U.S. Department of Labor

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

BRB No. 20-0229 BLA

DAVID M. HOWARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	DATE ISSUED: 10/18/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
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 of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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) Lauren C. Boucher's Decision and Order Awarding Benefits (2017-BLA-05163) rendered on a claim filed on November 19, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal, Inc. (Arch) is the responsible carrier because it self-insured Apogee on the last day of Claimant's coal mine employment with Apogee. She determined Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she concluded Claimant 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).[1] Further, she found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to ALJs violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It also argues the ALJ erred in finding Arch is the liable insurance carrier. On the merits, it contends she erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Finally, it argues she erred in determining it did not rebut the presumption.[3] Claimant has not filed a response brief.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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); *see* 20 C.F.R. §718.305.

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

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

U.S. Const. art. II, § 2, cl. 2.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenge. Further, the Director urges the Board to affirm the ALJ's determination that Apogee is the responsible operator and Arch is liable for the payment of benefits. Finally, the Director contends Employer's argument on the merits with respect to the issue of total disability is not persuasive. Employer has filed a reply brief reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 16-19. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 16-19. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 16-19.

Employer's arguments are not persuasive, as the only circuit court to squarely address this precise issue with regard to Department of Labor (DOL) ALJs 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).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 21, 42.

[5] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, 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)).

Further, in rejecting a similar argument raised regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise Fund*[6] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Id.* (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021)). Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Id*. at 315-16. Employer in this case has not alleged it suffered any harm due to the ALJ's removal protections.

Nor do *Seila Law* or *Arthrex* support Employer's argument. In *Seila Law*, the Supreme 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 because the CFPB was an "independent agency led by a single Director and vested with significant executive power."[7] 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 1970. The Court explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

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[6] 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. 477, 496 (2010). The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" 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.

[7] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau 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).

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 resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. 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 5 U.S.C. §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 1137-38.

Responsible Insurance Carrier

Claimant last worked in coal mine employment for Apogee from 1993 to 1997.[8] Director's Exhibit 6. Apogee was self-insured through Arch when Claimant last worked for Apogee. Employer's Brief at 34; Director's Response at 2. In 2005, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 2-3; Director's Response at 2; Director's Exhibit 49 at 31, 34. In 2015, Patriot went bankrupt. Director's Exhibit 32.

Employer does not directly challenge Apogee's designation as the responsible operator. Rather, it argues DOL violated its due process rights by failing to designate Arch as a responsible carrier in the district director's Proposed Decision and Order (PDO) and then seeking to impose liability on Arch at a later time. Employer's Brief at 19-21. In addition, Employer contends DOL did not serve the PDO on Arch. *Id.*

Next, Employer argues the ALJ erred in finding Arch is the responsible carrier liable for this claim. Employer's Brief at 2-3, 22-25, 32-35. It maintains that when Arch sold Apogee in 2005 and then renewed its self-insurance authorization with DOL in 2006, it excluded Apogee as a covered entity. *Id.* at 2-3. Therefore Employer contends Arch no longer provided insurance coverage "for any employee of Apogee no matter when they worked." *Id.* at 2-3. Employer asserts the sale of Apogee to Magnum on December 31,

[8] Claimant's Social Security Administration earnings record shows income from Apogee c/o Arch from 1993 to 1997. Director's Exhibit 7. Employer concedes Arch self-insured Apogee until December 31, 2005. Employer's Brief at 34.

2005, released Arch from liability for the claims of miners who worked for Apogee, and that DOL endorsed this shift of liability. *Id.*

In addition, Employer argues DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[9] reflects a change in policy wherein DOL began to retroactively impose new liability on self-insured mine operators and bypass traditional rulemaking. Employer's Brief at 32-35. Finally, Employer contends the ALJ abused her discretion in denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id.* at 26-32.

The Director responds, noting the PDO lists Arch as the responsible carrier and the district director served the PDO on Arch. Director's Response at 13-15. The Director argues the ALJ did not err in finding Apogee is the responsible operator and Arch is the self-insurer for this claim. *Id.* at 15-18. Moreover, he asserts the ALJ did not abuse her discretion in denying Employer's untimely request for discovery relating to its liability. *Id.* at 19-21. Finally, the Director argues the Board should reject Employer's challenges to the BLBA Bulletin No. 16-01. *Id.* at 21-24.

Relevant Procedural History

Although the district director initially issued a Notice of Claim on December 9, 2014, to Apogee, self-insured through Patriot, she subsequently issued a second Notice of Claim on December 8, 2015, to Apogee, self-insured through Arch. Director's Exhibits 21, 22. The Notice gave Employer thirty days to respond and ninety days to submit liability evidence. Director's Exhibit 22. Employer timely responded through its third-party administrator, Underwriters Safety & Claims, and denied liability. Director's Exhibit 24. It asserted, in part, that Apogee had become a subsidiary of Patriot and thus Patriot was the proper self-insurer, but it did not submit any evidence to the district director nor any discovery requests on the Director at that time. *Id.*

On March 17, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch, as the responsible operator and carrier. Director's Exhibit 27. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until May 16, 2016, to do so. *Id.* Moreover, the district director advised that "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id.*

[9] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015 to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

at 2-3 (citing 20 C.F.R. §725.456(b)(1)). On April 11, 2016, Arch responded, arguing the district director had improperly named Apogee and Arch as parties to the claim. Director's Exhibit 29. It also designated Claimant as a potential hearing witness pertaining to its liability. *Id*. But again, it submitted no documentary evidence to the district director, nor any discovery requests on the Director.

The district director issued a PDO awarding benefits on September 26, 2016, listing Apogee in the caption as the responsible operator. Director's Exhibit 44 at 2. In the summary of the medical and employment evidence section of the PDO, the district director stated Apogee was "self-insured through Arch" and thus Arch is the insurance carrier. *Id*. at 7. In the liability analysis section of the PDO, the district director stated Apogee meets all the criteria of being a potentially liable operator and was the last potentially liable operator that employed Claimant. *Id*. at 11. In addition, the district director stated:

> A Notice of Claim was received by the potentially liable operator/carrier, [s]elf-insured thru Patriot Coal Company, on December 11, 2014, as evidenced by the signed return receipt from the post office. The potentially liable operator/carrier has failed to timely submit evidence to support its position or to timely request an extension of the period of time for submission of such evidence.

Id. The district director served the PDO by certified mail on Apogee, Arch, Arch's attorney, and Arch's third-party administrator as evidenced by certified mail numbers and return receipts. *Id*. at 5, 14, 19-23.

Employer objected to the award of benefits and requested a formal hearing before an ALJ. Director's Exhibit 45. Thereafter the case was transferred to the OALJ.[10] Director's Exhibit 47.

The record does not reflect, nor does Employer argue, it submitted any liability evidence to the district director or any liability-related discovery requests on the Director prior to the above-stated deadlines. Nor did it request any extensions of time while the claim was before the district director. Further, Employer did not designate any liability witnesses other than Claimant.

On April 29, 2019, Employer requested – for the first time in this claim – that the ALJ issue subpoenas compelling DOL Office of Workers' Compensation Programs

[10] This case was initially assigned to ALJ Scott R. Morris, but subsequently reassigned to ALJ Boucher.

employees Michael Chance and Kim Kasmeier to give deposition testimony related to Arch's liability and provide related documentary evidence. The Director objected.

The ALJ quashed the subpoenas. She first concluded the requested documents were inadmissible because the regulations mandate she exclude liability evidence not first submitted to the district director, unless extraordinary circumstances are established. *See* 20 C.F.R. §§725.414(d), 725.456(b)(1); May 28, 2019 Order Denying Request for Subpoenas (May 28, 2019 Order); June 17, 2019 Order Granting Motion to Reconsider and Denying Request for Subpoenas (June 17, 2019 Order). The ALJ also ruled Employer is precluded from deposing the two DOL employees because the regulations require it to designate liability witnesses while the claim is before the district director, which Employer failed to do with respect to Mr. Chance and Ms. Kasmeier. 20 C.F.R. §725.414(c); May 29, 2019 Order; June 17, 2019 Order. Further, the ALJ found Employer did not establish extraordinary circumstances for failing to submit liability evidence or to designate Mr. Chance and Ms. Kasmeier as liability witnesses before the district director. 20 C.F.R. §§725.414(c), 725.456(b)(1); May 29, 2019 Order; June 17, 2019 Order.

On June 19, 2019, Employer moved to transfer liability to the Black Lung Disability Trust Fund. It argued the district director did not give Arch proper notice of the claim because she designated Patriot as the responsible carrier in the PDO. Thus it argued Arch should not be held liable as a responsible carrier. The ALJ denied the motion, finding no merit in Employer's arguments. July 10, 2019 Order Denying Employer's Motion to Transfer Liability (July 10, 2019 Order) at 3.

Finally, at the hearing for this claim, Employer submitted documentary evidence related to liability, marked Employer's Exhibits 12 through 17 and 21, and deposition testimony obtained in other cases from former Division of Coal Mine Workers' Compensation employees David Benedict and Steven Breeskin, marked Employer's Exhibits 19 and 20. The ALJ excluded the documentary evidence because she found it was not submitted to the district director and Employer did not establish extraordinary circumstances for failing to do so. 20 C.F.R. §725.456(b)(1); Hearing Transcript at 13-16. In addition, the ALJ excluded the depositions of Mr. Benedict and Mr. Breeskin because Employer neither identified them as liability witnesses before the district director nor established extraordinary circumstances for failing to do so. 20 C.F.R. §725.414(c); Hearing Transcript at 13-16.

In her Decision and Order, the ALJ concluded Apogee, self-insured through Arch, is the responsible operator and carrier. Decision and Order at 27-23.

Due Process Violation

We first address Employer's due process arguments. Due process requires only that a party be given notice and the opportunity to respond. *See Arch of Ky., Inc. v. Director,*

OWCP [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). Employer argues the district director failed to properly serve Arch with the PDO and thereby violated its due process rights. Employer's Brief at 19-21. It contends there "is no evidence of how or even whether [Arch] was served with the PDO."[11] *Id*. The record belies this contention.

The ALJ accurately found the PDO's "service sheet and certified mail receipts reflect [it] was served on [both] Apogee and Arch via certified mail."[12] July 10, 2019 Order at 2 (citing Director's Exhibit 44 at 5, 14, 19, 23). Moreover, as Arch timely responded to the PDO and controverted its liability, it actively participated in the claim when it was before the district director. Director's Exhibits 24, 29, 45. Thus we reject Employer's argument that the district director failed to properly serve the PDO on Arch. *Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84; *Dominion Coal Corp. v. Honaker*, 33 F.3d 401, 404 (4th Cir. 1994) ("When the record establishes actual notice, the purpose of the statutory certified mail requirement has been met."); 20 C.F.R. §§725.360(a)(4), 725.407(b), 725.418(d).

Employer also maintains the district director named Patriot, not Arch, as the responsible carrier in the PDO. Employer's Brief at 19-21. It contends because "Arch was not named as the responsible [carrier] in the PDO," it "cannot be held liable" after this claim was transferred to the OALJ. *Id*. This argument has no merit.

The ALJ acknowledged the PDO references Patriot insofar as the district director stated Employer never responded to the December 9, 2014 Notice of Claim sent to Apogee, self-insured through Patriot. July 10, 2019 Order at 2-3. She correctly found, however, that the "heading of the summary of evidence [section] associated with the PDO lists Apogee as the [responsible] operator and Arch as the insurance carrier." *Id*. at 2 (citing Director's Exhibit 44 at 7). Further, she found "the 'Certificate of First Payment of Benefits' to be filed by the responsible operator or carrier lists Apogee as the operator and Arch as the insurance carrier." *Id*. (quoting Director's Exhibit 44 at 15). She recognized

[11] Employer does not dispute the district director served the December 8, 2015 Notice of Claim and the SSAE on Arch, Arch's counsel, and Arch's third-party administrator. *See* Employer's Brief at 22; Director's Exhibits 22, 27.

[12] The district director stated she served Apogee, Arch, Arch's counsel, and Underwriters Safety & Claims by certified mail, and the Proposed Decision and Order (PDO) includes certified mail numbers and receipts for all four recipients. Director's Exhibit 44 at 5, 14, 19-23. The return receipt for Arch indicates the PDO was delivered to it on October 3, 2016. Director's Exhibit 44 at 19.

that on "October 5, 2016, Arch (through counsel) responded to the PDO, requested a hearing, and noted that 'DOL incorrectly named it as a party.'" *Id*. (quoting Director's Exhibit 45). The ALJ rationally found "a fair reading of the PDO and associated documents leads to the conclusion that Arch was named as the self-insurer, and the lone reference to Patriot in the analysis section was a typographical error." *See United States v. Hython*, 443 F.3d 480, 488 (6th Cir. 2006) ("failure to amend the affidavit was nothing more than 'a scrivener's error'" and thus of no legal consequence); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002). Thus we reject Employer's due process argument as it relates to the PDO.

Exclusion of Evidence

Employer next contends the ALJ erred in quashing its subpoenas for testimony and documents from Mr. Chance and Ms. Kasmeier and in otherwise excluding evidence relevant to Bulletin No. 16-01. Employer's Brief at 25-32. It asserts the evidence it was seeking to obtain and have admitted into the record does not relate to its liability as an insurance carrier, but instead relates to whether the Director improperly changed DOL's policy through the issuance of Bulletin No. 16-01 and issued a rule in violation of the APA. *Id*. The Director responds the ALJ did not abuse her discretion in determining this constitutes liability evidence and finding Employer did not establish extraordinary circumstances for its failure to designate witnesses and submit documentary evidence while the case was before the district director. Director's Response at 19-21. We agree with the Director's argument.

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an "abuse of . . . discretion." *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The ALJ acknowledged Employer's argument that its discovery request did not pertain to the issue of liability, but rather whether DOL violated the notice and comment provisions of the APA when it issued Bulletin No. 16-01. June 17, 2019 Order at 2. Regardless of how Employer characterized its argument, however, the ALJ correctly found its defense only relevant to whether the designated responsible carrier is liable for the payment of benefits. June 17, 2019 Order at 2-6. In *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018), the United States Court of Appeals for the District of Columbia Circuit rejected Arch's argument that its challenge to Bulletin 16-01 is "wholly collateral" to the Act's statutory review scheme. *Acosta*, 888 F.3d at 502. Because Bulletin No. 16-01 is not a substantive rule that had to comply with the notice and comment provisions of the APA, the court concluded Arch's challenge to it is one that Congress intended to be

reviewed within the Act's "detailed and comprehensive process for adjudicating black lung benefits claims." *Id.* at 499-505.

Thus Employer had to submit its evidence in compliance with the applicable regulations. Because the district director must identify the responsible operator or carrier before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, liability evidence pertaining to the responsible carrier must be timely submitted to the district director; moreover, a party must identify any potential liability witnesses before the district director.[13] 20 C.F.R. §§725.414(c), 725.456(b)(1). The ALJ found "the record does not reflect Employer identified either Mr. Chance or Ms. Kasmeier as a potential witness on the issue of liability at any time while this claim was pending before the district director." June 17, 2019 Order at 4; *see also* Hearing Transcript at 13-16. She also found no indication that while the case was before the district director Employer submitted any evidence "on the issue of liability or propounded any discovery requests on the [DOL] for documents relevant to the issue of liability." *Id.* Employer does not dispute it did not submit any liability evidence or designate any liability witnesses, other than Claimant, while this claim was before the district director.[14] Thus we see no abuse of discretion in the ALJ's finding that Employer was required to establish extraordinary circumstances to admit this evidence. *Blake*, 24 BLR at 1-113.

[13] The ALJ correctly rejected Employer's argument that "the regulations governing the admissibility of liability evidence address the liability of an operator, not a carrier." June 17, 2019 Order at 4. A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations therefore specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend on the question of its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Osborne*, 895 F.2d at 952.

[14] Employer argues the United States Court of Appeals for the District of Columbia Circuit "guaranteed" Arch the "right to develop evidence" challenging Bulletin No. 16-01 in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018). Employer's Reply Brief at 11-12 (unpaginated). Contrary to Employer's argument, the court explained "Arch is entitled to reasonable discovery before the Department to the full extent allowed by the [Act] and its *implementing regulations*." *Acosta*, 888 F.3d at 502 (emphasis added). Employer's failure to follow the applicable regulations by submitting liability evidence or designating liability witnesses before the district director undermines its argument that its due process rights have been violated. *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009).

The ALJ addressed Employer's assertion that extraordinary circumstances exist because "the Director has not complied with Employer's discovery requests in other cases." June 17, 2019 Order at 5; *see* Employer's Brief at 32 n.9. She rationally rejected this argument because "[t]he Director's actions in separate claims . . . have no bearing on how the regulations apply to the evidence in this claim." June 17, 2019 Order at 6; *see Blake*, 24 BLR at 1-113. As Employer raises no other specific argument, we affirm the ALJ's exclusion of Employer's liability evidence.[15] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); June 17, 2019 Order at 4-6. Because Employer had the opportunity to submit discovery requests regarding documentary liability evidence, submit any such documentary evidence it received or possessed, and identify liability witnesses before the district director, and it failed to do so, we reject its due process arguments.[16] *Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84; Employer's Brief at 25-32.

Arch's Liability

Employer argues the ALJ erred in finding Arch is the responsible carrier. Employer's Brief at 22-35. The ALJ found Apogee qualifies as a potentially liable operator because it is undisputed: (1) Claimant's disability arose at least in part out of his employment with it; (2) Apogee operated a mine after June 30, 1973; (3) Apogee employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Apogee was self-insured through Arch on Claimant's last day of coal mine employment with Apogee and therefore is capable of assuming liability. 20 C.F.R. §725.494(a)-(e); Decision and Order at 30. Because Apogee was the last potentially liable operator to employ Claimant, the ALJ designated Apogee as the responsible operator and Arch as the responsible carrier. 20

[15] Although the ALJ's June 17, 2019 Order pertained to the subpoenas and documents Employer sought with respect to Mr. Chance and Ms. Kasmeier, the ALJ applied the same rationale for excluding the liability evidence and deposition testimony of Mr. Benedict and Mr. Breeskin that Employer moved to have admitted at the hearing for this claim. Hearing Transcript at 13-16. Thus we affirm the ALJ's exclusion of Employer's Exhibits 12-17, 19-21.

[16] Employer states that subjecting the development of its liability evidence to the regulatory time constraints would render "the district director an inferior officer in violation of *Lucia*." Employer's Brief at 32 n.9. It also argues the regulations "divest the ALJ of her powers, duties, and responsibilities including accepting and overseeing disputes concerning evidence." *Id.* (internal quotations omitted). As Employer has offered no explanation or argument to support these assertions, we decline to address them as inadequately briefed. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Cox v. Benefits Review Bd.*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

C.F.R. §725.495(a)(1); Decision and Order at 30. She also found Employer did not present any evidence that Arch is unable to assume liability if Claimant is found eligible for benefits. 20 C.F.R. §§725.494(e), 725.495(c); Decision and Order at 30. Therefore, she found Employer met the requirements for liability under the Act. Decision and Order at 30.

Employer argues the Director did not meet his burden to establish Arch's self-insurance authorization covers this claim. Employer's Brief at 22-25. As the ALJ correctly held, Employer "misconstrues the burdens of the parties involved in this case."[17] Decision and Order at 30. The Director bears the burden of establishing the named responsible operator meets the criteria for being a potentially liable operator as set forth in 20 C.F.R. §725.494(a)-(e). *See* 20 C.F.R. §725.495(b). However, "in the absence of evidence to the contrary," the regulation presumes the designated responsible operator is capable of assuming liability for the payment of benefits.[18] *Id*. The named responsible operator may be relieved of liability only if it shows either it is financially incapable of assuming liability

[17] Employer cites 20 C.F.R. §725.495(d) to support its contention that the Director bears the burden of establishing that Arch's self-insurance authorization covers this claim. Employer's Brief at 22. Its reliance on this regulation is misplaced. If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*. No operator employed Claimant after Apogee. Thus 20 C.F.R. §725.495(d) is inapplicable.

[18] An operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was authorized to self-insure during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to 20 C.F.R. §726.104(b) is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). Insurance coverage for black lung benefits exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured. 20 C.F.R. §726.203(a).

or another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c).

Employer does not dispute Arch provided self-insurance coverage to Apogee on Claimant's last date of employment with it.[19] 20 C.F.R. §§725.494(e), 726.203(a). Rather, it argues the ALJ erred in finding that self-insurance coverage applies to this claim. Employer's Brief at 32-35; Employer's Reply Brief at 5-8 (unpaginated). It asserts self-insurance liability is triggered by the date a claim is filed, whereas commercial insurance liability is triggered by the date of a miner's last coal mine employment. *Id*. To support this argument, Employer notes the regulations "set forth two distinct regulatory systems," with self-insurance regulations found at 20 C.F.R. §§726.101-726.115 and commercial insurance regulations found at 20 C.F.R. §§726.201-726.213. Employer's Brief at 32-35. Citing 20 C.F.R. §726.203(a), Employer asserts liability for commercial insurance is triggered if a policy is in place "on the date of the miner's last day of employment in the mines." Employer's Brief at 32-35. Insofar as no similar provision is found within the regulations applicable to self-insurance, Employer contends applying 20 C.F.R. §726.203(a) to self-insurers "eliminates the distinction between commercial and self-insurance set forth in the regulations as well as the case law." *Id*.

But as the ALJ correctly found, there is no regulatory authority to support Employer's argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment. Decision and Order at 33. She correctly found the regulations at 20 C.F.R. §§726.101-726.115 govern "only how an operator must secure its existing liability" and do not "create liability." *Id*. Arch does not dispute that it qualified as a self-insurer and its self-insurance coverage included Apogee when Apogee last employed Claimant.

Employer next argues that, in other cases, DOL historically has placed liability on self-insured parent companies based on the date of filing of the claim. Employer's Brief at 26-27. We agree with the Director's position that Employer has failed to show the Director changed its policy in naming Arch as the responsible carrier. Director's Response

[19] Employer argues that in "other cases" the district director has improperly designated Arch as the responsible operator to hold it liable for claims. Employer's Brief at 23-24. It further contends the district director improperly "pierce[d] Arch's corporate veil [to] hold it responsible for" Apogee's employee, Claimant. Employer's Brief at 25 (citing 20 C.F.R. §725.493(b)(2)). But as the ALJ correctly held, the district director did not name Arch as the responsible operator in this case. Decision and Order at 31-32. Nor did she rely on 20 C.F.R. §725.493(b)(2) to determine Arch is liable. *Id*. Rather, she determined Arch "bears liability for this claim as Apogee's self-insurer, not as the responsible operator." *Id*.

at 22. Employer cites three cases in which a district director named either Patriot or Magnum as the responsible carrier. Employer's Brief at 26-27 (citing *Massey v. Apogee Coal*, 2019-BLA-05144; *Creech v. Apogee Coal*, xxx-xx-6408 LM C; *Allen v. Hobet Mining*, 2019-BLA-06231). But in each of those cases, either Patriot or Magnum owned the subsidiary, was insured or self-insured, and was financially capable of paying benefits. Director's Response at 22. In this case, however, Patriot is no longer capable of paying benefits, reflecting a change in circumstances rather than a change in DOL's policy.

Employer further argues the Director released Arch from liability because DOL approved Arch's agreement not to insure Apogee's liabilities after December 31, 2005. Employer's Brief at 1-2, 34-35 (citing Employer's Exhibits 13-17); Employer's Reply Brief at 8-9 (unpaginated). But the ALJ permissibly excluded as untimely the only evidence Employer cites to support this argument. June 17, 2019 Order; Hearing Transcript at 13-16. Thus we reject this argument.[20]

BLBA Bulletin No. 16-01

Employer argues DOL's issuance of BLBA Bulletin No. 16-01 constitutes a new "rule" retroactively imposing new liability on self-insured mine operators in violation of the APA. Employer's Brief at 34-35.

As the ALJ correctly found after considering the evidence properly admitted into the record, Arch's liability is established under the Act and regulations, not by BLBA Bulletin No. 16-01 or any internal DOL policy; therefore Bulletin No. 16-01 "is immaterial." Decision and Order at 31-32 n.22; *see* 20 C.F.R. §§725.494-495. She found Employer meets all the requirements of a potentially liable operator: Claimant's total disability is presumed to have arisen at least in part out of his coal mine work for Apogee; Apogee was an operator after June 30, 1973; Claimant worked for Apogee for a cumulative period of not less than one year; Claimant's employment with Apogee included at least one working day after December 31, 1969; and Apogee is able to pay benefits through Arch. 20 C.F.R. §725.494; Decision and Order at 30. Further, she found Apogee is the last potentially liable operator to employ Claimant. 20 C.F.R. §725.495; Decision and Order

[20] For the same reasons, we reject Employer's argument that Patriot Coal should have been held liable for this claim. Employer's Brief at 22-23 (arguing the Director has not "explain[ed] why [he] did not pursue Patriot" as the responsible carrier). DOL's authorization for Patriot to self-insure for claims retroactive to July 1, 1973, does not release Arch from liability. 30 U.S.C. §932(a), (b); 20 C.F.R. §726.110(a)(1). Moreover, as the Director correctly notes, Claimant retired eleven years before Patriot purchased Apogee and thus never worked for Patriot. Director's Response at 16-17.

at 30. As Employer has not challenged any of these findings, we affirm them. *Skrack*, 6 BLR at 1-711.

Moreover, the D.C. Circuit rejected Employer's argument that Bulletin No. 16-01 constitutes a substantive rule affecting Arch's rights and interests or governing its liabilities in any given case. *Acosta*, 888 F.3d at 500-01. We therefore reject Employer's challenges to its liability based on Bulletin No. 16-01.

In light of the foregoing, we affirm the ALJ's finding that Apogee, as insured by Arch, is liable for the payment of benefits. 20 C.F.R. §§725.494, 725.495; Decision and Order at 30.

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 and comparable gainful work. 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 the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions, and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 4 n.3, 5.

Employer acknowledges it "conceded" before the ALJ that Claimant is totally disabled based on the pulmonary function studies and medical opinions. Employer's Brief at 4; *see* Employer's Post-Hearing Brief at 6. Nonetheless, it now argues the ALJ failed to consider that Claimant is totally disabled from working as a coal miner due to neck, back, and knee injuries and thus is not entitled to benefits. Employer's Brief at 35-37.

Employer advocates applying *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), but that decision interpreted a prior version of 20 C.F.R. §718.204 (1999), and the Board has declined to apply *Vigna* to cases, like this one, arising in jurisdictions outside of the Seventh Circuit. *See Bateman v. E. Assoc. Coal Corp.*, 22 BLR 1-255, 1-267 (2003). Moreover, DOL explicitly rejected the premise that a non-pulmonary disability precludes entitlement when it promulgated the 2001 revised regulations. 20 C.F.R. §718.204(a) ("any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall

not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]"). For these reasons, we reject Employer's argument.

As Employer raises no further argument regarding total disability, we affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 5.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[21] 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)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[22]

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). The United States Court of Appeals for the Sixth Circuit requires Employer to establish Claimant'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

[21] "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).

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

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 medical opinions of Drs. McSharry and Rosenberg to disprove legal pneumoconiosis. Director's Exhibit 18; Employer's Exhibits 3, 6, 9, 24.

Dr. McSharry diagnosed Claimant with an obstructive lung impairment and a restrictive lung impairment. Employer's Exhibit 3. He attributed the impairments to cigarette smoking and opined they are unrelated to coal mine dust exposure. *Id.* Dr. Rosenberg diagnosed Claimant with tobacco-induced chronic obstructive pulmonary disease (COPD) and emphysema. Director's Exhibit 18; Employer's Exhibits 6, 9, 24. He initially opined these conditions are significantly related to Claimant's coal mine dust exposure, Director's Exhibit 18; Employer's Exhibits 6, 9, but ultimately changed his opinion and concluded they are unrelated to coal mine dust exposure and thus Claimant does not have legal pneumoconiosis. Employer's Exhibit 24.

The ALJ found Dr. McSharry's opinion inadequately reasoned and inconsistent with the regulations. Decision and Order at 24-25. She found Dr. Rosenberg's opinion internally inconsistent and inadequately reasoned. *Id*. at 23-24.

We first reject Employer's argument that the ALJ erred in discrediting Dr. McSharry's opinion. Employer's Brief at 39-40. Dr. McSharry opined that when coal mine dust exposure causes a mixed obstructive and restrictive lung impairment, it is "almost universally associated with severe radiographic changes of pneumoconiosis," which were not present in this case. Employer's Exhibit 3 at 2. Contrary to Employer's contention, the ALJ permissibly found this reasoning unpersuasive because the regulations provide a claim shall not be denied solely on the basis of a negative chest x-ray and further recognize legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 24-25.

Dr. McSharry also acknowledged it is "possible" coal mine dust exposure contributed to or aggravated Claimant's lung impairments, but he determined there is "no compelling evidence" that it did so in this case and thus it is "unlikely" Claimant has legal pneumoconiosis. Employer's Exhibit 3 at 3. The ALJ noted the preamble[23] to the 2001

[23] Contrary to Employer's contention, an ALJ may evaluate expert opinions in conjunction with the preamble to the 2001 revised regulations, as it sets forth studies the DOL found credible and the DOL's resolution of scientific questions relevant to the regulations. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491

revised regulations cites medical studies, which DOL found credible, concluding that the risks of smoking and coal mine dust exposure may be additive. 65 Fed. Reg. at 79,941 (risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 25. Further, she recognized legal pneumoconiosis is presumed because Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 25. The ALJ acted within her discretion in finding Dr. McSharry's opinion unpersuasive because he did not sufficiently explain why Claimant was not suffering "from both tobacco-related and coal mine dust-related lung disease, or why Claimant's coal dust exposure did not substantially exacerbate any tobacco related lung disease." *Id*.; *see Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 20 C.F.R. §718.201(a)(2), (b).

Employer next argues the ALJ erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 40-41. We are not persuaded by this argument.

In his first three medical reports dated May 10, 2016, April 13, 2017, and November 2, 2017, Dr. Rosenberg stated he could not exclude legal pneumoconiosis because the pattern of obstruction present on Claimant's pulmonary function testing reveals a severely reduced FEV1 value but a mildly reduced FEV1/FVC ratio, indicating coal mine dust exposure contributed to Claimant's smoking-related COPD. Director's Exhibit 18; Employer's Exhibits 6 at 1-4; 9. However, in his final report dated June 17, 2019, Dr. Rosenberg opined the pattern of Claimant's obstructive impairment is inconsistent with legal pneumoconiosis. Employer's Exhibit 6 at 5-16.

Although, in his deposition, Dr. Rosenberg explained his change of opinion by testifying "over time [he] had more information to look at," Employer's Exhibit 24 at 36, the ALJ found "it does not appear that Dr. Rosenberg reviewed any additional [pulmonary function study] results" between his November 2, 2017 report and his final June 17, 2019 report.[24] Decision and Order at 23. The ALJ permissibly found Dr. Rosenberg's opinion

(6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Brief at 37-38. Although Employer contends it submitted medical evidence contrary to the medical science set forth in the preamble, it does not specifically identify what evidence it submitted. Employer's Brief at 40. Thus we reject this argument. *Samons v. Nat'l Mines Corp.*, 25 F.4th 455, 466-67 (6th Cir. 2022); *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[24] The ALJ specifically noted that, in his final June 17, 2019 report, "Dr. Rosenberg references Dr. McSharry's November 2016 pulmonary function [study], Dr. Ajjarapu's April 2017 pulmonary function [study], and 2016 pulmonary function [studies] contained in Claimant's treatment records from St. Charles Breathing Center." Decision and Order at 23. She further pointed out, however, that Dr. Rosenberg had referenced all these studies

"is internally inconsistent because he reaches different conclusions based on the same test results."[25] Decision and Order at 23; *see Napier*, 301 F.3d at 713-14; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Because the ALJ permissibly discredited the opinions of Drs. McSharry and Rosenberg, the only opinions supportive of Employer's burden on rebuttal, we affirm her finding that Employer did not disprove legal pneumoconiosis. Decision and Order at 26. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

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in his prior reports where he had diagnosed legal pneumoconiosis. *Id*. At his deposition, Dr. Rosenberg identified the presence of ground glass opacifications on computed tomography (CT) scan as a basis for changing his opinion. Employer's Exhibit 24 at 37. However, as part of his April 13, 2017 report he reviewed and discussed a CT scan interpretation which noted the presence of ground glass opacifications – although Dr. Rosenberg referred to this as a November 29, 2016 CT scan, this appears to be a scrivener's error as there is no CT scan of record with that date. Employer's Exhibit 6 at 2. At that time, despite having knowledge of the ground glass opacifications, Dr. Rosenberg still maintained his opinion that "one cannot rule out a component of legal [coal workers' pneumoconiosis]." *Id*. at 4. Similarly, Dr. Rosenberg reviewed pulmonary function studies showing a response to bronchodilators when preparing his reports prior to his June 2019 report. *See* Director's Exhibit 18. Although he also referenced two additional pulmonary function studies in his deposition, a December 12, 2017 study and a December 13, 2018 study that were in Claimant's treatment records, they were not mentioned as materials he reviewed in the June 2019 report where he changed his position. Employer's Exhibit 24. The ALJ thus permissibly determined Dr. Rosenberg changed his position as of his June 2019 report based on the same pulmonary function test results he considered in formulating his earlier opinions. *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).

[25] We reject Employer's argument that the ALJ mischaracterized Dr. Rosenberg's opinion. Employer's Brief at 40-41. She acknowledged that, at the time of Dr. Rosenberg's deposition, he "had reviewed an additional pulmonary function [study] of record, namely Dr. Ajjarapu's December 2017 study." Decision and Order at 23 n.12 (citing Employer's Exhibit 24 at 23; Claimant's Exhibit 1). The ALJ found, however, that this did not explain why Dr. Rosenberg changed his opinion between his third and fourth medical reports, and thus his opinion was internally inconsistent. *Napier*, 301 F.3d at 712-14; Decision and Order at 23 n.12.

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201."[26] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26-27. She permissibly discredited the opinions of Drs. McSharry and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to her finding Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 26. We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[26] We reject Employer's argument that the "no part" regulatory standard the ALJ applied to determine whether it rebutted the presumed fact of total disability causation is invalid. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge