U.S. Department of Labor

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

BRB No. 20-0187 BLA

HOMER JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GAP FORK FUELS INCORPORATED[1]	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 05/25/2021
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

John Earl Hunt, Allen, Kentucky, for Claimant.

[1] The administrative law judge's Decision and Order lists "Cap Fork Fuels Inc." as the Employer in the caption. However, all other references in the Decision and Order and in the record are to "Gap Fork Fuels Inc."

Kathleen H. Kim (Elena S. Goldstein, Deputy 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-06118) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on August 28, 2017.[2]

The administrative law judge credited Claimant with more than fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[3] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

[2] This is Claimant's second claim for benefits. His first claim, filed on August 18, 1995, was denied and subsequently sent to the Federal Records Center for storage. Director's Exhibits 1-2, 63. The district director requested the file after the filing of the current claim but was advised it had been destroyed. Director's Exhibit 1.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the bases of the prior denial are unknown, the administrative law judge assumed that Claimant established no element of entitlement. Decision and Order at 10.

[4] 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 administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to administrative law judges violate the separation of powers doctrine and render his appointment unconstitutional. Employer further contends the Department of Labor's (DOL) destruction of Claimant's prior claim record violates its due process rights. Employer also challenges the constitutionality of the Section 411(c)(4) presumption. On the merits, it argues the administrative law judge erred in finding the presumption invoked because he failed to properly weigh the evidence to find Claimant totally disabled.[6] Finally, it argues the administrative law judge erred in finding the presumption unrebutted.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment, its challenge to the validity of the Section 411(c)(4) presumption, and its argument that destruction of the prior claim record violated its due process rights. Employer filed a reply brief reiterating its arguments on the issues the Director addressed.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

---

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

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

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

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the finding that Claimant established 16.75 years of coal mine employment, all but three months of which were underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

evidence, and in accordance with applicable law.[7] 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 Challenge

Employer argues the administrative law judge was not properly appointed as an "inferior officer" and the Secretary's ratification of his appointment on December 21, 2017, as well as the August 31, 2018 Executive Order providing new procedures for the appointment of administrative law judges, was inadequate to remedy his improper appointment. Employer's Brief at 19-23, 27; Employer's Reply at 9-10, 16-17. Employer thus urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8]

We agree with the Director that Employer has forfeited these arguments. Director's Brief at 3. Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *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).

Although *Lucia* was decided nearly one year before the hearing in this matter, Employer did not raise any challenge to the administrative law judge's authority to decide the case while the matter was before the administrative law judge; instead, it raises this argument for the first time on appeal. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Had Employer timely raised its Appointments Clause challenge to the administrative law judge, he could have considered the issue and, if appropriate, provided the relief Employer is requesting. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10.

[8] *Lucia* involved a challenge to the appointment of an administrative law judge 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 administrative law judges 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)).

(6th Cir. 2021) (employer forfeited its Appointments Clause challenge by failing to raise it to the administrative law judge); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019).

Employer raised no basis for excusing its forfeiture of the issue beyond arguing that it was not required to do so because an administrative law judge cannot resolve constitutional issues. Employer's Reply at 11. Such an argument, however, is not a valid basis for excusing forfeiture of the issue. *See Zdanok*, 370 U.S. at 535; *Kiyuna*, 53 BRBS at 11 (Appointments Clause argument is an "as-applied" challenge that the administrative law judge can address and thus can be waived or forfeited); *see also* 20 C.F.R. §802.301(a) (Board cannot engage in "unrestricted review of a case" but must limit its review to "the findings of fact and conclusions of law on which the decision or order appealed from was based"). We therefore see no reason to entertain its forfeited arguments.[9] *See Davis*, 937 F.3d at 591-92; *Powell*, 53 BRBS at 15; *Kiyuna*, 53 BRBS at 11.

Removal Provisions

Employer also asserts the removal protections afforded administrative law judges in the Administrative Procedure Act, 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 23-26; Employer's Reply Brief 11-15. Employer also 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). Employer's Brief at 23-26; Employer's Reply at 11-15.

The removal argument is subject to similar issue preservation requirements, however, and Employer likewise forfeited it by not raising it before the administrative law judge. *See, e.g., Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion, and because petitioners "did not raise the dual for-cause removal provision before the agency" court was "powerless to excuse the forfeiture"). Regardless, Employer's arguments are without merit.

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

[9] Employer's citations to cases that discuss issue exhaustion requirements in other administrative frameworks, such as *Freytag v. Comm'r*, 501 U.S. 868 (1991) and *Ramsey v. Comm'r of Social Security*, 973 F.3d 537, 547 (6th Cir. 2020), are misplaced. Employer's Reply Brief at 2-7. Exhaustion requirements must be applied "with a regard for the particular administrative scheme at issue." *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 590 (6th Cir. 2021).

"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 administrative law judges" 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 administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1. Finally, in *Seila Law*, the Court held 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."[10] 140 S. Ct. at 2201.

Although Employer generally summarizes these cases, it has not explained how or why these legal authorities should apply to administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Employer simply assumes, without explaining, that because limitations on removal are unconstitutional for certain executive branch officials performing executive functions, the same must be true for administrative law judges.[11] A reviewing court, however, 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 argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause). Thus,

---

[10] 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).

[11] In other cases Employer does not address, the Supreme Court has distinguished between officials performing executive functions and those performing purely adjudicatory functions. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld limitations on removal for members of the War Claims Commission which "receive[d] and adjudicate[d] according to law" personal injury and property damage claims arising from World War II. Similarly, in *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), the Court upheld removal limitations for members of the Federal Trade Commission whose duties were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *See Seila Law*, 140 S. Ct. at 2199 (comparing permissible removal protections for "multimember bodies" performing "quasi-judicial" or "quasi-legislative" functions with the President's "unrestrictable power . . . to remove purely executive officers").

Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional.

Due Process - Destruction of the Prior Claim Record

Employer argues its due process rights were violated because it did not have access to Claimant's initial claim after it was destroyed by the Federal Records Center. It argues the DOL has the duty to preserve the record and failure to do so barred a determination of whether Claimant established a change in an applicable condition of entitlement in this subsequent claim or if the claim was timely filed. Employer's Brief at 17; Employer's Reply at 17. Thus, Employer asserts any liability for benefits must transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 17-19; Employer's Reply at 17-18. We disagree.

In the absence of deliberate misconduct, "the mere failure to preserve evidence – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the DOL loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). As the United States Court of Appeals for the Tenth Circuit explained in *Oliver*, Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met this burden.

Employer first argues the destruction of this evidence deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement. Employer's Brief at 17. To obtain review of the merits of the claim, a claimant bears the burden of first establishing through *new evidence* that one of the applicable elements of entitlement that defeated entitlement in the prior claim has changed since that denial. 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). By establishing total disability and invoking the Section 411(c)(4) presumption, Claimant established every element of entitlement based on the new evidence. Thus, he has established a change in an applicable condition of entitlement, entitling him to review of the merits of his claim. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c). Employer has not

explained how the record from Claimant's prior claim, filed in 1995, is relevant to this inquiry.[12] *Oliver*, 555 F.3d at 1222-23.

Employer also argues it is unknown if the prior claim was denied as untimely, which would also render the current claim untimely. Employer's Brief at 17; Employer Reply at 17. There is no indication, however, that Employer was prevented from developing evidence regarding the timeliness of either the current claim or the prior claim or obtaining testimony from Claimant regarding issues relevant to whether these claims were timely filed. As the administrative law judge indicated, Employer submitted no evidence relevant to timeliness.[13] Decision and Order at 4.

Therefore, we agree with the administrative law judge that Employer's due process argument is unpersuasive.[14] Employer has failed to demonstrate any specific prejudice resulting from the destruction of the prior claim record in this case. As the Director points out, Employer was timely notified of the current claim as well as the existence of the prior claim, developed evidence, and participated in every stage of the adjudication. Director's Brief at 8. Accordingly, we reject Employer's assertion that liability for benefits should transfer to the Trust Fund.

---

[12] The administrative law judge indicated that, even if he were able to consider evidence from Claimant's prior claim, he would find the evidence in the current claim "more probative" because it is "more indicative of the Claimant's current physical condition." Decision and Order at 17 n.17.

[13] Employer made no attempt to obtain testimony relevant to timeliness. Counsel for Employer cross-examined Claimant at the hearing and asked a single question: whether Gap Fork Fuels, Inc., was Claimant's most recent employer. Hearing Transcript at 22.

[14] Employer's reliance on *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) is misplaced. Employer's Brief at 17; Employer's Reply at 18. In distinguishing *Holdman*, the United States Court of Appeals for the Tenth Circuit explained the district director "lost a critical part of the record (the transcript of the claimant's testimony) during an ongoing adjudication, making it impossible to evaluate the [administrative law judge's] findings on appeal." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1221 (10th Cir. 2009) (internal quotations omitted). The Board had instructed the administrative law judge to reconstruct the record because it could not conduct meaningful review; moreover, the administrative law judge concluded the missing evidence "was critical to the resolution of the claim," and "the case could not fairly be resolved without it." *Id.* In contrast, the loss of a prior denied claim remote in time "cannot be said to be similarly critical to [the] adjudication" of a subsequent claim. *Oliver*, 555 F.3d at 1221.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional and argues the case should be held in abeyance pending a holding on the constitutionality of the ACA. Employer's Brief at 29. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

The United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) and the Board has declined to hold appeals in abeyance pending legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case and deny its request to hold this case in abeyance.

Section 411(c)(4) Presumption: Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting 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 Claimant established total disability based on the pulmonary function studies and the medical opinions, and when weighing the evidence as a whole.[15] Decision and Order at 17. Employer contends the administrative law judge

[15] The administrative law judge found the arterial blood gas studies did not support a finding of total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 13, 17.

failed to explain his finding that the weight of the evidence established total disability, but rather "simply declared that qualifying pulmonary function studies were not negated by the nonqualifying blood gas tests."[16] Employer's Brief at 27.

Employer's argument lacks merit. The administrative law judge first properly weighed the pulmonary function testing together and then weighed the arterial blood gas studies together. Decision and Order at 13-17. While he found the pulmonary function testing supported total disability, he found the arterial blood gas studies did not. *Id.* at 16-17. He further considered the medical opinions, finding three of the four opining experts found Claimant totally disabled, including one of Employer's experts, Dr. Rosenberg.[17] *Id.* at 17.

The administrative law judge did not "dismiss" the non-qualifying arterial blood gas studies as Employer alleges; he explained that they did not outweigh the qualifying pulmonary function studies, given that the tests measure different aspects of lung function. Decision and Order at 17 (citing *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993)); Employer's Brief at 27-28. Weighing the pulmonary function studies, arterial blood gas studies, and medical opinions together, the administrative law judge permissibly found the qualifying pulmonary function studies and medical opinions outweighed the non-qualifying arterial blood gas studies. Decision and Order at 17; *see Tussey*, 982 F.2d at 1040-41; *Rafferty*, 9 BLR at 1-232. We therefore affirm the administrative law judge's finding that the medical evidence as a whole established a totally disabling respiratory or pulmonary impairment, and that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b).

[16] We affirm, as unchallenged on appeal, the administrative law judge's determination that the pulmonary function study evidence weighs in favor of total disability. 20 C.F.R. §718.204(b)(2)(i); *Skrack*, 6 BLR at 1-711; Decision and Order at 16.

[17] The administrative law judge found Dr. Vuskovich's opinion not probative because although Dr. Vuskovich opined Claimant "did not suffer from a respiratory or pulmonary standpoint arising out of his coal mine employment," he did not specify whether Claimant is totally disabled regardless of cause. Decision and Order at 17 (citing Employer's Exhibits 3, 7). We affirm, as unchallenged, the administrative law judge's determination that the medical opinion evidence weighs in favor of total disability. 20 C.F.R. §718.204(b)(iv); *Skrack*, 6 BLR at 1-711; Decision and Order at 17.

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[18] nor clinical pneumoconiosis[19] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method. Decision and Order at 25, 33, 35. Employer does not challenge the administrative law judge's determination that it failed to rebut the presence of clinical pneumoconiosis; we therefore affirm it. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25.

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 Co.*, 25 BLR 1-149, 159 (2015).

The administrative law judge considered the opinions of Drs. Rosenberg and Vuskovich on rebuttal. Dr. Rosenberg opined that Claimant has severe airflow obstruction, in the form of emphysema and bronchitis, caused solely by Claimant's history of cigarette smoking. Employer's Exhibit 2 at 3-11. Dr. Vuskovich also diagnosed obstructive lung disease, and explained it was the result of smoking, as well as chronic aspiration from gastroesophageal reflux disease (GERD) and the chronic use of narcotics. Employer's Exhibit 3 at 11-16. Both physicians indicated that coal mine dust exposure did not cause or contribute to Claimant's disease and thus opined he does not have legal pneumoconiosis. Employer's Exhibits 2-3, 7.

The administrative law judge discredited Dr. Rosenberg's opinion for several reasons, ultimately concluding that Dr. Rosenberg did not persuasively explain how

[18] "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).

[19] "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).

Claimant's disease is due entirely to cigarette smoking. Decision and Order at 29-32. He also found that, while Dr. Vuskovich credibly explained why narcotics use could affect Claimant's pulmonary function, the doctor's opinion that Claimant does not have legal pneumoconiosis was unpersuasive because he did not adequately explain why coal mine dust exposure did not also contribute to Claimant's obstruction. *Id.* at 32-33. As the remaining opinions did not support Employer's burden on rebuttal, the administrative law judge found that Employer did not rebut legal pneumoconiosis.[20] *Id.* at 33.

Employer's contention that the administrative law judge did not evaluate the record but instead used the preamble to the 2001 regulatory revisions as "the litmus test" for discrediting Employer's rebuttal evidence lacks merit. Employer's Brief at 30. An administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). As discussed below, the administrative law judge permissibly evaluated the medical opinions in light of the specific evidence before him, taking into account the preamble's interpretation of the scientific studies DOL relied upon in amending the regulations. *See Adams*, 694 F.3d at 801-02.

Among the reasons Dr. Rosenberg provided to exclude coal mine dust exposure as a contributor to Claimant's impairment, he indicated "the reduction of the FEV_1 in comparison to the reduction in the FVC provides a basis for distinguishing between the effects of cigarette smoking and coal mine dust exposure" in that "cigarette smoking drives the FEV_1 down much farther than the FVC" but "coal dust reduces the FEV_1 and FVC in equal measure." Employer's Exhibit 2 at 4-5. Thus, Dr. Rosenberg indicated that Claimant's reduction of the ratio to "around 47% . . . is entirely consistent with the effects of cigarette smoking, not coal dust." *Id.* at 6. The administrative law judge permissibly discredited this rationale as inconsistent with the principles in the preamble that "coal miners have an increased risk of developing COPD," which "may be detected from decrements in certain measures of lung function" including a miner's FEV_1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 29-30.

[20] The administrative law judge also noted Claimant's treatment records provided diagnoses of chronic obstructive pulmonary disease and pneumoconiosis and found they did not support Employer's burden to establish rebuttal. Decision and Order at 33.

One of the reasons Dr. Vuskovich provided for excluding coal mine dust exposure as a factor in Claimant's obstruction was the lack of reduced ventilatory capacity in March 2, 2010, which Dr. Vuskovich noted was fifteen years after Claimant's coal mining employment ended.[21] Decision and Order at 32 (citing Employer's Exhibits 3 at 11-12; 7 at 6). Dr. Vuskovich conclusorily asserted that if Claimant had legal pneumoconiosis, he would have had some reduced capacity at that time. Employer's Exhibits 3 at 11-12; 7 at 6. The administrative law judge permissibly found this opinion contrary to the regulations, which recognize that legal pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014)(upholding administrative law judge's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012)(same); Decision and Order at 32.

We also reject Employer's argument that the administrative law judge erred in finding Drs. Rosenberg's and Vuskovich's opinions insufficient to rebut legal pneumoconiosis when they indicated Claimant's "other issues were self-sufficient causes of total disability." Employer's Brief at 30. The administrative law judge permissibly found Dr. Rosenberg's opinion did not persuasively explain why Claimant's disabling obstructive impairment was due entirely to smoking. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 32, 35. He also permissibly found Dr. Vuskovich's opinion undermined because he did not credibly explain why "Claimant's extensive coal mine dust exposure did not also contribute to his obstructive impairment" along with smoking, narcotics use, and GERD-induced aspiration. *See* 20 C.F.R. §718.201(a)(2), (b); *Ogle*, 737 F.3d at 1074; *Barrett*, 478 F.3d at 356; *Napier*, 301 F.3d at 713-14; Decision and Order at 33. Thus, we affirm the administrative law judge's finding that Employer failed to rebut the presence of legal pneumoconiosis.[22]

[21] The administrative law judge also gave Dr. Vuskovich's opinion less weight due to his reliance on evidence not in the record, including the March 2, 2010 pulmonary function study on which he based his statement. Decision and Order at 22 n. 21; 33. We affirm that determination as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[22] Because the administrative law judge provided valid reasons for discrediting Drs. Rosenberg's and Vuskovich's opinions, we need not address Employer's challenges to the additional reasons he gave for rejecting their opinions regarding legal pneumoconiosis. *See*

Disability Causation

The administrative law judge next addressed whether Employer rebutted disability causation. 20 C.F.R. §718.305(d)(1)(ii). To rebut disability causation, Employer must demonstrate that "no part" of Claimant's disability was caused by pneumoconiosis. *Id.*

First, there is no merit to Employer's contention that the administrative law judge created "an impossible burden of proof" by applying the "no part" standard when considering rebuttal of total disability causation. Decision and Order at 34; Employer's Brief at 29-30. The United States Court of Appeals for the Sixth Circuit, whose law applies in this case, upheld the "no part" standard:

> Simply put, the "play no part" or "rule-out" standard and the "contributing cause" standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must "rule-out" coal mine employment as a cause of the disability. Where the employee must affirmatively prove causation, he must do so by showing that his occupational coal dust exposure was a contributing cause of his disability. Because the burden here is on the [employer], the [employer] must show that the coal mine employment played no part in causing the total disability.

Ogle, 737 F.3d at 1070-71.

Applying the "no part" standard, the administrative law judge permissibly found Drs. Rosenberg's and Vuskovich's disability causation opinions undermined by their failure to diagnose legal pneumoconiosis, and found Dr. Vuskovich's opinion further undermined by his failure to diagnose clinical pneumoconiosis. *See Ogle*, 737 F. 3d at 1071; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 34-35. We therefore affirm the administrative law judge's determination that Employer did not rebut the Section 411(c)(4) presumption by establishing that no part of Claimant's respiratory or pulmonary disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 35.

Kozele v. Rochester & Pittsburgh Coal Co., 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 29-33, 35; Employer's Brief at 30.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with my colleagues' decisions to reject Employer's challenges to the administrative law judge's appointment and removal protections and its allegation it was denied due process. I further concur in their affirmance of the determination that Employer failed to rebut the Section 411(c)(4) presumption. Specifically, I concur in the administrative law judge's discrediting of Dr. Vuskovich's opinion regarding legal pneumoconiosis because I agree Employer did not contest the administrative law judge's discrediting of his opinion based on his reliance on evidence outside the record. I also agree the administrative law judge permissibly discredited his opinion as inadequately explained regarding whether coal mine dust exposure substantially aggravated Claimant's impairment. I write to suggest a more nuanced approach to considering opinions related to onset of impairment in light of the DOL's recognition that pneumoconiosis may be latent and progressive.

Dr. Vuskovich conclusorily opined that if coal mine dust exposure had played a part in Claimant's impairment, the impairment would have developed earlier. Employer's Exhibits 3 at 11-12; 7 at 6. The majority simply affirms discrediting his opinion as contrary to the DOL's determination that pneumoconiosis may be latent and progressive.

Discrediting Dr. Vuskovich's opinion on this basis is permissible, as Dr. Vuskovich does not explain why the impairment would have developed earlier had coal mine dust exposure been significantly related to the impairment or had it substantially aggravated the impairment. His opinion is tantamount to a dismissal of relationship to or aggravation by coal mine dust exposure based solely on the fact of late development of the impairment and thus is contrary to the recognition that pneumoconiosis can be latent.

However, while pneumoconiosis *may* be latent and progressive it is not *necessarily* latent and progressive. *See* 20 C.F.R. §718.201(c) ("pneumoconiosis is recognized as a latent and progressive disease which *may* first become detectable only after the cessation of coal mine dust exposure") (emphasis added); *see also Nat'l Min. Ass'n v. Dept. of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002) ("The rule simply prevents operators from claiming that pneumoconiosis is *never* latent and progressive."). None of the science cited by the DOL indicates the latency period is indefinite. *See* 65 Fed. Reg. 79,920, 79,968-72 (Dec. 20, 2000). There presumably are reasons that development is latent when it *is* latent that also affect the duration of the latency period. Consequently, an opinion that if Claimant's particular impairment were pneumoconiosis it would have presented itself earlier is not necessarily contrary to the Department's determination that pneumoconiosis may be latent and progressive and any specific explanation provided by the physician must be examined.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge