each of his coal mining positions, and

[7] Because it is unchallenged, we affirm the ALJ's finding that Claimant has 22.25 years of surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[8] According to the reports of Drs. Gottschall and Sood, Claimant reported that the enclosed cabs in which he worked were not well-sealed and within a shift he would have a heavy layer of dust deposit inside the cabs. Director's Exhibits 16 at 29, 23 at 5.

his spouse's testimony regarding his post-shift appearance and respiratory symptoms.[9] Decision and Order at 9; Hearing Transcript at 64-65; Director's Exhibits 5, 16, 23, 76 at 55. Finding Claimant was regularly exposed to coal mine dust in his surface coal mine job, the ALJ concluded Claimant worked at least fifteen years in qualifying coal mine employment. Decision and Order at 9.

Employer generally asserts Claimant's testimony does not establish an "intensity or extent of [dust] exposure" to prove he worked in conditions substantially similar to underground coal mine work. Employer's Appeal Brief at 24. But this is not the standard. Claimant need only establish his working conditions "regularly" exposed him to coal mine dust.[10] 20 C.F.R. §718.305(b)(2); *Bonner*, 25 BLR at 1-282-4 (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust); *see Goodin*, 743 F.3d at 1343-44 (claimant's testimony regarding the dust conditions he experienced constitutes substantial evidence of regular dust exposure); *Duncan*, 889 F.3d at 304 (rejecting argument that claimant must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Kennard*, 790 F.3d at 664 (claimant's

[9] Claimant's wife testified that, although Claimant showered before returning home from his shift, he "still had evidence of coal on him like behind his ears, in his ears and on his neck." Hearing Transcript at 64. She recalled Claimant's mucous and discharge from coughing and blowing his nose were black. *Id.* at 65.

[10] The comments accompanying the DOL's regulations discuss a claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013).

"uncontested lay testimony" regarding the dust conditions he experienced "easily supports a finding" of regular dust exposure); *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions of his employment were "very dusty" sufficient to establish regular dust exposure).

Apart from asserting a legally incorrect standard to assess whether Claimant's surface employment regularly exposed him to coal mine dust, Employer does not challenge the ALJ's factual determination. Employer identifies no specific error in the ALJ's credibility determinations, and we see no error in his permissible finding, drawn from all the uncontradicted evidence considered under the correct standard, that Claimant was regularly exposed to coal mine dust in his surface coal mine employment.[11] *See Goodin*, 743 F.3d at 1343-44; *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993). Consequently, we affirm his determination that Claimant established at least twenty-five years of qualifying coal mine employment and thus invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305(b)(1)(i), 718.305(b)(2); *see Goodin*, 743 F.3d at 1343-44; *Bonner*, 25 BLR at 1-282-84; Decision and Order at 9.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined

[11] We reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid because it "eliminate[s] the distinction between underground and surface mines" and is contrary to the Act. Employer's Appeal Brief at 24. The Tenth Circuit has rejected similar arguments and upheld the validity of 20 C.F.R. §718.305(b)(2). *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014); *see also Zurich American Insurance Group v. Duncan*, 889 F.3d 293 (6th Cir. 2018).

[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 that is 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).

in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.[13]

Legal Pneumoconiosis

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 Corp*., 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Tuteur and Farney to disprove legal pneumoconiosis. Employer's Appeal Brief at 31. Dr. Tuteur diagnosed disabling chronic obstructive pulmonary disease (COPD) due to smoking and not coal dust exposure. Employer's Exhibit 6 at 3. Dr. Farney diagnosed disabling Asthma COPD Overlap Syndrome (ACOS); he attributed the COPD component to smoking and adult-onset asthma and the asthmatic component to allergic asthma and Samter's Triad (Aspirin-Exacerbated Respiratory Disease). Employer's Exhibit 4 at 44-45. He opined coal dust exposure did not cause or contribute to Claimant's lung condition/ACOS. *Id*.

The ALJ found the opinions of Drs. Tuteur and Farney not well-reasoned and inconsistent with the preamble to the revised 2001 regulations. Employer contends the ALJ improperly relied on the preamble and failed to adequately explain his credibility determinations. We disagree.

The preamble sets forth the DOL's resolution of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *see Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015). The ALJ therefore permissibly considered the medical opinions in conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1223-24 (10th Cir. 2018); *Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830 (10th Cir. 2017); *Gunderson*, 805 F.3d at 1260-62.

The ALJ observed correctly that Dr. Farney eliminated coal mine dust exposure as a cause of Claimant's disabling obstructive impairment, in part, because Claimant's coal

[13] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 10.

mine employment occurred after the 1970 enactment of federally mandated dust control standards. Decision and Order at 43-44; Employer's Exhibits 4 at 41, 7 at 9-10. But the ALJ permissibly rejected this explanation, as scientific studies the DOL found credible in the preamble confirm a connection between post-1970 coal mine dust exposure and obstructive lung disease. 65 Fed. Reg. at 79,938-940; *see McLean*, 881 F.3d at 1223-24; *Estate of Blackburn*, 857 F.3d at 830; Decision and Order at 43-44.

The ALJ accurately noted Dr. Tuteur eliminated coal mine dust exposure as a cause of the Miner's disabling obstructive impairment, in part, because he believes smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 44; Employers Exhibit 6 at 3-4. The ALJ permissibly found this opinion unpersuasive to the extent Dr. Tuteur relied on generalities drawn from medical literature, rather than the specifics of Claimant's case. *See Goodin*, 743 F.3d at 1345-46; *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 44. Further, we see no error in the ALJ's finding that Drs. Farney and Tuteur failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating Claimant's COPD. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *McLean*, 881 F.3d at 1223-25; *Estate of Blackburn*, 857 F.3d at 828-830; Decision and Order at 43.[14]

Employer's arguments on appeal are a request to reweigh the evidence, which the Board may not do. *See Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited Drs. Farney's and Tuteur's opinions, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis,[15] we affirm his determination that

[14] Contrary to Employer's characterization, the ALJ did not discredit the opinions of Drs. Farney and Tuteur for expressing views inconsistent with the DOL's position in the regulations that pneumoconiosis can be a latent and progressive disease, and thus we reject its contention of error. Decision and Order at 43-45; Employer's Appeal Brief at 32. We also reject Employer's conclusory assertion that the ALJ "substituted his opinion for that of Drs. Farney and Tuteur in overestimating the amount of work [Claimant] had to do," as Employer does not brief this argument or raise any specific challenge to the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). Employer's Appeal Brief at 35; *see* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983).

[15] Because Employer has the burden of proof, we reject its general contention that Claimant must establish legal pneumoconiosis. *See* 20 C.F.R. §718.305(c)(1); Employer's Appeal Brief at 32. Further, because we affirm the ALJ's rejection of Employer's experts, we need not address Employer's arguments that the ALJ erred in finding Drs. Gottschall's, James's, and Sood's opinions diagnosing legal pneumoconiosis well-reasoned. *See*

Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 45.

Disability Causation

The ALJ next considered whether Employer rebutted the presumption by establishing "no part" of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Goodin*, 743 F.3d at 1336-37; Decision and Order at 45-46. He rationally discredited Drs. Farney's and Tuteur's opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease.[16] *See Goodin*, 743 F.3d at 1345-46; Decision and Order at 45-46. We therefore affirm the ALJ's determination that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Goodin*, 743 F.3d at 1336-37. Thus, we affirm the ALJ's award of benefits.

District Director's Attorney Fee Awards

Claimant's counsel, Jared Bramwell (counsel), filed a complete, itemized fee petition requesting $6,992.50 for legal services performed before the district director from November 20, 2014 to January 9, 2018.[17] The total fee requested represents $3,842.50 for

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Larioni v. Director, OWCP, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 42, 45; Employer's Appeal Brief at 32-37.

[16] Drs. Farney and Tuteur did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he did not have the disease.

[17] The fee petition Attorney Bramwell (counsel) submitted sets forth his qualifications and level of experience in federal black lung claims as well as the qualifications and experience of his paralegal. Counsel stated his "usual and customary fee ranges between $250.00 and $300.00 per hour in non-black lung cases" and "$290.00 per hour in federal black lung cases," and that, to his knowledge, "there are no other attorneys in the state of New Mexico [where Claimant resides] or Utah [where counsel's office is located] that represent coal miners on a regular basis in pursuit of federal black lung benefits." October 11, 2021 Fee Petition at 3-4; Reply to Fee Objections at 3. For this reason, counsel submitted affidavits of experienced black lung attorneys practicing within the jurisdictions of the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits attesting to the reasonableness of his and Paralegal Brester's requested hourly rates for black lung services, as well as affidavits of experienced Utah attorneys practicing in the areas of corporate law, family law, immigration, business transactions, civil litigation, criminal law,

13.25 hours of attorney services performed by counsel at an hourly rate of $290.00 and $3,150 for 21.00 hours of services performed by his paralegal, Michelle Brester, at an hourly rate of $150.00.

Employer objected to the hourly rates of Attorney Bramwell and Paralegal Brester and to the number of hours for "block-billed" services. Counsel replied to Employer's objections.

After considering the regulatory criteria at 20 C.F.R. §725.366(b), the district director issued a Proposed Order Supplemental Award – Fee for Legal Services on September 7, 2021 (September 7, 2021 Fee Award), reducing the paralegal hourly rate from the requested rate of $150.00 to $100.00. She awarded Attorney Bramwell's requested hourly rate and all the time Attorney Bramwell and Paralegal Brester billed for their services. Thus, she awarded a total fee of $5,942.50, representing $3,842.50 for 13.25 hours of attorney services at a rate of $290.00 per hour and $2,100.00 for 21.00 hours of paralegal services at a rate of $100.00 per hour.

On October 11, 2021, counsel filed a supplemental fee petition requesting an additional $1,262.50, representing $362.50 for 1.25 hours of attorney services at the hourly rate of $290.00 and $900.00 for 6.00 hours of paralegal services at the hourly rate of $150.00 for work performed on August 22-25, 2021, defending counsel's fee petition. In a letter to the district director dated October 12, 2021, Employer acknowledged receipt of counsel's supplemental fee request and inquired "as to the amount of time [it] has in which to respond to the April 11, 2021 Fee Application." Letter to the District Director (Oct. 12, 2021).

Without responding to Employer's inquiry, the district director issued a Proposed Order Supplemental Award – Fee for Legal Services on December 9, 2021 (December 9, 2021 Fee Award), awarding all requested time for paralegal services at the reduced hourly rate of $100.00 and all requested time for attorney services at the requested hourly rate of $290.00. She thus awarded a total supplemental fee of $962.50 representing $362.50 for

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personal injury, and estate planning attesting to the reasonableness of an hourly rate of $250.00 to $350.00 for attorney services and of $90.00 to $125.00 for paralegal services in the Utah market. October 11, 2021 Fee Petition at 4; Exhibits A and B to October 11, 2021 Fee Petition. Counsel additionally submitted examples of the hourly rates Greenberg Traurig LLP charges Employers in defending against black lung claims ($305.00 or less for federal black lung litigation; $350.00 to $750.00 for services in a coal mine operator's bankruptcy proceedings).

1.25 hours of counsel's services at the requested hourly rate of $290.00 and $600.00 for 6.00 hours of paralegal services at the reduced hourly rate of $100.00.

Employer appeals, and Claimant cross-appeals, the district director's September 7, 2021 Fee Award, while Claimant appeals and Employer cross-appeals the district director's December 9, 2021 fee award. Employer contends the district director's approval of the $290.00 hourly rate for Attorney Bramwell is unsupported and should be reduced, and also challenges the number of hours and expenses awarded in the September 7, 2021 and December 9, 2021 fee awards. Employer's Appeal Brief at 37-42; Employer's Cross-Appeal Brief at 2-6. Employer further contends the district director deprived it of its right to oppose counsel's supplemental fee petition. Employer's Cross-Appeal Brief at 1. Counsel urges affirmance of the hourly rate awarded him but contends the district director erred in reducing the requested hourly rate for paralegal services from $150.00 to $100.00. Claimant's Brief at 3-11.

We see no error in the district director's fee awards.

Hourly Rate

The amount of an attorney fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). The regulations provide that an approved fee must take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b).

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can

reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also Bentley*, 522 F.3d at 666-67. The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer contends Counsel did not show that his requested hourly rate of $290.00 is in line with the prevailing market rate of similarly experienced counsel in New Mexico. Employer's Appeal Brief at 37; Employer's Cross-Appeal Brief at 2-5. It argues the location of Claimant's residence in New Mexico, as opposed to the location of counsel's practice in Utah, is the "proper" relevant community for purposes of determining a lodestar rate because the formal hearing took place telephonically. Employer's Appeal Brief at 37; Employer's Cross-Appeal Brief at 3.

However, even assuming that the relevant community for purposes of assessing a lodestar market rate is New Mexico, as Employer alleges, the record does not support Employer's assertion as to different communities of black lung practitioners in New Mexico and Utah.[18] Further, Employer raised similar objections to Attorney Bramwell's requested hourly rate before the district director. *See* August 16, 2021 Fee Objections. After considering Employer's arguments, counsel's fee petition with supporting documentation, and "the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided[,]" the district director awarded Attorney Bramwell's requested hourly rate of $290.00 but reduced the requested rate for paralegal services from $150.00 to $100.00 per hour. September 7, 2021 Fee Award at 2 (unpaginated). She explained that this is a "routine case" and that "the approved rate [for counsel] is comparable to that being charged by other highly qualified attorneys within the same geographical location who also have considerable experience in the handling of Federal Black Lung claims." *Id*.

As Employer fails to explain or support its alleged distinction between market rates in New Mexico and Utah and otherwise does not explain why the district director's approval of counsel's $290.00 hourly rate is arbitrary, capricious, or fails to accord with law, it has not established the district director abused her discretion. *See Velasquez v.*

[18] In this regard, we note the record contains no evidence regarding attorney services in New Mexico and counsel indicated there are no other practitioners in New Mexico or Utah that regularly represent coal miners with regard to federal black lung benefits. *See* n.17 *supra*. Further, Claimant correctly noted before the district director that New Mexico and Utah both lie within the jurisdiction of the Tenth Circuit. Reply to Fee Objections at 3 n.2.

Director, OWCP, 844 F.2d 738, 739 (10th Cir. 1988) (hourly rate analysis not limited to rates received in black lung cases); *Jeffboat, L.L.C. v. Director, OWCP* [*Furrow*], 553 F.3d 487, 490 (7th Cir. 2009) (the relevant "community" for purposes of a lodestar hourly rate determination may refer to a "community of practitioners," particularly when the subject matter of the litigation is such that the attorneys practicing it are highly specialized and the market for legal services in that area is a national market); *Bentley*, 522 F.3d at 666 (affidavit from an experienced attorney in the same or similar market attesting to fee applicant's customary rate and the rates prevalent in the market is relevant to lodestar analysis); *Jones*, 21 BLR at 1-110 (an employer's assertion that the hourly rate awarded is excessive is insufficient to meet its burden of proving the awarded rate is excessive or that the factfinder abused his discretion). We therefore affirm the district director's award of $290.00 per hour for Attorney Bramwell's services.

Similarly, we reject Claimant's counsel's assertions that the district director erred in awarding an hourly rate of $100.00 for paralegal services. Given that counsel conceded he usually charges $100.00 to $150.00 for Brester's paralegal services, he has not established an abuse of discretion in the district director's award of an hourly rate of $100.00 for the paralegal services rendered in the informal proceedings before her.[19] *Velasquez*, 844 F.2d at 739; *Bentley*, 522 F.3d at 664-65. We therefore affirm the district director's award of $100.00 per hour to Paralegal Brester.

Billable Hours and Expenses

With regard to the district director's September 7, 2021 fee award, Employer challenges the number of hours counsel billed for various services rendered and expenses incurred while the case was before the Office of Administrative Law Judges (OALJ) between January 23, 2018, and February 17, 2021. Employer's Appeal Brief at 42. However, the district director did not award any fees for services performed or expenses incurred before the OALJ and the ALJ's fee award is not now before the Board. As we have affirmed the district director's hourly rate awards and neither party challenges the number of hours she awarded for services rendered before her, we affirm her September 7, 2021 fee award of $5,942.50, representing $3,842.50 for 13.25 hours of attorney services

[19] Although Claimant's counsel asserts the case was not, as the district director states, "routine" because Employer submitted "countless correspondence" and multiple pleadings, he does not assert the case involved novel or complex issues and fails to explain why the quantity of paralegal hours billed does not fully account for the quantity of work necessary to review and address any correspondence or pleadings. Claimant's Brief at 5-6.

at a rate of $290.00 per hour and $2,100.00 for 21.00 hours of paralegal services at a rate of $100.00 per hour.

With regard to the district director's December 9, 2021 supplemental fee award, Employer argues counsel was not entitled to fees related to preparing his supplemental fee application filed on October 11, 2021. However, counsel did not request fees for time spent on his October 11, 2021 supplemental fee application. Rather, counsel's fee application sought fees only for 1.25 hours of attorney time and six hours of paralegal time rendered on August 25, 2021, in preparing a twelve-page reply to Employer's fee objections. As Employer does not allege that the amount of time billed for these services is unreasonable, and since we have affirmed the district director's hourly rate awards, we affirm her December 9, 2021 fee award of $962.50, representing $362.50 for 1.25 hours of attorney services at an hourly rate of $290.00 and $600.00 for 6.00 hours of paralegal legal services at an hourly rate of $100.00.[20]

[20] We reject Employer's assertion that it was unable to contest counsel's supplemental fee application and was thereby deprived of due process because the district director did not respond to its inquiry regarding a briefing schedule. During the two-month period between the date of Employer's inquiry and the district director's supplemental award, Employer did not attempt to file any objections to counsel's supplemental fee petition. Further, counsel requested the same hourly rates in his supplemental fee petition as he did in his initial fee application and submitted no new documentation supporting the requested hourly rates. *See* October 11, 2021 Fee Application; July 9, 2021 Fee Application. Moreover, pursuant to 20 C.F.R. §725.366(e), Employer has availed itself of the opportunity to appeal the district director's supplemental fee award to the Board. Employer raises the same arguments it raised before the district director with regard to counsel's hourly rate, does not challenge the reasonableness of any time for the services awarded, and nowhere explains how the district director's failure to respond to its inquiry affected the disposition of counsel's supplemental fee petition. *See Energy West Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (The Due Process Clause "is concerned with procedural outrages, not procedural glitches;" to sustain its allegation of a procedural due process violation, an employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim); *see also 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*, 6 BLR at 1-1278.

Accordingly, the ALJ's Decision and Order Awarding Benefits and the district director's September 7, 2021 Proposed Order Supplemental Award Fee for Legal Services and December 9, 2021 Proposed Order Supplemental Award Fee for Legal Services are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge