U.S. Department of Labor

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

BRB No. 19-0224 BLA

TABATHA ROBINSON BAKER and KENDRA MERCER, o/b/o the Estate of ROGER ROBINSON	)	
Claimants-Respondents	)	
v.	)	
COAL MOUNTAIN TRUCKING, INCORPORATED	)	DATE ISSUED: 04/30/2020
and	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY	)	
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 Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, 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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05144) of Administrative Law Judge Richard M. Clark rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on March 11, 2013.[1]

The administrative law judge determined employer is the properly designated responsible operator. He also credited the miner with twenty-six years of surface coal mine employment but found the conditions were not substantially similar to those in an underground mine. Therefore, he found claimants could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Considering whether claimants established entitlement to benefits under 20 C.F.R. Part 718,[3] the administrative law judge found the evidence established the miner suffered from legal pneumoconiosis, a totally disabling respiratory impairment, and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Thus, he awarded benefits.

[1] Claimants are the surviving daughters of the miner, who died on January 2, 2016, while his claim was pending. *See* Director's Exhibit 72. Claimants are pursuing this claim on behalf of his estate. Decision and Order at 2; *see* Director's Exhibit 72.

[2] Under Section 411(c)(4) of the Act, claimants are entitled to a rebuttable presumption of total disability due to pneumoconiosis if the miner 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) (2012); 20 C.F.R. §718.305.

[3] The administrative law judge found the record contains no evidence of complicated pneumoconiosis and therefore claimants could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); Decision and Order at 22.

On appeal, employer challenges its designation as the responsible operator. It also contends the administrative law judge erred in finding claimants established legal pneumoconiosis and total disability due to legal pneumoconiosis. Claimants respond in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the finding employer is the responsible operator. [4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for at least one year and be financially capable of assuming liability for the payment of benefits.[6] 20 C.F.R. §725.494(e).

If the responsible operator 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

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings the miner worked for twenty-six years in surface coal mine employment and had a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5, 27-29.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[6] The regulation at 20 C.F.R §725.494 further requires the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

Once the district director properly identifies a potentially liable operator, it may be relieved of liability only if it proves either that it is financially incapable of paying benefits or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer asserts it is not the responsible operator because claimant last worked for Forrester Joseph Trucking, Inc. (Forrester Joseph) for a cumulative period of one year and the district director allegedly did not properly investigate whether Forrester Joseph is financially capable of paying benefits. Employer's Brief at 5-8. Employer also argues the administrative law judge erred in not considering evidence it alleges establishes Forrester Joseph is financially capable of assuming liability. *Id*. at 8-12. The Director argues the district director properly investigated Forrester Joseph's financial ability to pay benefits. She further argues the administrative law judge properly excluded employer's liability evidence because employer did not timely submit it to the district director and failed to establish extraordinary circumstances to excuse its failure to do so. Director's Brief at 4-6. We agree with the Director.

Procedural History

The district director issued a Notice of Claim on April 26, 2013, to six of the miner's previous employers indicating their potential liability: Island Fork Construction, Ltd.; M C Trucking Company, Inc.; Forrester Joseph; Robinson Trucking; Virgil Raleigh Coal Company, Inc.; and Coal Mountain Trucking, Inc. (employer). Director's Exhibits 26-31. On August 20, 2014, the district director relieved all of them, except employer, from liability. *See* Director's Exhibits 46-50. With the letter informing Forrester Joseph of its dismissal, the district director attached a 20 C.F.R. §725.495(d) statement explaining that a search of the Department of Labor's records revealed it was not covered by federal black lung insurance as of June 24, 2004, the date the miner was last employed with the company. Director's Exhibit 48. The attached statement, however, identified the company as "Joseph Forrestor Trucking Inc."

On November 6, 2014, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) preliminarily designating employer as the responsible operator. Director's Exhibit 51. The SSAE explained employer met all the requirements to be designated a responsible operator and the companies the miner worked for after he left employer, including "Forester Joseph Trucking," were either out of business or did not employ the miner for one year, and thus did not meet the requirements to be designated a responsible operator. The SSAE also explained the consequences of failing to submit a

timely response to employer's designation as the responsible operator, stating "[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."[7] *Id*. Employer contested its liability, but did not submit any additional documentary evidence relevant to the issue. Director's Exhibit 52.

On September 9, 2015, the district director issued a Proposed Decision and Order (PDO) designating employer as the responsible operator. Director's Exhibit 65. The PDO reiterated that "Foster Joseph Trucking" was uninsured and no longer in business. Employer requested a formal hearing and the case was forwarded to the Office of Administrative Law Judges (OALJ). Director's Exhibit 69.

At the April 25, 2018 hearing, employer argued it should not be held liable for the claim. Hearing Transcript at 10-14. Referencing Forrester Joseph's transposed and/or misspelled name on the statement prepared pursuant to 20 C.F.R. §725.495(d), the SSAE and the PDO, employer asserted the district director did not adequately investigate Forrester Joseph's ability to pay because the district director "basically searched for another company" in determining whether it was insured during the relevant period. Hearing Transcript at 11. Employer also attempted to introduce evidence into the record allegedly establishing Forrester Joseph was insured on the miner's last day of employment with it. *Id*. The administrative law judge excluded this evidence from the record because employer failed to establish extraordinary circumstances to admit untimely liability evidence. Decision and Order at 5-7.

Discussion

Employer initially contends the record does not contain the statement 20 C.F.R. §725.495(d) requires, indicating the district director searched its database and determined

[7] Because the district director must finally resolve identification of the responsible operator or carrier before a case is referred to the Office of Administrative Law Judges, the regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Thus, "no documentary evidence pertaining to liability may be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director . . . ." 20 C.F.R. §725.414(d). If documentary evidence pertaining to the identification of a responsible operator or carrier is not submitted to the district director, it "shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1).

the miner's last coal mine employer, Forrester Joseph, was uninsured. Employer's Brief at 7-8. Rather, employer asserts, the statement reflects the district director investigated coverage for "Joseph Forrestor Trucking, Inc.," a company that does not exist. We disagree.

As the administrative law judge accurately found, the record includes the statement 20 C.F.R. §725.495(d) requires, indicating the claims examiner searched the Department records and determined "Joseph Forrestor Trucking Inc." was not covered by a federal black lung insurance policy or approved to self-insure, as of June 24, 2004, the last date of the miner's employment with Forrester Joseph. Director's Exhibit 48. Although the name of the company was misspelled on that statement, the administrative law judge noted it was correctly spelled in the cover letter provided to all of the parties. *See* Director's Exhibit 48. He thus permissibly rejected employer's argument that the district director's reference to "Joseph Forrester" was more than a clerical error indicating the district director did not actually investigate Forrester Joseph's ability to pay.

Moreover, as the Director asserts, the record supports the conclusion that the misspellings are typographical errors, and the district director was aware Forrester Joseph last employed the miner and properly investigated its ability to pay.[8] *See* Director's Exhibits 3 (miner's employment history form completed on March 13, 2013), 7 (miner's FICA statements the district director received on March 25, 2013), 8 (miner's Social Security Administration statements the district director received on May 9, 2013), 28 (notice of claim sent to Forrester Joseph on April 23, 2013), 39 (letter dated May 1, 2013, to Forrester Joseph's owner notifying him of his potential liability as an officer of Forrester Joseph). Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination the 20 C.F.R. §725.495(d) statement supports a finding that the district director adequately investigated Forrester Joseph's insurance coverage. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 6.

Employer next argues Forrester Joseph "is very much an active corporation that has continuously maintained policies of insurance for worker's compensation coverage and particularly black lung coverage since the company was created." Employer's Brief at 7-

[8] The district director gathered this information and prepared the cited exhibits around the same time it prepared the 20 C.F.R. §725.495(d) statement on April 14, 2013. *See* Director's Exhibit 48. Further, as the Director indicates, the Proposed Decision and Order and Schedule for the Submission of Additional Evidence accurately contain the miner's employment period with Forrester Joseph and the misspelled entry on the list of Director's Exhibits references a letter that was correctly addressed to Forrester Joseph. *See* Director's Brief at 5; Director's Exhibits 28, 51, 65.

8. In support, employer attempted to submit a page from the Kentucky Department of Workers' Claims Litigation Management System website indicating Forrester Joseph had a workers' compensation insurance policy effective August 1, 2002, to September 28, 2005. As the administrative law judge accurately found, however, employer failed to submit this evidence to the district director and therefore could not submit it to the administrative law judge, absent establishing extraordinary circumstances for doing so. *See* 20 C.F.R. §725.456(b)(1); Decision and Order at 6.

Employer contends extraordinary circumstances exist because its reliance on the district director's misspellings of Forrester Joseph's name prevented it from undertaking its own investigation into Forrester Joseph's ability to pay. Employer states it was not aware of the misspelling issue until it reviewed the entire record before the hearing. Employer's Brief at 8-10. In resolving evidentiary matters, an administrative law judge exercises broad discretion. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus, a party seeking to overturn the disposition of an evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer has not met this burden.

As the administrative law judge accurately observed, employer was aware of the proper spelling of Forrester Joseph while the claim was before the district director. As early as May 17, 2013, employer itself identified Forrester Joseph as one of the parties when it sent interrogatories to the miner. Decision and Order at 7; *see* Director's Exhibit 23. In response to the interrogatories, the miner identified Forrester Joseph as his last employer. *See* Decision and Order at 7; Director's Exhibit 24. The Notice of Claim sent to employer on April 26, 2013, shows a copy was sent to Forrester Joseph. Decision and Order at 7; *see* Director's Exhibit 31. Thus, as the administrative law judge permissibly determined, employer was aware of the correct spelling of Forrester Joseph long before the district director issued the PDO on September 9, 2015. *Dempsey*, 23 BLR at 1-63; Decision and Order at 7. Consequently, we affirm his determination that employer did not establish extraordinary circumstances to justify its failure to timely submit liability evidence before the claim was transferred to the OALJ. *Blake*, 24 BLR at 1-113; Decision and Order at 7.

Moreover, the administrative law judge permissibly found that even if the evidence indicating Forrester Joseph had a workers' compensation insurance policy was admitted, it does not, as employer alleges, establish Forrester Joseph had insurance coverage for federal black lung claims.[9] *Dempsey*, 23 BLR at 1-63; Decision and Order at 7. Consequently we

[9] Other than a general assertion that Forrester Joseph maintained "workers' compensation coverage and particularly black lung coverage," employer does not set forth any specific challenge to the administrative law judge's finding that the policy number it

affirm, as supported by substantial evidence, the administrative law judge's finding employer is the properly designated responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 7.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants to establish these elements when certain conditions are met, but failure to establish any one precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis[10]

Employer contends the administrative law judge erred in finding the medical opinions established legal pneumoconiosis.[11] 20 C. F. R. §718.204(b)(2)(iv); Employer's Brief at 12-19. To establish legal pneumoconiosis, claimants must prove the miner had 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(b). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds a claimant satisfies this standard by establishing the miner's lung disease or impairment was

identified, WC38187, suggests it only covered workers' compensation claims, not federal black lung claims. Decision and Order at 7. Employer has thus identified no error in the administrative law judge's finding that the insurance policy evidence is "not sufficient to establish that Forrester Joseph Trucking Inc. was insured for federal black lung liability . . . ." *Id.*

[10] The administrative law judge found the evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 21-22.

[11] 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). A disease arising out of coal mine employment 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).

caused "in part" by coal mine employment. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014).

The administrative law judge considered the medical opinions of Drs. Alam, Vuskovich, and Jarboe. Dr. Alam diagnosed legal pneumoconiosis in the form of emphysema and chronic bronchitis due to coal mine dust exposure, cigarette smoking, and lung cancer. Director's Exhibit 10. In contrast, Drs. Vuskovich and Jarboe opined the miner did not have legal pneumoconiosis. Director's Exhibits 16, 20, 72; Employer's Exhibits 1, 3. The administrative law judge found Dr. Alam's opinion well documented and reasoned, and entitled to significant weight. Decision and Order at 24. Conversely, he found the opinions of Drs. Jarboe and Vuskovich inadequately explained and inconsistent with the medical science the Department of Labor (DOL) relied on in the preamble to the 2001 revised regulations. *Id*. at 24-26. Thus, the administrative law judge determined the medical opinion evidence established the existence of legal pneumoconiosis. *Id*. at 27.

Employer contends the administrative law judge erred in crediting Dr. Alam's opinion because he relied on an inaccurate understanding of the nature of the miner's coal mine employment. Employer's Brief at 13-16. Employer asserts Dr. Alam mistakenly believed the miner's employment "was actually in coal mining," instead of coal truck driving, and therefore he had an inaccurate understanding of the degree of the miner's coal mine dust exposure. *Id*. at 14. Contrary to employer's assertion, Dr. Alam recorded the miner's coal mine employment history as a "coal truck driver" in "surface coal mining" in his initial report. Director's Exhibit 10. In addition, in his supplemental report, he stated the miner "also has legal pneumoconiosis because of his 26 years of confirmed coal mining employment that includes driving a coal truck." *Id*. Moreover, Dr. Alam observed even though coal dust exposure in underground mines "is definitely higher" than in surface mines, "coal miners that work driving a coal truck still have a significant amount of coal dust exposure inhaling the coal dust because of the constant moving of the coal by different equipment."[12] *Id*. Therefore, we reject employer's contention Dr. Alam relied on an inaccurate understanding of the miner's coal dust exposure as a truck driver.

We also reject employer's argument the administrative law judge erred in crediting Dr. Alam's opinion because he allegedly relied on an inaccurate smoking history for the

[12] While the administrative law judge found there was insufficient evidence to establish the miner's coal mine dust exposure in surface mining was substantially similar to that in an underground mine for the purpose of invoking the Section 411(c)(4) presumption, he noted claimant's [Ms. Mercer's] testimony that most days the miner came home from work covered in dust. Decision and Order at 5.

miner. Employer's Brief at 13. The administrative law judge determined "it is not possible to determine the extent of [the miner's] smoking with any precision," but found the miner smoked "at least an average of a pack and a half a day for at least forty years."[13] Decision and Order at 7.

Although Dr. Alam initially relied on a smoking history for the miner of two to three cigars daily since 1968, following his review of additional medical records documenting smoking histories for the miner ranging from one pack of cigarettes per day for at least forty years to three packs per day since the miner was sixteen,[14] Dr. Alam stated the miner "has a very long history of tobacco abuse" that accounted for much of his pulmonary disability. *See* Director's Exhibits 10, 13, 20. Dr. Alam concluded, however, that he "could not ignore" the miner's twenty-six years of coal dust exposure as a significant cause of his impairment. *Id.* As Dr. Alam acknowledged the miner had a very significant smoking history, employer has not shown how the administrative law judge's determination to credit his opinion that the miner also has a coal dust-related impairment constitutes error. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[13] The administrative law judge based his finding on a review of the following evidence: claimant's [Ms. Mercer's] hearing testimony that the miner smoked one and a half packs daily since age sixteen; Dr. Alam's report indicating the miner smoked two to three cigars per day since 1968; Dr. Jarboe's report indicating the miner started smoking at age fifteen or sixteen, smoked up to three packs per day, decreased to one pack per day, and quit two months before his examination; and Dr. Vuskovich's account of a 120 pack-year history. Decision and Order at 7; Hearing Transcript at 21-22, 27-28; Director's Exhibits 10, 20; Employer's Exhibits 1, 3.

[14] In his July 6, 2015 supplemental report, Dr. Alam stated he reviewed the medical reports of Drs. Baker and Jarboe, and treatment records from Hazard Appalachian Regional Healthcare Medical Center (Hazard ARH). Director's Exhibit 10. Dr. Baker's report is not in the record. Dr. Jarboe's February 9, 2015 report contains a smoking history for the miner of three packs of cigarettes per day since sixteen years of age, which decreased to one pack per day until the miner stopped smoking two months before Dr. Jarboe examined him. Director's Exhibit 20. In addition, Dr. Jarboe's review of additional medical records revealed smoking histories for the miner of one pack per day for the past twenty-five years, one pack per day for at least forty years, and three packs per day since the age of sixteen. *Id.* Treatment notes in the Hazard ARH records document that the miner smoked one pack per day for at least forty years and was currently smoking. Director's Exhibit 13.

In addition employer has not offered any support for its contention Dr. Alam relied on a positive diagnosis of clinical pneumoconiosis when diagnosing legal pneumoconiosis. *See* Employer's Brief at 14. Dr. Alam clearly states in his supplemental report that his diagnosis of clinical pneumoconiosis is based on the positive x-ray evidence and that he independently diagnosed legal pneumoconiosis. *See* Director's Exhibit 10.

Nor is there merit to employer's assertions the administrative law judge erred in finding Dr. Alam's opinion reasoned and documented, and sufficient to establish the existence of legal pneumoconiosis. *See* Employer's Brief at 14-16. The administrative law judge correctly found Dr. Alam's opinion attributing the miner's chronic bronchitis and emphysema to both his coal mine dust exposure and tobacco abuse, if credited, is sufficient to establish legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'"); Decision and Order at 17. Further, contrary to employer's assertion, and as the administrative law judge noted, Dr. Alam did not rely merely on symptoms but examined the miner, and based his diagnosis on clinical findings and objective testing, as well as the miner's history of smoking and coal mine dust exposure. Decision and Order at 10-11, 24, 27; *see* Director's Exhibit 10. He further permissibly found Dr. Alam's opinion consistent with the DOL's recognition that the effects of smoking and coal dust exposure can be additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 24, 27.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012). Because it is based on substantial evidence, we affirm the administrative law judge's determination that Dr. Alam's opinion is well reasoned and documented, and sufficient to satisfy claimant's burden of proof to establish legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407; Decision and Order at 17.

Employer next argues the administrative law judge applied a more stringent standard in assessing the opinions of Drs. Jarboe and Vuskovich. Employer's Brief at 17-19. Contrary to employer's assertion, the administrative law judge did not require them to "rule out" or "exclude" coal mine dust as a cause of the miner's impairment. He stated correctly that claimants must prove the miner had legal pneumoconiosis, which includes "lung diseases that are significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 23-24; *see* 20 C.F.R. §718.201(a). In finding Dr. Jarboe did not adequately explain why coal mine dust exposure had "not at all aggravated" the miner's impairment, the administrative law judge was not

applying a heightened standard; he was considering whether Dr. Jarboe offered a reasoned opinion for completely excluding any contribution from the miner's coal mine dust exposure. Director's Exhibits 20, 72; Employer's Exhibit 3 at 32-33. The same is true of the administrative law judge's conclusion that Dr. Vuskovich did not explain why coal dust "did not play a part" in the miner's respiratory impairment, as Dr. Vuskovich completely excluded any contribution from the miner's coal mine dust exposure. Director's Exhibit 16; Employer's Exhibit 1. Thus, the administrative law judge did not discredit their opinions for failing to satisfy a particular standard; he found they did not credibly explain how they ruled out any contribution from the miner's coal mine dust exposure.[15] *See Larioni*, 6 BLR at 1-1278; Decision and Order at 24-27.

We further reject employer's assertions the administrative law judge did not provide valid reasons for discrediting Dr. Jarboe's opinion. Employer's Brief at 17-18. The administrative law judge noted Dr. Jarboe relied on studies indicating miners have very minor elevations of residual volume on pulmonary function testing to conclude the miner's elevated residual volume is inconsistent with an obstructive impairment caused by coal dust inhalation. Decision and Order at 25; Director's Exhibit 20. Contrary to employer's contention, the administrative law judge permissibly found Dr. Jarboe did not credibly explain how he eliminated the miner's significant coal dust exposure as a contributing or aggravating factor in his obstructive impairment in light of the scientific premises underlying the regulations that coal dust and smoking cause damage to the lungs by similar mechanisms and have additive effects. Decision and Order at 35; *see* 65 Fed. Reg. at 79,940-43; *Adams*, 694 F.3d at 801-02; *Barrett*, 478 F.3d at 356; Employer's Brief at 17.

Further, the administrative law judge noted Dr. Jarboe relied on studies demonstrating a greater loss in FEV1 on pulmonary function testing in people who smoke as opposed to estimated losses of FEV1 in coal miners to support his conclusion coal dust did not contribute to the miner's respiratory impairment. Director's Exhibit 20. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Jarboe's opinion because it was based, in part, on relative risk and statistical probabilities rather than the miner's particular condition. Decision and Order at 25-26; *see Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Dr. Jarboe further explained he eliminated coal mine dust exposure as a source of the miner's obstructive pulmonary disease, in part, because he found a reduction in the

[15] Employer has not otherwise challenged the administrative law judge's weighing of Dr. Vuskovich's opinion. *See* Employer's Brief at 19.

miner's FEV1/FVC ratio on pulmonary function testing to be incompatible with obstruction due to coal mine dust exposure.[16] Decision and Order at 24; Director's Exhibit 20. The administrative law judge permissibly discredited his opinion as conflicting with the DOL'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; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 24-25. Employer does not challenge that finding. Employer also fails to challenge the administrative law judge's permissible discrediting of Dr. Jarboe's opinion that chronic bronchitis due to coal dust exposure will generally resolve after dust exposure ceases as contrary to the regulations recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); Decision and Order at 26. Thus, we affirm the administrative law judge's finding that claimants established the existence of legal pneumoconiosis as supported by substantial evidence. *Martin*, 400 F.3d at 305; Decision and Order at 27.

Disability Causation

Employer next argues the administrative law judge erred in finding the evidence established the miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Employer's Brief at 19-21. We disagree. The administrative law judge articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599; Decision and Order at 29. He further recognized pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

[16] Dr. Jarboe opined that claimant's "disproportionate reduction of FEV1 compared to FVC is the type of functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Director's Exhibit 20.

20 C.F.R. §718.204(c)(1); Decision and Order at 29, *citing Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611 (6th Cir. 2001).

Contrary to employer's argument, in relying on the opinions of Drs. Alam and Jarboe to find disability causation established, the administrative law judge did not mischaracterize Dr. Jarboe's opinion as diagnosing legal pneumoconiosis or as stating the miner's legal pneumoconiosis was totally disabling.[17] Decision and Order at 29; Employer's Brief at 19-20. He stated: "There is no dispute between Dr. Alam and Jarboe that [the miner's] respiratory impairment was due to obstruction/emphysema, *and I have found* that [the miner's] obstruction/emphysema was totally disabling, and that it constituted legal pneumoconiosis." Decision and Order at 29 (emphasis added); *see* Director's Exhibits 10, 20, 72; Employer's Exhibit 3.

Nor did the administrative law judge find, as employer contends, that "a diagnosis of COPD and Emphysema by all doctors, automatically mean[s] that pneumoconiosis has been a cause of that totally disabling impairment." Employer's Brief at 20. Rather, he correctly recognized where the evidence establishes the miner's pulmonary impairment was legal pneumoconiosis and the impairment was totally disabling, the evidence necessarily supports a finding of disability causation.[18] *See* 20 C.F.R. §718.204(c)(1)

[17] Dr. Vuskovich initially opined the miner did not have a totally disabling respiratory impairment. Director's Exhibit 16. Although his second report identified a moderate impairment with obstruction as well as hypoxemia, Employer's Exhibit 1, the administrative law judge found he did not "address the issue of whether Mr. Robinson had a totally disabling respiratory impairment." Decision and Order at 28. Employer does not challenge the administrative law judge's finding or argue that Dr. Vuskovich's opinion should have been credited on the cause of the miner's total disability, despite the physician's failure to diagnose a totally disabling impairment.

[18] Contrary to employer's argument, the administrative law judge did not state that claimants could establish disability causation by proving the miner's totally disabling respiratory impairment was "due, at least in part" to coal mine dust exposure. Decision and Order at 29; Employer's Brief at 20. At the conclusion of his decision, the administrative law judge accurately summarized that "[c[laimants have established that [the miner's] totally disabling respiratory impairment was due, at least in part, to his history of coal mine dust exposure -- that is, that he had legal pneumoconiosis . . ." Decision and Order at 29. In other words, the miner had a totally disabling impairment; claimants established it was due "in part" to the miner's coal dust exposure and thus is legal pneumoconiosis. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599 (6th Cir. 2014) (legal pneumoconiosis includes lung disease "caused 'in part' by coal mine employment"). The administrative law judge repeatedly recited the correct standard in finding the evidence

(pneumoconiosis must be a "substantially contributing cause" of the total disabling respiratory impairment.); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (disability causation element satisfied where claimant suffered from totally disabling COPD determined to be legal pneumoconiosis); *see also Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847 (6th Cir. 2016) (physician's determination that pneumoconiosis had an adverse effect on the miner's respiratory condition and contributed to the miner's disabling impairment satisfies substantially contributing cause standard); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489-90 (6th Cir. 2012); Decision and Order at 29.

We also reject employer's assertion "Dr. Alam's opinion is insufficient to establish disability causation as it is merely speculative given that he used a percentage apportionment." Employer's Brief at 21. Dr. Alam stated in his "assessment and . . . clinical judgment" and "reasonable medical opinion" that ten percent of the miner's pulmonary disability was due to his legal pneumoconiosis. Director's Exhibit 10. He based this opinion on, among other things, the miner's "significant" mining work history, objective testing meeting disability criteria, "development of chronic symptoms," and "medical literature confirming that coal dust exposure can definite[ly] exacerbate the underlying lung condition caused by other lung insults." *Id.* He stated he considered "all the different diagnoses as well as the clinical workup" and could "not ignore the mining history." *Id.* Employer does not explain how Dr. Alam's apportionment between legal pneumoconiosis and the miner's other conditions is speculative, nor does it allege that legal pneumoconiosis accounting for ten percent of the miner's disability is not "substantial." Thus we affirm the administrative law judge's permissible finding that his opinion establishes disability causation.[19] *See Tennessee 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); *see also Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983) (not even a "reasonable degree of medical certainty" is required as a physician's opinion regarding the cause of miner's

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sufficient to establish disability causation and further concluded pneumoconiosis "significantly contributed" to the miner's disability. As the administrative law judge found, because the miner's totally disabling impairment *is* legal pneumoconiosis, claimants necessarily established pneumoconiosis was a substantial contributing cause of the miner's disability. Decision and Order at 29.

[19] We additionally note that because Dr. Jarboe did not diagnose the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that claimants established the disease, the administrative law judge could accord his opinion, at most, little weight on disability causation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015).

impairment is sufficient if it constitutes a reasoned medical judgment). As employer raises no further challenge to the administrative law judge's finding that claimants established disability causation, it is affirmed. 20 C.F.R. §718.204(c); Decision and Order at 29.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge