U.S. Department of Labor

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

BRB Nos. 19-0289 BLA
and 19-0289 BLA-A

MICHAEL LAY	)	
	)	
Claimant-Respondent	)	
Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY, Self-Insured By ARCH COAL, INCORPORATED	)	DATE ISSUED: 05/22/2020
	)	
Employer/Carrier-Petitioners	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Granting Motion for Reconsideration and Amending Decision and Order, and Order Granting, In Part, Claimant's Petition for Attorney Fees of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Sarah M. Hurley (Kate S. O'Scannlain, 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: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2017-BLA-05944) and Order Granting Motion for Reconsideration and Amending Decision and Order, and claimant appeals the Order Granting, In Part, Claimant's Petition for Attorney Fees of Administrative Law Judge Lauren C. Boucher rendered in a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The Board has consolidated the appeals for purposes of decision only. This case involves a miner's claim filed on April 20, 2016.

This case was initially assigned to Administrative Law Judge Adele Higgins Odegard, who presided over the formal hearing on April 3, 2018.[1] Judge Odegard retired and this case was reassigned to Judge Boucher (the administrative law judge), who issued a Decision and Order Awarding Benefits on November 23, 2018. Judge Boucher credited claimant with at least fifteen years of underground coal mine employment, based on the parties' stipulation, and found he established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). She further found employer did not rebut the presumption and awarded benefits commencing April 2016, when the claim was filed.

Claimant filed a motion for reconsideration, which the administrative law judge granted, agreeing the commencement date for benefits should be November 2013, the date of claimant's earliest qualifying pulmonary function study. In a June 5, 2019 order, the

[1] Administrative Law Judge Lauren C. Boucher was present at the hearing. Decision and Order at 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

administrative law judge granted claimant's counsel a fee of $6,642.50 and $422.42 in expenses.

On appeal, employer argues Judge Boucher's decision must be vacated because Judge Odegard was not appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] In addition, it challenges the constitutionality of the Section 411(c)(4) presumption, and in the alternative contends the administrative law judge erred in finding it did not rebut the presumption.[4] Employer also appeals the administrative law judge's order amending the commencement date for benefits.

Claimant responds, urging affirmance of the award and appealing the administrative law judge's partial denial of his attorney's fee. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's Appointments Clause and Section 411(c)(4) constitutionality arguments[5] and to affirm the administrative law judge's determination of the date for the commencement of claimant's benefits. Employer reiterated its arguments in its reply brief.

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

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

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§718.305(b), 725.309(c); Decision and Order at 14.

[5] On February 10, 2020, the Board issued an Order declining employer's request to hold this case in abeyance pursuant to *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting) and rejecting its argument the Section 411(c)(4) presumption is unconstitutional. *Lay v. Cumberland River Coal Co.*, BRB Nos. 19-0289 BLA and 19-0289 BLA-A (Feb. 10, 2020) (unpub.).

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decisions and orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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, 362 (1965).

Appointments Clause Challenge

Employer asserts Judge Boucher lacked authority to issue her decision because Judge Odegard lacked authority to conduct the hearing. Employer's Brief at 6. Employer therefore contends this case must be remanded to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 5-7. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor administrative law judges,[8] including Judge Odegard, but maintains the ratification was insufficient to cure the constitutional

[6] Because claimant's last coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 7, 8; Hearing Transcript at 41.

[7] *Lucia* involved an Appointments Clause challenge to the selection of a Securities and Exchange Commission (SEC) administrative law judge. 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*, 138 S.Ct. at 2055 (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[8] The Secretary of Labor issued a letter to Judge Odegard 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 a District Chief Administrative Law Judge. This letter is intended to 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 Administrative Law Judge Odegard.

defect because it merely "rubber stamped" Judge Odegard's improper appointment. Employer's Brief at 6.

The Director responds Judge Odegard had the authority to adjudicate this case because the Secretary's ratification brought her appointment into constitutional compliance. Director's Brief at 4-5. She also maintains employer failed to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Id.* at 4, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden 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 administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, under the presumption of regularity, it is presumed 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 administrative law judges in a single letter. Rather, he specifically identified Judge Odegard and indicated he gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Odegard. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Odegard "as an Administrative Law Judge." *Id*.

Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Odegard's appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal,* 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler,* 244 F.3d at 1340. The Secretary's ratification of Judge Odegard's appointment was proper.[9] *See Edmond v.*

[9] Employer does not otherwise challenge Judge Boucher's authority to adjudicate this claim aside from its contention concerning the validity of the Secretary's ratification of Judge Odegard's appointment. *See* Employer's Brief at 5-7. Moreover, we note the

United States, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 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" earlier invalid actions was proper).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,[10] or "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer did not rebut the presumption by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit has held this standard requires employer to show "coal mine employment did not contribute, in part, to [claimant's] alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

Secretary properly appointed Judge Boucher in a letter dated December 21, 2017, effective March 19, 2018. Secretary's December 21, 2017 Letter to Administrative Law Judge Boucher.

[10] 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). This definition encompasses 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 contends the administrative law judge erred in finding the opinions of Drs. Dahhan and Jarboe insufficiently reasoned to disprove claimant has legal pneumoconiosis.[11] Employer's Brief at 12-23. Employer asserts the administrative law judge applied the wrong legal standard, selectively analyzed the evidence, and did not give controlling weight to claimant's treating physician. We disagree.

Employer initially alleges the administrative law judge applied "an erroneous legal standard" by requiring its physicians to prove claimant's impairment is related entirely to cigarette smoking. Employer's Brief at 12-13; Decision and Order at 24. Contrary to employer's contention, she applied the correct standard by requiring employer to affirmatively disprove the existence of pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8; Decision and Order at 14. She permissibly rejected Dr. Dahhan's and Dr. Jarboe's opinions because they failed to adequately explain how they excluded a diagnosis of legal pneumoconiosis. Decision and Order at 24-25.

Drs. Dahhan and Jarboe opined claimant has an obstructive respiratory impairment due solely to smoking. Director's Exhibit 23; Employer's Exhibit 5. As the administrative law judge accurately noted, Dr. Dahhan stated because claimant's pulmonary impairment is obstructive he could eliminate "any interstitial lung disease that could have resulted from inhalation of coal dust as a cause or contributing factor." Decision and Order at 24, *quoting* Director's Exhibit 23. The administrative law judge permissibly discounted his rationale as inconsistent with the regulations and the preamble to the 2001 revised regulations recognizing coal dust exposure can cause either obstructive or restrictive impairments. 20 C.F.R. §718.201(a)(2) ("'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive *or obstructive* pulmonary disease arising out of coal mine employment.") (emphasis added); 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 24.

She also rationally determined Dr. Dahhan's opinion, that claimant's decrease in FEV1 was too great to have been caused by coal mine dust, conflicts with Department-accepted medical science finding coal mine dust exposure can cause significant obstructive disease shown by a reduction in FEV1. 65 Fed. Reg. at 79,943; *see Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at

[11] The administrative law judge also considered Dr. Alam's opinion diagnosing legal pneumoconiosis, claimant's hospital and treatment records, and his CT scans but found they were insufficient to establish rebuttal. Decision and Order at 23, 25-26.

24. Additionally, the administrative law judge permissibly found although Dr. Dahhan explained why claimant's impairment is "*more consistent* with smoking-induced lung disease," he did not adequately explain why coal dust could not also have contributed to his impairment. Decision and Order at 24; *see Barrett*, 478 F.3d at 356. Based on the administrative law judge's reasonable determination that several factors detract from its credibility, we further reject employer's contention she was required to give Dr. Dahhan's opinion "controlling weight" because of his status as claimant's treating physician.[12] Employer's Brief at 14-15; s*ee* 20 C.F.R. §718.104(d)(5) (weight given a treating physician's opinion shall be based on "its reasoning and documentation, other relevant evidence, and the record as a whole"); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade").

Regarding Dr. Jarboe's opinion, the administrative law judge noted correctly he eliminated a legal pneumoconiosis diagnosis, in part, because he found a reduction in claimant's FEV1/FVC ratio on pulmonary function testing to be incompatible with obstruction due to coal mine dust exposure.[13] Decision and Order at 25; Employer's Exhibit 5. The administrative law judge permissibly discredited his opinion as conflicting with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; Decision and Order at 25.

She also permissibly determined Dr. Jarboe's opinion is not sufficiently reasoned because he did not adequately explain why, even if claimant's increased residual volume over time is a "marker" of smoking causation, coal dust could not also have contributed to his respiratory impairment. Decision and Order at 25; *see Barrett*, 478 F.3d at 356. Further, the administrative law judge rationally inferred Dr. Jarboe's conclusions were based in part on the length of time elapsed since claimant was last exposed to coal mine dust and permissibly found his reasoning contrary to the regulations recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable

[12] When evaluating claimant's treatment records, the administrative law judge detailed the duration, frequency, and extent of Dr. Dahhan's treatment of claimant. *See* 20 C.F.R. §718.104(d); Decision and Order at 21, 26; Director's Exhibit 19.

[13] Dr. Jarboe opined "the disproportionate reduction of the FEV1 compared to the FVC seen on several spirograms" indicates claimant's respiratory impairment is due to cigarette smoking, not coal dust. Employer's Exhibit 5.

only after the cessation of coal mine dust exposure."[14] 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); Decision and Order at 25. Because the administrative law judge recognized Dr. Jarboe provided multiple reasons to support his conclusion that coal mine dust exposure did not contribute to claimant's obstructive impairment, we further reject employer's argument the administrative law judge selectively considered his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order at 25; Employer's Brief at 18. Having affirmed the administrative law judge's credibility determinations of the medical opinion evidence, we affirm the administrative law judge's finding employer failed to establish claimant did not have legal pneumoconiosis. Decision and Order at 26; *see* 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[15] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 26-27. Employer argues the administrative law judge erred in using her finding that neither Dr. Dahhan nor Dr. Jarboe credibly disproved the existence of legal pneumoconiosis as the basis for discounting their opinions on disability causation. Employer's Brief at 11-12; Decision and Order at 27. We reject this argument because the administrative law judge permissibly found the same reasons that undercut their opinions claimant does not suffer from legal pneumoconiosis also undercut their opinions his disability is unrelated to it. 20 C.F.R. §718.305(d)(1)(ii); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (physician who fails to diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, cannot be credited on rebuttal of disability causation "absent specific and persuasive reasons");

[14] Dr. Jarboe stated "[t]he evidence shows [claimant] continues to smoke heavily without further exposure to coal mine dust (since 2013)." Employer's Exhibit 5.

[15] Thus, we need not address employer's argument the administrative law judge erred in considering the x-ray evidence and in finding employer did not disprove clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1284 (1983); Decision and Order at 14-23; Employer's Brief at 20-22.

Decision and Order at 27. We therefore affirm the administrative law judge's determination employer failed to prove no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Commencement Date for Benefits

Benefits commence the month in which the claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-604 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the administrative law judge credits establishes the claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The administrative law judge initially found because a pulmonary function study does not establish the cause of total disability, claimant's November 2013 qualifying pulmonary function study was insufficient to prove he was totally disabled due to pneumoconiosis. Decision and Order at 28. Consequently, she awarded benefits commencing April 2016, the month claimant filed his claim. *Id.* Claimant thereafter filed a Motion for Reconsideration, asking the administrative law judge to amend the commencement date for benefits to November 2013 based on his November 12, 2013 qualifying pulmonary function study coupled with his invocation of the Section 718.305 presumption. On reconsideration the administrative law judge granted claimant's motion and amended the commencement date for benefits to November 2013. Order Granting Motion for Reconsideration at 7.

Employer contends the administrative law judge erred because the November 2013 pulmonary function study does not establish disability and causation on a specific date as Section 725.503(b) requires and therefore the proper commencement date for benefits is April 2016. Employer's Brief at 25. Employer also argues claimant forfeited this issue because he did not properly raise it before the district director or administrative law judge, and asserts claimant was not disabled in November 2013 because he continued to work as a miner. *Id.* at 23-26.

The Director urges the Board to affirm the administrative law judge's finding claimant is entitled to benefits as of November 2013 because, under the facts of this case, claimant established all elements of entitlement through application of the Section 411(c)(4) presumption as of November 2013. 30 U.S.C. §921(c)(4) (2012); Director's Brief at 6-9. We agree.

The administrative law judge correctly found, and employer does not contest, claimant has been continuously disabled from a pulmonary standpoint since November 2013 based upon the uniformly qualifying pulmonary function studies and unanimous medical opinion evidence of record.[16] *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Order Granting Motion for Reconsideration at 7. Given her finding claimant has been continuously disabled from a pulmonary standpoint since November 2013, the administrative law judge correctly found the conclusions the fifteen-year presumption established applied to the entire period of claimant's disability. Order Granting Motion for Reconsideration at 6-7. Thus, the administrative law judge permissibly concluded claimant proved his compensable totally disabling lung disease began in November 2013 and it is appropriate benefits be paid beginning that month. *See* 20 C.F.R. §725.503(b); *see also Ogle*, 737 F.3d at 1069 (once miner establishes fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, the rest of the elements of entitlement are presumed); Order Granting Motion for Reconsideration 6-7; Director's Brief at 6-9.

We also reject employer's argument claimant did not properly raise the issue of the commencement of benefits date before the district director or administrative law judge, and therefore forfeited this issue. Employer's Brief at 23-24. Claimant timely made employer aware he believed the correct commencement date for benefits is November 2013 by submitting the November 2013 pulmonary function study as evidence before the district director and administrative law judge. *See* Director's Exhibit 19 at 114. Additionally, claimant timely asserted his contention by submitting a letter to the district director stating he was disabled as of the November 12, 2013 pulmonary function study and he sufficiently argued the issue in his post-hearing brief before the administrative law judge. *See* 20 C.F.R. §725.463(a) (permits consideration of issues raised in writing before the district director); *Hamer v. Neighborhood Housing Serv. of Chicago*, 138 S. Ct. 13, 17 & n.1 (2017) (failure to make the timely assertion of a right results in forfeiture); Director's Exhibit 20; Claimant's Post-Hearing Brief at 26.

Nor is there any merit to employer's contention claimant was not disabled in November 2013 because he was still working as a miner based on his 2014 W-2 Wage and Tax Statement which indicates $10,228.81 in wages, tips and other compensation from Cumberland River Coal Co. Employer Brief at 28-29; Director's Exhibit 7. Employer

[16] The non-qualifying blood gas study does not contradict the qualifying pulmonary function studies because the two tests measure different aspects of pulmonary function. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 798 (1984); Order Granting Motion for Reconsideration at 4, 7.

acknowledged in its post-hearing brief that claimant's coal mine dust exposure ceased in November 2013, claimant has consistently maintained the same, and Dr. Dahhan noted claimant stopped working on November 21, 2013. Employer's Post-Hearing Brief at 10; Hearing Transcript at 30; Director's Exhibits 3, 4, 19 at 100. We therefore affirm the administrative law judge's finding that benefits commence as of November 2013. 20 C.F.R. §725.503(b).

Attorney's Fees

Claimant appeals the administrative law judge's fee order, arguing the administrative law judge erred in declining to award fees for time his counsel spent defending his fee petition. Claimant's Brief at 25. The administrative law judge disallowed fees associated with counsel's drafting of his reply brief to employer's opposition to the fee petition because, pursuant to 29 C.F.R. §18.33(d), reply briefs are generally not permitted and she did not grant claimant permission to file a reply brief. Order Granting, In Part, Claimant's Petition for Attorney Fees at 5. Claimant argues this was reversible error, as the plain language of this section refers to prehearing motions and the response brief at issue here occurred post-hearing. Claimant's Brief at 25-26.

We agree with claimant's counsel that the regulation the administrative law judge cited is inapplicable, as it pertains to responses "filed prior to hearing," 29 C.F.R. §18.33(d).[17] As counsel's response was not a pre-hearing submission, the administrative law judge erred in applying this regulation. *Id.* Thus, we vacate the disallowance of fees for time spent preparing counsel's reply brief and remand this case for consideration of

[17] 29 C.F.R. §18.33(d) (2015) states:

> (d) *Opposition or other response to a motion filed* ***prior to hearing***. A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

(bold and underlining added).

the reasonableness of the time spent preparing it. In all other respects, the administrative law judge's Order Granting, In Part, Claimant's Petition for Attorney Fees is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order are affirmed. The Order Granting, In Part, Claimant's Petition for Attorney Fees is affirmed in part and vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge