U.S. Department of Labor

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

BRB Nos. 19-0155 BLA
and 19-0278 BLA-A

JOYCE ANN HICKS (o/b/o and Widow of CARL HICKS) Claimant-Respondent Cross-Petitioner v. MAGIC MINING, INCORPORATED Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/31/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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 appeals and claimant cross-appeals the Decision and Order Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2014-BLA-05156 and 2014-BLA-05157) of Administrative Law Judge Steven B. Berlin rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a request for modification of the denial of the miner's subsequent claim filed on January 20, 2004,[2] and a survivor's claim filed on August 31, 2012.

[1] The Director, Office of Workers' Compensation Programs (the Director), filed an appeal in the miner's claim, which claimant cross-appealed in response. The Director subsequently withdrew her appeal in the miner's claim and only claimant's cross-appeal in that claim remains before the Board.

[2] Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim. This is the miner's second claim. On November 26, 2002, the district director finally denied the miner's prior claim, filed on July 24, 2002, by reason of abandonment. Director's Exhibits 1, 96. The miner filed the current claim on January 20, 2004. Director's Exhibit 3. In a Decision and Order dated November 2, 2006, Administrative Law Judge Paul H. Teitler awarded benefits. Director's Exhibit 78a.

Pursuant to employer's appeal, the Board vacated the award and remanded the case for reconsideration. *C.H.* [*Hicks*] *v. Magic Mining, Inc.*, BRB No. 07-0514 BLA (Apr. 30, 2008) (unpub.); Director's Exhibit 98. On remand, the case was reassigned to Administrative Law Judge Janice K. Bullard who awarded benefits on April 15, 2009. Director's Exhibits 99, 105. In response to employer's appeal, the Board again vacated the award and remanded the case for reconsideration. *Hicks v. Magic Mining, Inc.*, BRB No. 09-0539 BLA (Jul. 22, 2010) (unpub.); Director's Exhibit 130.

On remand, in a decision dated January 4, 2011, Judge Bullard found the miner failed to establish the existence of pneumoconiosis and denied benefits. Director's Exhibit 137. The miner appealed, but died on November 9, 2011, while his appeal was pending before the Board. Director's Exhibits 156, 160, 168. The Board subsequently affirmed the denial of benefits. *Hicks v. Magic Mining, Inc.*, BRB No. 11-0344 BLA (Dec. 21, 2011) (unpub.), *aff'd on recon.* (May 10, 2012) (Order) (unpub.); Director's Exhibits 145, 148.

Claimant filed a modification request in the miner's claim on May 10, 2013, and filed her survivor's claim on August 31, 2012. Director's Exhibits 149, 153. The miner's

Adjudicating the miner's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found he worked 21.63 years in coal mine employment, mostly underground. The administrative law judge further found the evidence did not establish the existence of pneumoconiosis. He therefore found claimant did not establish a mistake in a determination of fact in the prior denial at 20 C.F.R. §725.310 and denied benefits in the miner's claim.

In the survivor's claim, the administrative law judge found the miner had a totally disabling respiratory or pulmonary impairment. Thus, having credited the miner with at least fifteen years of underground coal mine employment, the administrative law judge found claimant invoked the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge determined employer did not rebut the presumption and awarded benefits.

On appeal of the denial of the miner's claim, claimant argues the administrative law judge should have found claimant entitled to the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. Employer responds in support of the denial of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs (the Director), did not file a brief in the miner's claim.

On appeal in the survivor's claim, employer challenges the constitutionality and applicability of the Section 411(c)(4) presumption. Employer also argues that pursuant to the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018), the administrative law judge lacked the authority to decide the case because he was not appointed consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer further asserts the removal provisions contained in the Administrative

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claim and survivor's claim were consolidated and assigned to Administrative Law Judge Steven B. Berlin (the administrative law judge).

[3] Section 411(c)(4) of the Act presumes a miner's death was due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not entitled to an automatic award of survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).

[4] 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,

Procedure Act (APA), 5 U.S.C. §7521, applicable to the administrative law judge, rendered his appointment unconstitutional. Employer also challenges the merits of the award in the survivor's claim, asserting the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant did not file a response brief in the survivor's claim. The Director filed a limited response urging the Board to reject employer's challenges to the constitutionality and applicability of the Section 411(c)(4) presumption. Employer filed a reply brief, reiterating its arguments.[5]

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the requirement for individuals to maintain health insurance in the Affordable Care Act (ACA) is unconstitutional and the remainder of the legislation, which reinstated the Section

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> 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.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment and, thus, invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] 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, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 9, 10.

411(c)(4) presumption, is inseverable.[7] Employer's Brief at 18-19. The Director responds that because the district court stayed its ruling, the decision does not preclude application of the amendments to the Act found in the ACA. Director's Brief at 7.

We agree the decision does not affect application of the amendments to the Act. After the parties filed their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement is unconstitutional, but vacated and remanded the determination the remainder of the ACA is inseverable.[8] *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting). Further, the United States Supreme Court upheld the constitutionality of the ACA, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act have a stand-alone quality and thus are severable. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

Appointments Clause Challenge

Employer challenges the administrative law judge's authority to decide this case. It notes the Supreme Court held in *Lucia* that Securities and Exchange Commission (SEC) administrative law judges were not properly appointed in accordance with the Appointments Clause of the Constitution. Employer's Brief at 12. It argues the administrative law judge in this case was similarly appointed improperly and the Secretary of Labor's ratification of his appointment on December 21, 2017, was insufficient to "cure the defect." Employer's Brief at 15-17. In response, the Director asserts employer forfeited its Appointments Clause challenge by failing to timely raise the issue before the administrative law judge. Director's Response Brief at 2-5. Employer replies that "it is not clear that a party can waive a challenge to the constitutionality of [Department of Labor (DOL) administrative law judges], given that [they] have no authority to determine their own constitutionality and the Board's authority is limited to the [administrative law judge's] decision." Employer's Reply Brief at 5. Employer maintains it is sufficient that an Appointments Clause challenge is raised before the Board. *Id.* at 8.

[7] Section 1556 of the ACA reinstated the Section 411(c)(4) presumption of total disability due to pneumoconiosis for certain miners and survivors, as well as automatic entitlement at Section 422(*l*) for certain survivors. Pub. L. No. 111-148, §1556 (2010).

[8] Furthermore, the Board has declined to hold cases in abeyance pending the resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019).

Lucia was decided more than five months before the administrative law judge issued his decision and order awarding survivor's benefits, but employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (Jun. 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Because employer has not identified any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (recognizing exception for considering a forfeited argument due to extraordinary circumstances).

Removal Provisions

Employer also argues the administrative law judge lacked the authority to adjudicate this claim because the APA provisions governing the removal of administrative law judges violates the separation of powers doctrine as it provides two levels of for-cause protection. Employer's Brief at 13-15. Employer relies on the Supreme Court's invalidation of a similar statutory scheme in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).[9] *Id.* We consider employer's arguments to be adjunct to the Appointments Clause challenge, which was forfeited. Furthermore, we conclude employer

[9] The United States Supreme Court determined that the two-level for-cause removal protection provided to members of the Public Company Accounting Oversight Board resulted in a constitutionally impermissible "diffusion of accountability." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

has failed to adequately brief this issue. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

The Board's procedural rules impose certain threshold requirements for alleging specific error before the Board will consider the merits of an issue on appeal. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros.*, 898 F.3d at 677, *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of argument that the FTC is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

Employer states that the administrative law judge's appointment was improper in view of the removal provisions contained in the APA, 5 U.S.C. §7521. Employer's Brief at 13-15. Employer has not specified how those provisions violate the separation of powers doctrine or explained how such a holding undermines the administrative law judge's authority to hear and decide this case.[10] *Id*. Thus, we decline to address this issue. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

Claimant's Appeal of the Denial of the Miner's Claim

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a

[10] Employer cites the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) and *Lucia*. Employer's Brief at 14-15. Although employer notes the holding in *Free Enterprise*, it does not set forth how the holding applies to the administrative law judge. *Id*. at 14. As the Director notes, the Supreme Court stated its holding "did not address [administrative law judges]" who "perform adjudicative rather than enforcement or policymaking functions." Director's Brief at 6, *citing Free Enter. Fund*, 561 U.S. at 507 n.10. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

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, 1-27 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1, 1-2 (1986) (en banc).

Because this case involves a request for modification of the denial of the miner's subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, established a mistake in a determination of fact with regard to the prior denial. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5 (4th Cir. 1993).

The administrative law judge found the miner did not have clinical or legal pneumoconiosis. He therefore found claimant did not establish a mistake in a determination of fact with respect to either the existence of the disease or the ultimate determination of entitlement. *See* 20 C.F.R. §725.310; *Trent*, 11 BLR 1-27; *Perry*, 9 BLR 1-2. As claimant raises no specific challenge to that finding, we affirm it.[11] *Cox v. Director, OWCP*, 791 F.2d 445 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Claimant's Brief at 2-5 [unpaginated].

[11] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the miner's 2002 claim was denied by reason of abandonment, the miner was considered to have failed to establish any element of entitlement. 20 C.F.R. §725.409(c). Consequently, to obtain review of the merits of the miner's claim, claimant had to establish one element of entitlement. The administrative law judge did not make a threshold determination whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) by establishing any of the elements of entitlement. However, as claimant's failure to establish the existence of pneumoconiosis based on all the evidence of record precludes entitlement, the administrative law judge's failure to make a determination at 20 C.F.R. §725.309(c) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant instead argues the administrative law judge erred in finding she failed to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis in the miner's claim, as more than twenty-one years of coal mine employment and the existence of a totally disabling respiratory impairment were established. Claimant's Brief at 4 [unpaginated]. Claimant's argument lacks merit. The Section 411(c)(4) presumption applies only to claims filed after January 1, 2005. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305(a). As the miner's subsequent claim was filed on January 24, 2004, the presumption does not apply and claimant must affirmatively establish each element of entitlement. As we have affirmed the administrative law judge's finding that claimant failed to establish the miner had pneumoconiosis,[12] an essential element of entitlement, we affirm his denial of benefits in the miner's claim. *See* 20 C.F.R. §§802.211(b), 802.301(a).

Survivor's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis in her survivor's claim,[13] the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] death

[12] Claimant asserts that the miner's cigarette smoking history was not the sole cause of his pulmonary disability. Claimant's Brief at 4 [unpaginated]. Claimant has not, however, identified any specific error of law or fact in the administrative law judge's findings that claimant did not affirmatively establish the miner had clinical or legal pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, claimant seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[13] The administrative law judge correctly found that the Section 411(c)(4) presumption applies to the survivor's claim as it was filed after January 1, 2005, and was pending on or after March 23, 2010. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305(a); Decision and Order at 17.

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

was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found employer failed to rebut clinical or legal pneumoconiosis or death causation.

Pneumoconiosis

We affirm the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21. Employer's failure to disprove clinical pneumoconiosis precludes a finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention the administrative law judge erred in finding it failed to disprove legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To disprove legal pneumoconiosis, employer must establish the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit holds that an employer may rebut legal pneumoconiosis by showing that the miner's coal mine employment "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). The "in part" standard requires employer to show that coal mine dust exposure "had at most only a *de minimis* effect on [the miner's] lung impairment." *Id.* at 407.

The administrative law judge considered the opinions of Drs. Rosenberg and Vuskovich attributing the miner's pulmonary disease or impairment to conditions unrelated to coal mine dust exposure.[15] Decision and Order at 22-25; Employer's Exhibits 1, 4. He found their opinions inadequately explained and inconsistent with the 2001 revised regulations and, therefore, insufficient to disprove legal pneumoconiosis. Decision and Order at 22-25; *see* 65 Fed. Reg. 79,920 (Dec. 20, 2000). Employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Vuskovich lacks merit.

[15] The administrative law judge also considered Dr. Baker's opinion the miner had chronic obstructive pulmonary disease related to coal dust exposure and cigarette smoking and properly noted it does not assist employer in meeting it burden on rebuttal. Decision and Order at 22; Claimant's Exhibit 1.

Employer argues the administrative law judge erred in relying on the medical studies cited in the preamble to the 2001 revised regulations to assess the sufficiency of Dr. Rosenberg's opinion which, it generally asserts, is based on studies that post-date the preamble. Employer's Brief at 19-20. Contrary to employer's argument, an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the medical and scientific bases for the regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012). Moreover, employer fails to identify any more recent studies Dr. Rosenberg relied on or state how they are more reliable than those the DOL relied on to promulgate its regulations. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014). Absent the type and quality of medical evidence sufficient to invalidate the studies cited in the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *Id.*

Dr. Rosenberg opined the miner's chronic obstructive pulmonary disease (COPD) developed from his past smoking history and not his coal mine dust exposure. Employer's Exhibit 1. The administrative law judge noted in excluding coal mine dust as a contributing factor, Dr. Rosenberg cited to medical studies indicating the "general pattern" of obstruction in miners is such that the FEV1/FVC ratio on pulmonary function testing is preserved, while in smoking-related obstruction the FEV1/FVC ratio is "generally reduced," as in the miner's testing. Employer's Exhibit 1. The administrative law judge permissibly discredited this aspect of Dr. Rosenberg's opinion because his reasoning conflicts with the DOL's recognition that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; Decision and Order at 23.

Dr. Rosenberg also opined claimant does not have legal pneumoconiosis based, in part, on studies indicating the average losses in FEV1 values on pulmonary function testing from cigarette smoking are far greater than those from coal mine dust exposure. Employer's Exhibit 1. The administrative law judge permissibly found his opinion unpersuasive because the miner was "not a statistic" and the fact his smoking may have placed him at greater risk for developing airway obstruction than his coal dust exposure does not explain why, in his particular circumstances, coal mine dust exposure did not also contribute.[16] Decision and Order at 24; *see Antelope Coal Co./Rio Tinto Energy Am. v.*

[16] Employer asserts the administrative law judge's use of the phrase "[the miner] was not a statistic" is "troubling" because it has been used in "more than forty opinions issued by [Department of Labor] Administrative Law Judges." Employer's Brief at 20 n.3; Decision and Order at 24. Despite its concern, employer has not articulated how the use of the phrase indicates any evidence of bias or prejudice in the administrative law judge's analysis. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992).

Goodin, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. at 79,941 (statistical averaging can hide the effect of coal mine dust exposure in individual miners). He also permissibly found Dr. Rosenberg's analysis not credible because he "did not discuss any additive effects" of coal mine dust exposure in causing the miner's COPD. Decision and Order at 24; *see Sterling*, 762 F.3d at 491; *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); 65 Fed. Reg. at 79,940.

We also reject employer's challenge to the administrative law judge's consideration of Dr. Vuskovich's opinion.[17] He opined the miner's pulmonary symptoms and abnormal pulmonary function test results were caused by congestive heart failure as a consequence of excessive water accumulating in his lungs. Employer's Exhibit 4. He stated a person's cardiovascular system and respiratory system operate "in concert" to perform their major functions including gas exchange, supplying oxygen to tissues, muscles and organs, and eliminating carbon dioxide. *Id*. He therefore concluded the miner's tobacco abuse, hypoventilation from obstructive sleep apnea, supplemental oxygen therapy, use of narcotics, and congestive heart failure had all contributed to his disabling impairment. *Id.* at 25. He added that coal mine dust exposure did not contribute to any of these conditions. *Id*. As the administrative law judge observed, however, Dr. Vuskovich also diagnosed mild emphysema and stated "[i]t was medically reasonable to determine that [his] coal mine dust exposure contributed to his emphysema." *Id*. at 24; *see* Decision and Order at Order at 14. Given this additional diagnosis, the administrative law judge permissibly discredited Dr. Vuskovich's opinion because he did not address the role the miner's coal mine-dust related emphysema played in this concerted process or otherwise explain why

[17] As employer asserts, at times the administrative law judge mistakenly referred to Dr. Vuskovich's opinion regarding a "Mr. Smith." Employer's Brief at 22. Specifically, in the initial paragraph analyzing Dr. Vuskovich's opinion, the administrative law judge correctly referred to the miner by his name. Decision and Order at 24. In the next paragraph, however, he stated, "Dr. Vuskovich did not discuss the role that Mr. Smith's emphysema played in this concerted process or otherwise explain why Mr. Smith's history of coal mine dust exposure, which he felt contributed to Mr. Smith's emphysema, did not contribute to his overall respiratory condition." *Id*. Immediately following that sentence, he again correctly referred to the miner by his name. *Id*. at 25. Contrary to employer's argument, based on the context of the administrative law judge's analysis we deem his reference to "Mr. Smith" to be a harmless typographical error that does not require remand. *See Larioni*, 6 BLR at 1-1278; *see also Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (the appellant must explain how the "error to which [it] points could have made any difference").

coal mine dust did not contribute to his impairment along with his other conditions. *See 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); Decision and Order at 24-25.

Thus, the administrative law judge permissibly concluded neither Dr. Rosenberg nor Dr. Vuskovich adequately explained why they eliminated the miner's significant history of coal mine dust exposure as a contributing or aggravating factor to his COPD. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 26.

Employer's arguments are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's discrediting of the opinions of Drs. Rosenberg and Vuskovich.[18] As employer raises no further challenge to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis, it is affirmed.[19] We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The administrative law judge next addressed whether employer established that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). Employer argues the administrative law judge

[18] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Vuskovich, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

[19] Employer also asserts the administrative law judge erred in finding the miner had a thirty pack-year smoking history. Employer's Brief at 19. Contrary to employer's contention, the administrative law judge did not simply adopt Judge Bullard's conclusion, but reviewed her findings and stated he agreed with them. Decision and Order at 6; Employer's Brief at 19. Moreover, any error in that finding is harmless given our affirmance of the administrative law judge's rationale for discrediting the physicians' opinions, which does not concern the length of claimant's smoking history. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

erred in finding the opinions of Drs. Vuskovich and Oesterling insufficient to satisfy its burden.[20] Employer's Brief at 22-23.

Contrary to employer's argument, the administrative law judge permissibly found the same reasons for discrediting Dr. Vuskovich's opinion that the miner did not suffer from legal pneumoconiosis also undercut his opinion that the miner's death was unrelated to pneumoconiosis.[21] 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015); *Kennard*, 790 F.3d at 668; *see Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26-27.

We further reject employer's argument the administrative law judge erred in finding Dr. Oesterling's opinion insufficient to meet employer's burden. Dr. Oesterling diagnosed minimal macular clinical coal workers' pneumoconiosis but opined the limited structural change would not have hastened, contributed to or caused the miner's death. Employer's Exhibit 3 at 19-20. Here, however, the administrative law judge found employer failed to disprove the existence of both clinical and legal pneumoconiosis. As Dr. Oesterling did not address the role legal pneumoconiosis played in the miner's death, the administrative law judge correctly found his opinion cannot support employer's burden.[22] *See Minich*, 25

[20] The administrative law judge also considered the opinions of Drs. Caffrey, Baker, and Rosenberg. He found their opinions insufficient to meet employer's burden as they either did not address the cause of the miner's death or did not address the role of pneumoconiosis in his death. Decision and Order at 25-26. As these findings are unchallenged on appeal, they are affirmed. *Skrack*, 6 BLR at 1-711.

[21] Contrary to employer's argument, while Dr. Vuskovich opined the miner's coal dust-related emphysema was mild, he did not address what role, if any, it played in his death. Employer's Brief at 22; Employer's Exhibit 4. Moreover, his attribution of the miner's death to other factors does not constitute affirmative proof that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

[22] Dr. Oesterling did not appear to address whether the miner suffered from legal pneumoconiosis. Employer's Exhibit 3. He diagnosed emphysema but did not offer an opinion as to its cause. *Id.* at 20. He also stated the minimal degree of changes in the miner's lungs due to coal dust would not have caused lifetime disability but did not address whether coal mine dust would have caused, contributed to, or aggravated the miner's pulmonary impairment. *Id.*

BLR at 1-154-56; Decision and Order at 26. Because employer does not raise any other contention of error, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(2)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis and employer did not rebut the presumption, claimant has established her entitlement to benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge