U.S. Department of Labor

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

BRB Nos. 21-0288 BLA-A
and 21-0289 BLA-A

SHIRLEY ENDICOTT (Survivor of and o/b/o DELFORD ENDICOTT)	)	
Claimant-Respondent	)	
v.	)	
RAINBOW MINING CORPORATION	)	
and	)	DATE ISSUED: 6/28/2022
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners/Cross- Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest/Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Olgamaris Fernandez (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, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2016-BLA-05618 and 2017-BLA-05051) rendered on a miner's subsequent claim filed on September 24, 2013,[1] and a survivor's claim filed on May 2, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 24.48 years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant[2] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and therefore demonstrated a change in an applicable condition of entitlement.[4]

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[1] The Miner filed two previous claims. His more-recent prior claim, filed on June 14, 2007, was denied on July 3, 2008, for failure to establish any element of entitlement, and the Miner took no further action on that claim. Miner's Claim (MC) Director's Exhibit 2; Decision and Order at 2-4.

[2] The Miner died on September 22, 2015, while his claim was pending before the district director. MC Director's Exhibits 12, 26; Decision and Order at 2. Claimant, the Miner's widow, pursued the miner's claim on his behalf along with her own survivor's claim until her death on October 26, 2019. Annette McClanahan, the widow's daughter, is now pursuing both claims as heir to her mother's estate. Decision and Order at 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's total disability (in a miner's claim) and death (in a survivor's claim) were due to pneumoconiosis if he had 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); 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon

20 C.F.R. §§718.305, 725.309. The ALJ further found Employer did not rebut the presumption in the miner's claim and Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5] The ALJ awarded survivor's benefits commencing October 2019, the month in which Claimant died.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[6] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. Employer also contends the ALJ erred in admitting Dr. Ajjarapu's examination report in place of Dr. Habre's report as the Department of Labor (DOL)-sponsored complete pulmonary evaluation of the Miner. On the merits, Employer asserts the ALJ's findings that Claimant invoked, and it did not rebut, the Section 411(c)(4) presumption are erroneous. The Director filed a limited response asserting the ALJ had authority to decide the case and acted within his discretion in admitting Dr. Ajjarapu's

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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 Miner's more-recent prior claim was denied for failure to establish any element of entitlement, Claimant had to establish at least one element of entitlement to obtain review of the merits of the miner's claim. MC Director's Exhibit 2.

[5] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] 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.

medical opinion. Employer filed a reply brief reiterating its arguments. Claimant did not file a response.[7]

On cross-appeal, the Director contends the ALJ erred in determining the commencement date for Claimant's survivor's benefits. Employer responds, agreeing that if the Board affirms the award of survivor's benefits, the commencement date should be modified. Claimant did not respond to the Director's cross-appeal.

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.[8] 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 Challenge

Employer urges the Board to vacate the ALJ's Decision and Order and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 13-21; Employer's Reply Brief at 1-8. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[10] but maintains the ratification was

[7] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had 24.48 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

[8] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 28.

[9] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. 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 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.

[10] The Secretary issued a letter to the ALJ 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 Associate Chief Administrative Law Judge. This letter is intended to

insufficient to cure the constitutional defect in ALJ Almanza's prior appointment. Employer's Brief at 14-16; Employer's Reply Brief at 2-5.

The Director responds asserting the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 3-5. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 5-6. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, 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). Ratification 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 Hosp. Co.*, 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). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate 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. 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. Rather, he specifically identified ALJ Almanza and gave "due consideration" to his appointment in his December 21, 2017 letter to ALJ Almanza. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment

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> address any claim that administrative proceedings 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 Almanza.

of ALJ Almanza "as an Administrative Law Judge." *Id.* In so doing, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment.[11]

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates he did not make a "detached and considered affirmation" when he ratified ALJ Almanza's appointment. Employer's Brief at 16; Employer's Reply Brief at 3. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[12] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were 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 of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" 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 Clauses argument because incumbent ALJs remain in the competitive service. Employer's Brief at 21. 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

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[11] Employer's assertion that the Secretary, in his December 21, 2017 letter to ALJ Almanza, "did not approve the appointment as his own" ignores that the Secretary explicitly approved the ALJ's prior appointment "in [his] capacity as head of the Department of Labor." Employer's Brief at 16; *c.f.* Secretary's December 21, 2017 Letter to ALJ Almanza.

[12] While Employer notes the Secretary's ratification letter was "signed with a robo-pen" and the ALJ's ratification was unaccompanied by any ceremony, Employer's Brief at 15-16; Employer's Reply at 3-4, this does not render the appointment invalid. *See 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"). We thus agree with the Director: "Employer's argument that the appointment was invalid because the exact wording of the letter varied from internal government guidance and that the Secretary's action lacked sufficient pomp and circumstance is unpersuasive." Director's Brief at 5 n.4; *see* Employer's Brief at 16.

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). Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Almanza's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Moreover, although Employer filed a Motion to Hold Claim in Abeyance in light of *Lucia* on December 22, 2020, the ALJ properly denied Employer's motion as he took no action on the claims before his appointment was ratified on December 21, 2017.[13] Decision and Order at 3. Unlike the situation in *Lucia*, in which the judge had presided over a hearing and issued an initial decision while he was not properly appointed, here the ALJ took no action that could affect his ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S. Ct. at 2055. We thus decline to remand this case to the OALJ for a new hearing before a different ALJ. *Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020).

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 17-21; Employer's Reply Brief at 5-8. 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 18-21. 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), and the United States Court of Appeals for the Federal Circuit in

[13] These claims were initially assigned to ALJ Carrie Bland, who held a formal hearing on May 17, 2017. On February 22, 2019, pursuant to Employer's challenge to ALJ Bland's authority to decide the case, the case was reassigned to ALJ Jennifer Whang, whom the Secretary appointed on September 12, 2018. September 12, 2018 Letter to ALJ Whang. ALJ Whang held a new hearing on May 14, 2019. She became unavailable to issue a decision, and the case was reassigned to ALJ Almanza (the ALJ). On December 11, 2020, the ALJ issued a Notice of Assignment and Opportunity to Request Rehearing. Although Employer submitted a Motion to Hold Claim in Abeyance, it stated in its attached cover letter, "[i]f this Motion is denied, we do not request a new hearing . . . ." Employer's December 22, 2020 Motion.

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 18-21; Employer's Reply Brief at 3-8.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality with respect to DOL ALJs. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, 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 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 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."[14] 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 branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be

[14] 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).

resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida 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 even 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 the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-1138.

Miner's Claim

Evidentiary Challenge

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer asserts the ALJ's evidentiary ruling allowing the Director to "swap out" Dr. Habre's DOL-sponsored complete pulmonary evaluation of the Miner for Dr. Ajjarapu's medical examination and supplemental opinion obtained as part of the DOL pilot program[15] violated its due process rights to present rebuttal evidence. Employer's Brief at 22-23; Employer's Reply Brief at 8-10. Even if we were to agree with Employer, it has not shown why remand is required because, as explained below, the ALJ's consideration of Dr. Ajjarapu's opinion was immaterial to his findings on total disability and rebuttal of the Section 411(c)(4) presumption.[16] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009)

[15] On behalf of the DOL, Dr. Habre examined the Miner on November 1, 2013. LM Director's Exhibit 11. Employer submitted Dr. Fino's report which consisted of his own examination findings and critique of Dr. Habre's examination findings. The district director later sought a supplemental report from Dr. Habre as part of the DOL pilot program, but Dr. Habre was unavailable. The Director thus referred the Miner to Dr. Ajjarapu, who conducted a physical examination on August 11, 2014, and issued a supplemental report on February 22, 2015. LM Director's Exhibit 13. The district director based his proposed decision and order awarding benefits on Dr. Ajjarapu's report and did not mention Dr. Habre's report. Employer objected to the admission of Dr. Ajjarapu's report before the district director and the ALJ.

[16] Dr. Ajjarapu's 2014 report relies on the objective studies that Dr. Habre conducted as part of his November 1, 2013 evaluation of the Miner; Dr. Ajjarapu did not conduct new objective studies. MC Director's Exhibit 13 at 3. Like Dr. Ajjarapu, Dr. Habre diagnosed a disabling pulmonary or respiratory impairment based on the qualifying pulmonary

(appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Brief at 3 n.1. We therefore reject Employer's asserted due process violation.

Invocation of the Section 411(c)(4) presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *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 ALJ must weigh all relevant supporting evidence against all relevant 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 ALJ found Claimant established the Miner was totally disabled based on the pulmonary function studies, blood gas studies, and medical opinions. Decision and Order at 28; *see* 20 C.F.R. §718.204(b)(2)(i), (ii), (iv).[17]

Employer alleges the ALJ erred in weighing the blood gas studies and failed to determine the exertional requirements of the Miner's usual coal mine work when weighing the medical opinions. Employer's Brief at 23. We reject Employer's assertion that these alleged errors require remand.

First, Employer does not challenge the ALJ's determination that all of the pulmonary function studies are qualifying.[18] *See Skrack*, 6 BLR at 1-711. Because

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function and blood gas studies that he obtained. *Id.* at 7, 29-30. As we affirm *infra* the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b) based on the absence of evidence contrary to the qualifying pulmonary function studies, and as Dr. Habre's total disability diagnosis is not contrary to the pulmonary function evidence, the ALJ's determination to "swap out" Dr. Habre's opinion for Dr. Ajjarapu's opinion is immaterial to the ALJ's total disability finding. 20 C.F.R. §718.204(b); *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Further, contrary to Employer's assertion, the ALJ did not consider Dr. Ajjarapu's opinion in assessing the sufficiency of Employer's experts' opinions at rebuttal of the Section 411(c)(4) presumption. Decision and Order at 33-37.

[17] The ALJ found there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure. Decision and Order 28; *see* at 20 C.F.R. §718.204(b)(2)(iii).

[18] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20

pulmonary function studies and blood gas studies measure different types of impairment, any non-qualifying blood gas studies Employer relies on do not undermine the ALJ's finding of total disability based on the qualifying pulmonary function studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993). Second, any alleged error the ALJ made in not specifically identifying the exertional requirements of the Miner's usual coal mine work when weighing the medical opinions is harmless, as there is no contrary evidence to outweigh the qualifying pulmonary function studies. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. All of the medical experts, including Employer's own experts, Drs. Fino and Tuteur, agree the Miner was totally disabled. 20 C.F.R. §718.204(b)(2).

We therefore affirm the ALJ's determination that Claimant established the Miner was totally disabled from a respiratory impairment, invoked the Section 411(c)(4) presumption, and consequently established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 718.305, 725.309(c); Decision and Order at 28, 39.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[19] or that "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.

C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[19] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

§718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[20] Decision and Order at 31-37.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Fino and Tuteur to disprove the existence of legal pneumoconiosis. Dr. Fino opined the Miner suffered from disabling end-stage pulmonary emphysema and lung cancer, both of which he attributed entirely to smoking and not coal dust exposure. MC Director's Exhibit 14 at 6, 9-13; Employer's Exhibit 10 at 6. Dr. Tuteur diagnosed tuberculosis with recurring pulmonary infections and advanced chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure. MC Employer's Exhibit 7 at 10. The ALJ found their opinions 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.[21] *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-16 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000). The ALJ therefore permissibly considered the medical opinions in

[20] The ALJ found Employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 31.

[21] Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990), and does not constitute evidence outside the record. Employer's Brief at 25-26; *see A & E Coal Co., v. Adams*, 694 F.3d 798, 801-03 (6th Cir. 2012).

conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Looney*, 678 F.3d at 314-16.

The ALJ observed correctly that Drs. Fino and Tuteur eliminated coal mine dust exposure as a cause of the Miner's disabling obstructive impairment, in part, because they believe smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 35-36; MC Director's Exhibit 14 at 7-9; MC Employer's Exhibit 7 at 11-13. He permissibly found their opinions unpersuasive to the extent they relied on generalities drawn from medical literature, rather than the specifics of the Miner's case. *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 35-36. Further, we see no error in the ALJ's finding that Drs. Fino and Tuteur failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating the Miner's COPD. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *Owens*, 724 F.3d at 558; *Looney*, 678 F.3d at 313-14; Decision and Order at 35-37.

Similarly, the ALJ permissibly rejected their explanations that coal dust exposure rarely results in clinically significant obstructive impairments, as scientific studies that the DOL found credible in the preamble show that coal dust-induced obstructive impairments can be clinically significant. 65 Fed. Reg. at 79,938-940, 70,943; *Looney*, 678 F.3d at 313-14; Decision and Order at 35-37; MC Director's Exhibit 14 at 7-9; MC Employer's Exhibit 7 at 12.

Additionally, the ALJ accurately noted Dr. Fino based his opinion on his view that coal-dust-related COPD does not progress after exposure to coal mine dust ceases, which is inconsistent with the DOL's recognition that coal mine dust exposure can cause a latent chronic pulmonary impairment. *See* 20 C.F.R. §718.201; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); Decision and Order at 34; MC Director's Exhibit 14 at 7. The ALJ also permissibly found Dr. Fino's reliance on negative x-rays for clinical pneumoconiosis to support his opinion that the Miner did not have legal pneumoconiosis inconsistent with the regulations which recognize that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,940-43; *see Looney*, 678 F.3d at 313-14; Decision and Order at 34-35; MC Director's Exhibit 14 at 7-8.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Having permissibly discredited the opinions of Drs. Fino and Tuteur that the Miner's COPD did not constitute legal pneumoconiosis, we reject Employer's assertion

that the ALJ applied a higher legal standard by requiring it to "rebut conclusions in the preamble that establish general causation," Employer's Brief at 25, and affirm his finding that Employer failed to establish the Miner did not have legal pneumoconiosis. Accordingly, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that the Miner did not have pneumoconiosis.[22] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Next, the ALJ addressed whether Employer established the second method of rebuttal by showing that no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 38-39. The ALJ permissibly discounted the opinions of Drs. Fino and Tuteur because they did not diagnose pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the presence of pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 38. Moreover, Employer raises no specific challenge to this determination. *See* Employer's Brief at 28-29; *Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis, and Employer did not rebut the presumption, Claimant has established the Miner's entitlement to benefits. We therefore affirm the ALJ's award in the miner's claim. 30 U.S.C. §921(c)(4) (2018).

Survivor's Claim – Commencement Date for Benefits

The ALJ found Claimant was entitled to derivative survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 43. Employer raises no specific error with regard to the ALJ's determination other than its assertion that the miner's claim was erroneously awarded, which we have

[22] Because Employer bears the burden to disprove pneumoconiosis and we affirm the ALJ's rejection of its experts, we need not address Employer's arguments concerning the ALJ's weighing of Drs. Forehand's and Ajjarapu's diagnoses of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 10; Employer's Brief at 9-10, 24.

rejected.[23] *See Skrack*, 6 BLR at 1-711; Employer's Brief at 28-29. Thus, we affirm the ALJ's award of benefits on the survivor's claim.

Regarding the commencement date for survivor's benefits, we agree with the Director's and Employer's arguments that the ALJ erred in concluding that survivor's benefits commence in October 2019, the month in which Claimant, the Miner's widow, died. Decision and Order at 43-44; Director's Brief at 5-8 & n.2; Employer's Reply Brief at 1. The applicable regulation at 20 C.F.R. §725.503(c) provides, "Benefits are payable to a survivor who is entitled beginning with the month of the miner's death, or January 1, 1974, whichever is later." 20 C.F.R. §725.503(c); *Dotson v. McCoy Elkhorn Coal Corp.*, 25 BLR 1-13, 1-18 (2011). As the Miner died in September 2015, that is the correct month for commencement of survivor's benefits.

[23] As Claimant was derivatively entitled to survivor's benefits, we need not reach Employer's challenge to the ALJ's alternative finding that Employer did not rebut the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; *Kozele*, 6 BLR at 1-382 n.4.

Accordingly, the ALJ's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed, but modified to reflect September 2015 as the month survivor's benefits commence.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge