U.S. Department of Labor

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

BRB Nos. 21-0290 BLA
and 21-0291 BLA

MARTHA EVANS (o/b/o and Widow of EARL EVANS) Claimant-Respondent v. DIXIE PINE COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/23/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Order Lifting Abeyance and Awarding Benefits Under the Automatic Entitlement Provision of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

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

Ann Marie Scarpino (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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits in a miner's claim and Order Lifting Abeyance and Awarding Benefits Under the Automatic Entitlement Provision in a survivor's claim (2012-BLA-06228, 2018-BLA-05384) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on October 3, 2011and[1] a survivor's claim filed on May 25, 2017.[2] It is before the Benefits Review Board for a second time.

In the miner's claim, ALJ Daniel F. Solomon initially denied benefits because he found the Miner did not timely file his current claim. Claimant appealed, and the Board reversed ALJ Solomon's finding and remanded the case for consideration of whether the Miner had established a change in an applicable condition of entitlement. *Evans v. Dixie Pine Coal Co.*, BRB No. 16-0061 BLA (Oct. 21, 2016) (unpub.). The Miner died on April 8, 2017, while his claim was pending before the Office of Administrative Law Judges (OALJ). MC Employer's Exhibit 10. Claimant filed a survivor's claim on May 25, 2017. Associate Chief ALJ William S. Colwell ordered that "the survivor's claim [would] be held in abeyance pending adjudication of the miner's claim." *See* February 26, 2019 Order Clarifying the Assignment of these Cases to the Undersigned, Denying Employer's Motion

[1] The Miner filed four previous claims. His last claim was denied because the evidence did not establish the existence of pneumoconiosis. Miner's Claim (MC) Director's Exhibit 1. We will refer to the Miner's prior claims only to the extent that they are relevant.

[2] Claimant is the widow of the Miner, who died on April 8, 2017. MC Director's Exhibit 10; Survivor's Claim (SC) Director's Exhibit 2. She is pursuing the miner's claim as well as her own survivor's claim. SC Director's Exhibits 1, 3.

for Abeyance and for Reassignment to a Properly Appointed Officer, and Directing the Parties' Response. ALJ Colwell also granted Employer's motion for a decision on the record but denied its motion to exclude Dr. Burrell's supplemental report.[3] *See* June 30, 2020 Order Granting Employer's Consent Motion for a Decision on the Record but Denying Employer's Motion to Exclude Dr. Burrell's Rebuttal Report. ALJ Colwell subsequently retired and the case was reassigned to ALJ Appetta (the ALJ), who granted the Director's, Office of Workers' Compensation Programs (the Director), Motion for Protective Order and subsequently issued the decisions that are the subject of the current appeal.

The ALJ credited the Miner with 19.14 years of coal mine employment either underground or on the surface in conditions substantially similar to an underground mine and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] 20 C.F.R. §718.305. The ALJ further determined Employer did not rebut the presumption and Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309,[5] and awarded benefits. Because the Miner was entitled

[3] Dr. Burrell conducted the Department of Labor's complete pulmonary evaluation of the Miner and prepared a supplement report as part of the Department of Labor's (DOL's) Pilot Program. In a footnote, Employer notes its continued objection to the admission of Dr. Burrell's supplemental report and to the Pilot Program but does not explain with any specificity why Dr. Burrell's supplemental report is inadmissible. Employer's Brief at 4 n.2. Because its objections are inadequately briefed, we decline to address them. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[4] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner was totally disabled 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(b).

[5] 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 she 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.

to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[7] It further asserts the removal provisions applicable to the ALJ rendered her appointment unconstitutional. On the merits, it contends the Board erred in reversing ALJ Solomon's finding that the Miner's fifth claim was untimely filed. It also contends the ALJ deprived it of due process by refusing to allow it to obtain discovery from the DOL regarding the scientific bases for the preamble to the 2001 regulatory revisions while relying on the preamble to weigh the evidence in this case. In addition, Employer argues the ALJ erred in crediting the Miner with at least fifteen years of qualifying coal mine employment and in finding Claimant invoked the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding it did not rebut the presumption and Claimant established a change in an applicable condition of entitlement

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§725.309(c)(3). Because the Miner's prior claim was denied for failure to establish the existence of pneumoconiosis, Claimant must establish the existence of pneumoconiosis to warrant a review of the Miner's current claim on the merits. *See White*, 23 BLR at 1-3; MC Director's Exhibit 1.

[6] Under Section 422(*l*) of the Act, a 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 that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[7] 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.

under 20 C.F.R. §725.309.[8] Claimant responds in support of the award of benefits. The Director filed a limited response urging the Board to reject Employer's constitutional challenges, its assertions that the United States Court of Appeals for the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) is dicta, and its contention that a pre-existing non-pulmonary injury precludes entitlement. Employer replied to Claimant's and Director's briefs, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[9] 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, 362 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Orders and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[10] Employer's Brief at 10; Employer's Reply Brief at 1-6. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[11] but maintains the ratification was

[8] We affirm, as unchallenged on appeal, the ALJ's findings that the Miner was totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b); MC Decision and Order at 36-37.

[9] This case arises within the jurisdiction of the Sixth Circuit, as the Miner performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

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

[11] The Secretary of Labor 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 Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by,

insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 10-12. The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance. Director's Brief at 4-7. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 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). 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 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 Appetta and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Appetta. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Appetta "as an Administrative Law Judge." *Id*.

Employer does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Appetta's appointment. Employer's Brief at 14. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04

> 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 Appetta.

(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 appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid 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 Brief at 17-19. 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 Appetta's appointment, which we have held constituted a valid exercise of his authority, thereby bringing her appointment into compliance with the Appointments Clause.

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

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-19; Employer's Reply Brief at 5-8. Employer generally argues the removal provisions 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 17-18. 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

[12] While Employer notes the Secretary's ratification letter was "signed in autopen," Employer's Brief at 13, 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").

(2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 18-19; Employer's Reply Brief at 7-8.

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

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."[13] 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 [C]ongressional enactment only upon a

[13] 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).

plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. 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 that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-1138.

The Miner's Claim

Timeliness

The Board previously reversed ALJ Solomon's finding that the Miner did not timely file his current claim. *Evans*, BRB No. 16-0061 BLA, slip op. at 5. In this appeal, Employer again argues that the claim is untimely, which was already considered and rejected by the Board in the prior appeal. Employer's Brief at 43-44. Because Employer has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to reconsider our prior holding on this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer's Request for Discovery

While the case was before the ALJ, Employer sought discovery from the DOL related to its deliberative process underlying the preamble to the 2001 revised regulations. *See* Employer's Interrogatories, Requests for Admissions and Documents Regarding the Preamble. In response, the Director moved for a Protective Order barring the requested discovery. *See* Director's Motion for Protective Order. Employer responded, urging the ALJ to deny the Director's request. *See* Employer's Opposition to Motion for a Protective Order. The ALJ granted the Director's motion, finding Employer's discovery request would not lead to relevant information regarding DOL's deliberative process or the science underlying the revised regulations that was not already set forth in the preamble. Order Granting the Director's Motion for Protective Order at 4. The ALJ noted Employer "may challenge the scientific basis for medical conclusions in the relevant regulation by presenting scientific studies or evidence post-dating the effective date of the 2001 amended regulations, which calls into question the scientific basis supporting the regulations." *Id.* at 5, *citing Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013).

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians as inconsistent with the science the DOL relied on in the preamble. Employer's Brief at 42-43. We disagree.

Due process requires Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer had the opportunity to submit evidence challenging the science that the DOL relied on in the preamble when promulgating its revised regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014); *Cochran*, 718 F.3d at 324 (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). Employer submitted such evidence in the form of Drs. Rosenberg's and Jarboe's opinions. MC Employer's Exhibits 3-5. The ALJ considered their opinions and permissibly found them unpersuasive, as discussed more fully below. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); MC Decision and Order at 31-35.

Because Employer was afforded and took advantage of the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. Further, Employer has not shown how review of the preamble material would make a difference, given its opportunity to present other scientific evidence and to review the published medical studies themselves. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm it. *See Skrack*, 6 BLR at 1-711 (1983).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered the Miner's CM-911a Employment History Form, CM-913 Description of Coal Mine Work Form, Social Security Administration (SSA) earning records, earnings statements, and an employment letter from Employer. MC Decision and Order at 6-7; MC Director's Exhibits 1, 4-9, 19, 23. She noted various inconsistencies and interruptions in the Miner's work history but found the records "collectively" established at least nineteen years of coal mine employment. MC Decision and Order at 7.

Because the ALJ found the "exact dates of [the Miner's] coal mine employment are not known[,]" she applied 20 C.F.R. §725.101(a)(32)(iii)[14] to determine the number of days that the Miner worked in coal mine employment from 1961 through 1983.[15] MC Decision and Order at 6-8. She divided Claimant's yearly earnings as reported in his SSA earning records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. *Id*. at 7-8. For each year in which the Miner's earnings met or exceeded the Exhibit 610 average "yearly" earnings, the ALJ credited him with a full year of coal mine employment. *Id*. For the years in which the Miner's earnings fell short, she credited him with a fractional year, calculated by dividing his annual earnings by the average yearly earnings. *Id*. Applying this method, the ALJ credited the Miner with twelve years of coal mine employment from 1967 to 1969, 1971 to 1972, and 1974 to 1980, and with 7.14 partial years from 1961 to 1966, 1970, 1973, and 1981-1983.[16] *Id*. at 8-9; *see Shepherd*, 915 F.3d at 401-02.

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[14] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

[15] As Employer failed to challenge the ALJ's determination that the "exact dates" of the Miner's coal mine employment could not be determined by the evidence, we affirm it. *See Skrack*, 6 BLR at 1-711; MC Decision and Order at 8.

[16] We note the ALJ erred in crediting the Miner with 1.39 years of coal mine employment in 1966. MC Decision and Order at 7. This error is harmless, however, because even if the ALJ credited the Miner with only one year of coal mine employment

The ALJ also considered Employer's assertion that the Miner had at most 14.63 years of coal mine employment. MC Decision and Order at 8-9; Employer's Reply Brief at 10. She noted Employer did not adequately explain its calculations and concluded her method utilizing the Miner's SSA earning records and Exhibit 610 was "more reliable" and consistent with the Miner's reported employment history, as well as the previous findings of the district director and ALJ Solomon. MC Decision and Order at 8-9. Thus, relying on her calculations, the ALJ found the Miner had 19.14 years of qualifying coal mine employment and Claimant invoked the Section 411(c)(4) presumption.[17]

Employer argues the ALJ erred in calculating the Miner's coal mine employment history by utilizing 125 days pursuant to *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019) because it asserts that portion of the Court's decision is dicta and disregards the Act's plain language concerning what constitutes a "year." Employer's Brief at 23-27; Employer's Reply Brief at 8-10. We disagree.

Contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, holding that 125 days may constitute a year of coal mine employment even if the miner did not have a calendar year employment relationship, is not dicta.[18] *See* Employer's Reply Brief at 8-9, *citing Shepherd*, 915 F.3d at 403; Employer's Brief at 23-28. As the Director correctly notes, "the court expressly instructed the ALJ to 'give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)' when evaluating the Miner's length of coal mine employment." Director's Brief at 11-12, *quoting Shepherd*, 915 F.3d at 407. Thus, we agree with the Director's position that regardless of Employer's disagreement with the court's interpretation of the regulations, the ALJ was bound by the Sixth Circuit's holding in *Shepherd*, which is "controlling law

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in 1966, he would still have 18.75 years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[17] We affirm, as unchallenged, the ALJ's finding that all of the Miner's coal mine employment was performed underground or in conditions substantially similar to an underground coal mine. *See Skrack*, 6 BLR at 1-711; MC Decision and Order at 11.

[18] Employer contends that in *Shepherd*, the Sixth Circuit "only recommends the ALJ's method of calculation if you cannot establish the years of employment through a more reliable method." Employer's Brief at 23, *citing Shepherd*, 915 F.3d at 401-02. Employer further asserts the Court's holding was limited to requiring the ALJ to consider "all evidence" as to the Miner's periods of coal mine employment and to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)." Employer's Reply Brief at 8, *citing Shepherd*, 915 F.3d at 403.

in the Sixth Circuit." *Id.* at 11. As the ALJ was bound by *Shepherd*, we also reject Employer's additional arguments about the correct interpretation of what constitutes "a year" of coal mine employment.[19] Employer's Brief at 24-28; Employer's Reply Brief at 8.

Because the ALJ's calculations are reasonable, supported by substantial evidence and in accordance with Sixth Circuit law, we affirm the ALJ's finding that Claimant established the Miner had more than fifteen years of qualifying coal mine employment. *Muncy*, 25 BLR at 1-27; *see Shepherd*, 915 F.3d at 401. We therefore also affirm her determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); MC Decision and Order at 7-9, 36-37.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[20] 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. §718.305(d)(2)(i), (ii). The ALJ found

[19] Employer contends "DOL promulgated section 725.101(a)(32) to provide a uniform definition of a 'year' to determine the length of a claimant's coal mine employment and what operator . . . would be deemed responsible for benefits." Employer's Brief at 26. This regulation provides a "[y]ear means a period of one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). Employer asserts that based on this provision, the Board has consistently held a factfinder should initially determine whether an individual has one year of coal mine employment, or a 365-day period, and then determine whether the miner had at least 125 working days during that year. Employer's Brief at 27-28. Thus, Employer argues "defining a year as 125 days is unreasonable and eliminates any scientific basis for invoking the presumption." *Id.* at 27

[20] "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).

Employer rebutted the presumption that Claimant suffers from clinical pneumoconiosis but did not rebut the presumption that he had legal pneumoconiosis or that no part of his total disability was caused by it. MC Decision and Order at 30, 35.

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 Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Rosenberg and Jarboe.[21] MC Decision and Order at 31-35. Dr. Rosenberg opined the Miner had chronic obstructive pulmonary disease (COPD) caused by smoking and unrelated to coal dust exposure. MC Employer's Exhibits 3 at 31, 48-50; 5 at 9. Similarly, Dr. Jarboe opined the Miner's severe airflow obstruction was due to a combination of smoking and bronchial asthma and not his coal mine employment. MC Employer's Exhibit 4 at 19, 22. The ALJ found their opinions not well-reasoned and inconsistent with the 2001 revised regulations and, therefore, insufficient to satisfy Employer's burden of proof.[22] MC Decision and Order at 31-35.

[21] The ALJ also considered Dr. Burrell's opinion. MC Decision and Order at 31. Dr. Burrell conducted the Miner's DOL complete pulmonary evaluation on October 10, 2011, and submitted a supplemental report after reviewing additional medical records at the request of the district director. MC Director's Exhibits 12, 30, 31. He diagnosed the Miner with chronic obstructive pulmonary disease (COPD) related to coal dust exposure and cigarette smoking. MC Decision and Order at 31; MC Director's Exhibit 12. As his opinion does not aid Employer on rebuttal, we need not address Employer's argument that the ALJ erred in finding his opinion reasoned and documented. *Larioni*, 6 BLR at 1-1278; *see* Employer's Brief at 32-43.

[22] We affirm, as unchallenged, the ALJ's findings that the Miner's treatment records do not support Employer's burden of proof. *See Skrack*, 6 BLR at 1-711; MC Decision and Order at 35.

Contrary to Employer's initial contention, the ALJ did not substitute her opinion for those of the medical experts by evaluating their opinions in conjunction with the preamble to the revised 2001 regulations. Employer's Brief at 31. Rather, she permissibly consulted the preamble as a statement of credible medical research findings the DOL accepted when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.[23] *See Sterling*, 762 F.3d at 491; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

We also reject Employer's assertion that the ALJ applied an improper rebuttal standard by requiring its physicians to "rule out" the possibility that coal dust contributed to the Miner's obstructive lung disease in order to disprove he has legal pneumoconiosis. Employer's Brief at 39-40. The ALJ correctly stated that in order to establish the first method of rebuttal, Employer must establish the Miner did not have legal or clinical pneumoconiosis. MC Decision and Order at 27. The ALJ also properly noted Employer can rebut legal pneumoconiosis by proving the Miner does not have a lung disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id.*, *quoting* 20 C.F.R. §718.201(b). Further, as discussed below, the ALJ ultimately rejected their opinions as not well-reasoned and not because their opinions failed to satisfy a heightened legal standard. *Id*.

Employer also generally contends the ALJ mischaracterized its experts' opinions and did not adequately explain her credibility determinations. Employer's Brief at 30-43. We disagree. The ALJ correctly observed that Drs. Rosenberg and Jarboe eliminated coal dust exposure as a contributing factor for the Miner's COPD, in part, because of his reduced FEV1/FVC ratio on pulmonary function testing, which they opined was inconsistent with an obstructive respiratory impairment due to coal mine dust exposure. MC Decision and Order at 31, 34; MC Employer's Exhibits 3 at 48-50, 4 at 19-22, 5 at 9. The ALJ permissibly discredited their opinions based on the DOL's recognition in the preamble that coal dust exposure may cause clinically significant obstructive lung disease with associated decrements in the FEV1/FVC ratio.[24] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491; MC Decision and Order at 31-32.

[23] We further reject Employer's unsupported assertion that in referencing the preamble in her analysis, the ALJ presumed that "all COPD is caused in part by coal dust inhalation." Employer's Brief at 31.

[24] Employer asserts Dr. Rosenberg relied on medical literature "published after the preamble" to support his conclusion with respect to the FEV1/FVC ratio and that Drs. Rosenberg and Jarboe relied on "real-world principles by applying studies – particularly studies post-dating the preamble – to [the Miner's] specific case." Employer's Brief at 9,

Further, the ALJ permissibly found Drs. Rosenberg and Jarboe did not adequately address the potentially additive effects of coal mine dust exposure and smoking and failed to persuasively explain why coal mine dust exposure did not aggravate the Miner's respiratory impairment. *See* 65 Fed. Reg. at 79,940; *Adams*, 694 F.3d at 801-02; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ permissibly rejected physician's opinion where physician failed to adequately explain why coal mine dust exposure did not exacerbate a claimant's smoking-related impairment); MC Decision and Order at 32-33; MC Employer's Exhibits 4 at 19-22, 5 at 8-10. We therefore affirm the ALJ's finding that Drs. Rosenberg's and Jarboe's opinions are insufficient to disprove legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); MC Decision and Order at 34-35.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within her discretion in rejecting the opinions of Drs. Rosenberg and Jarboe, we affirm her finding that Employer did not disprove legal pneumoconiosis.[25] *See Young*, 947 F.3d at 407-08; MC Decision and Order at 35. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). As the ALJ permissibly found Claimant established the Miner suffered from legal pneumoconiosis, we affirm her determination that Claimant established a change in an applicable condition of entitlement.[26] MC Decision and Order at 26-27.

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38. However, Employer fails to identify any specific recent medical studies they relied on or state how these studies are more reliable than those that the DOL relied on to promulgate its revised regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014). Absent the type and quality of medical evidence sufficient to invalidate the medical studies cited in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *Id*.

[25] Because the ALJ gave permissible reasons for rejecting the opinions of Drs. Jarboe and Rosenberg, we need not address Employer's additional challenges to the ALJ's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); MC Decision and Order at 31-35; Employer's Brief at 30-42.

[26] To the extent Employer suggests that the Section 411(c)(4) presumption cannot establish a change in an applicable condition of entitlement, we reject this assertion. Employer's Brief at 20-23. Several courts have held that invocation of the Section 411(c)(4) presumption satisfies claimant's burden to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See, e.g., E. Assoc. Coal Corp.*

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner's 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)(ii); MC Decision and Order at 37-38. The ALJ permissibly discredited the opinions of Drs. Rosenberg and Jarboe on the cause of the Miner's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to her determination.[27] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); MC Decision and Order at 38. We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption[28] and the award of benefits in the Miner's claim. *See* 20 C.F.R. §718.305(d)(1)(ii); MC Decision and Order at 38.

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v. Director, OWCP [*Toler*], 805 F.3d 502, 511-12 (4th Cir. 2015) (the fifteen-year presumption may be used to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, including the existence of pneumoconiosis); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794 (7th Cir. 2013). Employer points to no case law in the Sixth Circuit to contradict this rationale. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

[27] Drs. Rosenberg and Jarboe did not address whether legal pneumoconiosis caused the Miner's total respiratory disability independent of their conclusions that he did not have the disease. We affirm, as unchallenged, the ALJ's findings that the medical opinions of Drs. Branscomb, Fino, and Dahhan, from the Miner's prior claim, "suffer[ed] from the same infirmities as the opinions of" Drs. Rosenberg and Jarboe. *See Skrack*, 6 BLR at 1-711; MC Decision and Order at 38-39.

[28] Employer contends the ALJ failed to consider that the Miner was disabled by a career-ending accident that predated any of his respiratory or pulmonary issues; thus, it maintains that a pre-existing disability or co-existing non-respiratory impairment precluded the Miner from receiving benefits under the Act. Employer's Brief at 28-30, *citing Dehue Coal Co. v. Ballard*, 65 F.3d 1189 (4th Cir. 1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994). Contrary to Employer's argument, the Sixth Circuit has held that a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See, e.g., Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 216-17 (6th Cir. 1996). Additionally, in claims filed after January 19, 2001, such as this one, a non-pulmonary condition that causes an independent disability unrelated to the miner's

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Lifting Abeyance and Awarding Benefits Under the Automatic Entitlement Provision are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).