**U.S. Department of Labor**

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

BRB No. 20-0115 BLA

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| RUTLAND MELTON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| APOGEE COAL COMPANY | ) | |
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| and | ) | |
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| Self-Insured through ARCH COAL, INCORPORATED | ) | DATE ISSUED: 8/30/2022 |
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| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
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| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-05969) issued on reconsideration in regard to a subsequent claim filed on May 4, 2017[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

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. He further accepted Employer's concession that Claimant has at least fifteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement[3] and invoked the presumption of total disability due to

[1] This is Claimant's fifth claim for benefits. On June 5, 2013, the district director denied his most recent prior claim, filed on September 17, 2012, for failure to establish total disability. Director's Exhibit 4.

[2] The ALJ issued a Decision and Order Awarding Benefits on September 13, 2019. Employer timely requested reconsideration, arguing the ALJ wrongly held Arch Coal, Incorporated (Arch) liable as the responsible operator and failed to fully address its Appointments Clause challenge. *See* Employer's Oct. 11, 2019, Motion for Reconsideration. The ALJ vacated his initial decision and issued a revised Decision and Order Awarding Benefits on November 21, 2019, that is the subject of this appeal. Nov. 21, 2019 Order on Arch Coal's Motion for Reconsideration.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "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 Claimant did not establish a totally disabling respiratory or pulmonary impairment in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *See White,* 23 BLR at 1-3; Director's Exhibit 4.

pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). Finally, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution, Art. II § 2, cl. 2.[5] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. Employer also argues the ALJ erred in finding Arch is the liable insurance carrier. On the merits, Employer asserts the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and that it did not rebut the presumption.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment. The Director further urges the Board to affirm the ALJ's determination that Apogee is the responsible operator and Arch is liable for the payment of benefits. Claimant has not filed a response. Employer has filed a reply, 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

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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.

[5] 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.

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 Assocs., Inc.*, 380 U.S. 359 (1965).

**Appointments Clause**

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 16-20; Employer's Reply Brief at 5-8. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in ALJ Golden's prior appointment.[9] Employer's Brief at 17-18.

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[6] 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 7.

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

[8] The Secretary of Labor (Secretary) issued a letter to ALJ Golden on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Golden. ALJ Golden issued no order in this case until his August 2, 2018 notice of assignment, notice of hearing, and prehearing order.

[9] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought the appointment into compliance. Director's Response at 7-10. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id*. We agree with the Director's positions.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response at 8 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Golden and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Golden. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Golden and "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," but instead generally speculates he did not provide "genuine consideration" of the ALJ's qualifications when he ratified the ALJ's appointment. Employer's Brief at 19. Employer therefore has not overcome the presumption of regularity. [10] *Advanced Disposal*, 820 F.3d

[10] While Employer asserts that the Secretary's ratification letter was signed with "an autopen," Employer's Reply Brief at 6-7, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct.

at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).[11] Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

**Removal Provisions**

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 20-24. Employer generally asserts that the removal provisions 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*. *Id*. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc*., 941 F.3d 1320, 1338-1340 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id*.

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

Further, in rejecting a similar argument regarding the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals

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Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

[11] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 24, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Golden's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

for the Sixth Circuit, within whose jurisdiction this case arises, noted that in *Free Enterprise*[12] 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." *Calcutt*, 37 F.4th at 315. 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 any harm whatsoever.

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."[13] 140 S. Ct. at 2201. It did not address ALJs. Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by Administrative Patent Judges during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional

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[12] In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [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.

[13] 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 (June 29, 2020).

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 attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied. *Pehringer*, 8 F.4th at 1137-38.

**Responsible Insurance Carrier**

Claimant last worked in coal mine employment for Apogee from 1993 to 1999.[14] Director's Exhibit 9. Apogee was self-insured through Arch when Claimant last worked for Apogee. Employer's Brief at 28; Director's Response at 2; Director's Exhibit 32. In 2005, Apogee was sold to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 28; Director's Response at 2; Director's Exhibit 32. In 2015, Patriot went bankrupt. Director's Exhibit 32.

Employer does not directly challenge its designation as the responsible operator. Rather, it asserts Arch's self-insurance obligation, and thus its liability, ended on December 31, 2005, when it sold its assets and liabilities to Magnum in 2005 and Magnum purchased insurance to cover Apogee's liabilities. Employer's Brief at 24-31. Employer further maintains the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and that the DOL endorsed this shift of liability. *Id.* Similarly, it argues that responsibility to cover this claim further ended when DOL, after the sale of Apogee's assets to Patriot, authorized Patriot to self-insure. *Id.* In addition, Employer argues DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No.

[14] Claimant's Social Security Earnings Records reflect income from Apogee from 1993 to 1999. Director's Exhibit 9. Claimant reported working for Apogee from 1993 to January 30, 1998. Hearing Transcript at 26. Regardless, Employer contends Arch self-insured Apogee until December 31, 2005. Employer's Brief at 28.

16-01[15] reflects a change in policy, where DOL is retroactively imposing new liability on self-insured mine operators, bypassing traditional rulemaking. *Id*. at 29-31. Finally, Employer contends the ALJ abused his discretion in denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id*. at 32-38.

The Director responds that the ALJ did not err in finding Apogee, self-insured through Arch, is the responsible operator and carrier. Director's Response at 15-18. In addition, the Director asserts that the ALJ did not abuse his discretion in denying Employer's untimely request for discovery relating to its liability. *Id*. at 18-21. Finally, the Director argues the Board need not address Employer's challenges to the BLBA Bulletin No. 16-01. *Id*. at 21-24.

**Relevant Procedural History**

On May 16, 2017, the district director issued a Notice of Claim to Apogee, as self-insured through Arch. Director's Exhibit 28. The Notice gave Employer thirty days to respond and ninety days to submit liability evidence. *Id.* Employer timely responded, denying liability and requesting the district director dismiss it, arguing Patriot was the proper self-insurer. Director's Exhibit 32.

On August 18, 2017, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch, as the responsible operator. Director's Exhibit 33. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until October 17, 2017, to submit evidence in support of their positions. *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*. (citing 20 C.F.R. §725.456(b)(1)). On September 14, 2017, Arch responded that the district director had improperly designated Apogee and Arch as parties to the claim, and also designated Claimant as a potential hearing witness pertaining to its liability. Director's Exhibit 25.

The district director issued a Proposed Decision and Order on March 21, 2018, designating Apogee, self-insured through Arch as the responsible operator and carrier. Director's Exhibit 35. On April 13, 2018, Employer objected to the award of benefits, requested certain discovery from the district director pertaining to its liability, and

[15] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum that the DOL issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" which Patriot's bankruptcy has affected.

requested a formal hearing before an ALJ. Director's Exhibit 40. The case was transferred to the OALJ on June 13, 2018. Director's Exhibit 48.

The record does not reflect, nor does Employer argue, that it submitted any liability evidence prior to the deadline or requested an extension of time while the claim was before the district director. Nor did Employer designate any witness other than Claimant as a witness relevant to its liability while the claim was before the district director.

However, on August 3, 2018, Arch requested that the ALJ issue subpoenas compelling Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation Program employees, to appear and give deposition testimony related to Arch's liability and provide documentary evidence pertaining to its liability. The Director objected.

The ALJ quashed the subpoenas as Employer did not designate Mr. Chance or Ms. Kasmeier as liability witnesses while the case was before the district director and did not establish extraordinary circumstances for failing to do so. Sept. 12, 2018 Order on Director's Objection to Employer's Request for Subpoena (Sept. 12, 2018 Order); *see* 20 C.F.R. §725.414(c). Further, the ALJ found Employer failed to show that the documentary evidence it sought could reasonably lead to the discovery of admissible evidence and therefore rejected its discovery request. Sept. 12, 2018 Order at 4; Fed. R. Civ. P. 26(b)(2)(C)(iii). Employer appealed the ALJ's Order to the Board, which dismissed the appeal as interlocutory. *Melton v. Apogee Coal Co.*, BRB No. 19-0012 BLA (Mar. 26, 2019) (unpub.) (Order).

Employer subsequently submitted documentary liability evidence to the ALJ marked Employer's Exhibits 10 through 15 and deposition testimony from David Benedict and Steven Breeskin, two former DOL Division of Coal Mine Workers' Compensation (DCMWC) employees, marked Employer's Exhibits 24 through 27. The ALJ excluded this documentary evidence because he found it was not submitted to the district director and Employer did not establish extraordinary circumstances for failing to do so. *See* 20 C.F.R. §725.456(b)(1); May 31, 2019 Order on (1) Director's Motion to Exclude Employer's Exhibits 10-15; And (2) Director's Objection to Employer's Exhibits 24-27 (May 31, 2019 Order). The ALJ also excluded the depositions because Employer did not identify the liability witnesses before the district director and did not establish extraordinary circumstances for failing to do so.[16] *See* 20 C.F.R. §725.414(c); May 31, 2019 Order.

[16] We affirm the exclusion of Employer's Exhibits 10 through 15 and the deposition testimony from David Benedict and Steven Breeskin as unchallenged on appeal. *See*

**Exclusion of Evidence**

Employer contends the ALJ's failure to compel discovery violated its due process rights. Employer's Brief at 32-38. The Director responds that the ALJ did not abuse his discretion in 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 18-21. Employer replies that the evidence it was seeking relates not to its liability but to whether the Director improperly changed its policy through the issuance of BLBA Bulletin No. 16-01. Employer's Reply at 16-19. We agree with the Director.

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 rejected Employer's arguments that its subpoena requests and related discovery requests were not subject to the requirement to identify witnesses and submit evidence before the district director because they were directed at determining whether the DOL violated the APA. September 12, 2018 Order at 3-4; Employer's Response to Director's Objections at 9-11. Rather, he found that regardless of its characterization of its arguments, Employer was seeking evidence to challenge its liability, and he noted Employer stated it did not develop the evidence while the case was before the district director as it had not determined "the appropriate forum **for challenging Arch Coal's liability**." September 12, 2018 Order at 4 (citing Employer's Opposition to Motion for Protective Order at 14.) (emphasis in original). We see no abuse of discretion in the ALJ's determination.[17] *Blake*, 24 BLR at 1-113. Consequently, the ALJ rationally found

*Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); May 31, 2019 Order on (1) Director's Motion to Exclude Employer's Exhibits 10-15; And (2) Director's Objection to Employer's Exhibits 24-27 (May 31, 2019 Order).

[17] 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 and a party must notify the district director of the identity of any potential liability witnesses. 20 C.F.R. §§725.414(c), 725.456(b)(1).

Employer was required to designate Mr. Chance and Ms. Kasmeier as witnesses while the case was before the district director.[18] Sept. 12, 2018 Order at 4; 20 C.F.R. §725.414(c).

The ALJ further rejected Employer's alternative argument that extraordinary circumstances exist for its failure to designate Mr. Chance and Ms. Kasmeier as liability witnesses. Sept. 12, 2018 Order at 5. As Employer does not challenge the finding that it did not establish extraordinary circumstances for its failure to timely designate its witnesses, we affirm the ALJ's determination.[19] *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ acknowledges Employer might obtain otherwise admissible documents relating to its liability through discovery. Sept. 12, 2018 Order at 4 (citing 20 C.F.R. §18.51(a)). However, as Employer failed to attempt to show that the documents[20] it sought

[18] 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.

[19] Employer states that subjecting the development of its liability evidence to time constraints would render "the district director an inferior officer in violation of *Lucia*." Employer's Brief at 37, n.7. As Employer has offered no explanation or argument to support this assertion, we decline to address this issue, as it is inadequately briefed. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b). We further note that this argument was not raised before the district director the regulations require. 20 C.F.R. §§725.419(b); 725.451; *see Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021).

[20] Employer sought all documents used in the development and adoption of BLBA Bulletin No. 16-01, any and all documents related to Patriot's self-insurance, any plan for the disposition of Patriot's self-insurance assets, all documents related to Arch's self-insurance from July 1997 to present, all documents related to how the DOL allocates liability for coal miners who worked for Magnum on or after January 1, 2006, all documents related to the allocation of liability in cases filed before BLBA Bulletin No. 16-01 was issued involving the parental liability of a self-insured mine operator for a subsidiary or affiliated company that later became insolvent, any and all documents from 1974 to the present providing instructions to claims examiners relating to the same, and any documents relating to the DOL's Oct. 30, 2017 "Proposed Collection of Information;

could reasonably lead to the discovery of admissible evidence, the ALJ reasonably rejected its discovery request. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii); Sept. 12, 2018 Order at 4 (citing *Synyngy, Inc. v. ZS Assocs.*, Civ Action No. 07-3536, 2010 WL 4400064 (E.D. Pa. Nov. 4, 2010) and *Alexander v. FBI*, 194 F.R.D. 315, 325 (D.D.C. 2000)). Moreover, while Employer generally asserts it is entitled to discovery, it does not challenge the ALJ's determination that it failed to establish that the documents it sought could reasonably lead to the discovery of admissible evidence. *Skrack*, 6 BLR at 1-711; Employer's Brief at 32-38.

Consequently, we affirm the ALJ's denial of Employer's request for subpoenas and discovery. Sept. 12, 2018 Order.

**Arch's Liability**

Employer argues the ALJ erred in finding Arch is the responsible carrier. Employer's Brief at 24-31. It contends the Black Lung Trust Fund is liable because Patriot should be considered liable as Apogee's parent company that was authorized to self-insure when Claimant filed his current claim. *Id.* The Director responds that the ALJ properly found Apogee, as self-insured through Arch, is the correctly designated responsible operator and carrier. Director's Response at 14-18. We agree with the Director.

The ALJ found Employer met the requirements for liability under the Act. Apogee, a mine operator, employed Claimant as a miner for one year or more; Claimant was not employed by any other coal mine operator after Apogee; and Apogee was self-insured through Arch during Claimant's employment with it. Decision and Order at 6-7; 20 C.F.R. §725.494(a)-(e). Employer identifies no error in these findings. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b). The ALJ also correctly found Employer did not present any evidence that Arch is unable to assume liability if Claimant is found eligible for benefits. Decision and Order at 6-7; 20 C.F.R. §§725.494(e), 725.495(a)(3).

Nor has Employer cited any authority for its argument that, while commercial insurance liability is triggered by the date of the miner's last coal mine employment, self-insurance liability is triggered by the date the claim is filed. Employer's Brief at 24-28. Employer instead cites to Claimant's most recent prior claim in which Patriot and not Arch was named the responsible carrier and to other similar cases, arguing the DOL historically

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Comment Request." *See* Employer's Attachment to Subpoena; List of Documents to Produce at Deposition.

has placed liability on self-insured parent companies based on the date of filing of the claim. *Id.* at 28, 31, 33.

First, we note that although Patriot was named in Claimant's 2012 claim, Arch was named the responsible carrier in Claimant's 2006 and 2010 claims, even though they were filed after Apogee was sold to Magnum and Patriot. Director's Exhibits 2-3. Arch has not attempted to distinguish those prior claims, nor did Arch argue in those claims that Magnum or Patriot was the responsible carrier. *Id.*

Based on the evidence of record, we agree with the Director that Employer has failed to show the Director changed its policy in naming the responsible carrier. Director's Response at 22-23. Employer cites three cases in which either Patriot or Magnum was named as the responsible carrier. Employer's Brief at 28, 31, 33. 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 22-23; Director's Exhibit 4; *Massey v. Apogee Coal*, 2019-BLA-05144; *Creech v. Apogee Coal*, xxx-xx-6408; *Allen v. Hobet Mining*, 2019-BLA-06231. In this case, however, Patriot is no longer of capable of paying benefits, reflecting a change in circumstances rather than a change in the DOL's policy.

Nor is there any evidence in the record to support Employer's suggestion that the DOL endorsed a shift in liability by approving the sale of Apogee to Magnum. Employer's Brief at 28-29. As discussed above, the ALJ permissibly excluded all of the evidence Employer relies on because it was not submitted by the deadline that the district director set for the submission of liability evidence. May 31, 2019 Order; *See* 20 C.F.R. §§725.414(c), 725.456(b)(1). Employer has not specifically challenged that ruling. *Skrack*, 6 BLR at 1-711. Thus, the ALJ accurately found "[t]he documents Apogee Coal and/or Arch Coal rely on in support of their assertions are not in evidence." Decision and Order at 7. Further Employer presented no evidence that Apogee did not last employ Claimant or Arch is financially incapable of paying benefits. *Id.* at 6-7. Therefore, we affirm the ALJ's finding that Apogee, as self-insured through Arch, is liable for the payment of benefits. Decision and Order at 7; 20 C.F.R. §725.494.

**BLBA Bulletin No. 16-01**

Employer argues the DOL's issuance of BLBA Bulletin No. 16-01 is a new "rule" retroactively imposing new liability on self-insured mine operators, bypassing rulemaking in violation of the APA. Employer's Brief at 29-31. The Director responds that Employer's argument is irrelevant under the facts of this case. Director's Response at 21-24. We agree with the Director because Employer failed to timely submit evidence and argument on this point, as discussed above.

Based on the evidence of record, the ALJ permissibly found Employer meets all the requirements of a potentially liable operator: Claimant's presumed total disability arose 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 6-7. Employer has not challenged any of these findings. *Skrack*, 6 BLR at 1-711.

Moreover, the D.C. Circuit Court of Appeals rejected Employer's argument that the Bulletin is a substantive rule affecting Arch's rights and interests or governing its liabilities in any given case. *Arch Coal, Inc. v. Acosta*, 888 F.3d 393, 500-01 (D.C. Cir. 2018). As the ALJ found, based on the record before him, Arch's liability is established under the Act and regulations. 20 C.F.R. §§725.494-495; Decision and Order at 7. We therefore reject Employer's challenges to its liability based on BLBA Bulletin No. 16-01.

**Invocation of the Section 411(c)(4) Presumption**

Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 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 all relevant supporting evidence against all relevant contrary evidence.[21] *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 the blood gas study and medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv).[22]

[21] The ALJ found that the new medical reports, including the new objective testing results, indicated that Claimant's condition had changed since his previous claim was denied and "accord[ed] little weight to the old reports" and tests. Decision and Order 27.

[22] The ALJ found the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 7-9.

**Blood Gas Studies**

The ALJ considered two new arterial blood gas studies conducted on July 11, 2017, and July 19, 2018. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9. The July 11, 2017 study produced non-qualifying[23] values at rest and qualifying values with exercise. Director's Exhibit 15. The July 19, 2018 study produced non-qualifying values at rest, but did not include any testing with exercise. Employer's Exhibit 2. The ALJ found the July 11, 2017 exercise blood gas study entitled to controlling weight, as it is the most accurate representation of Claimant's ability to perform manual labor. Decision and Order at 10. Therefore, he found the new arterial blood gas study evidence established total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 10.

Contrary to Employer's argument, the ALJ was not required to assign greater weight to the July 19, 2018 non-qualifying study because it was more recently administered. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Employer's Brief at 5. He permissibly gave more weight to the July 11, 2017 qualifying exercise blood gas study[24] because exercise testing is "more probative of a miner's ability to perform manual labor." Decision and Order at 9; *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); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984). Thus we affirm his finding that the blood gas studies support finding total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9.

[23] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(ii). A "non-qualifying" study exceeds those values.

[24] We further reject Employer's argument that the ALJ erred in not addressing Dr. Forehand's statement that the altitude at which the July 11, 2017 study was conducted could have been responsible for its qualifying values. Employer's Brief at 40. A qualifying arterial blood gas study, absent contrary probative evidence, is sufficient to establish a miner's total disability. 20 C.F.R. §718.204(b)(2). Contrary to Employer's argument, there is no such contrary evidence in this case. At Dr. Forehand's deposition, Employer's counsel asked him whether there could "potentially" be a clinically significant change in the blood gas studies if they were adjusted for altitude. Employer's Exhibit 22 at 38. He responded, "Possibly, yes, sir." *Id*. However, he did not indicate that he believed the study was nonqualifying, and no physician opined it was not qualifying if adjusted for altitude. Moreover, the regulations already take into account the altitude at which tests are conducted. *See* 20 C.F.R. Part 718, Appendix C.

**Medical Opinions**

The ALJ next weighed the medical opinion of Dr. Forehand that Claimant is totally disabled, and the contrary opinions of Drs. Rosenberg and Tuteur.[25] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-14. The ALJ found Dr. Forehand's opinion well-documented, well-reasoned, and consistent with his underlying objective testing. Decision and Order at 11. Conversely, the ALJ found Dr. Rosenberg's opinion inconsistent, and not well-documented or reasoned, and he accorded it little weight. *Id*. at 12. Similarly, he found Dr. Tuteur's opinion not well-reasoned as he did not address Claimant's qualifying exercise blood gas study or address the contradictory evidence that he considered. *Id*. at 13-14. The ALJ therefore determined the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 14.

Employer contends the ALJ erred in his consideration of the medical opinion evidence. Employer's Brief at 38-41. We disagree.

The ALJ accurately noted Dr. Forehand opined Claimant is totally disabled from performing his usual coal mine employment as a shuttle car operator based upon his exercise blood gas study and his diffusion capacity results. Decision and Order at 11, 13; Director's Exhibits 15, 23; Employer's Exhibit 22. The ALJ found his opinion was based on Claimant's relevant histories, physical examination, and objective testing, and is consistent with the underlying data. Decision and Order at 11. He therefore found his opinion well-reasoned and well-documented, and accorded it probative weight. *Id*.

Employer argues the ALJ erred in failing to consider whether Dr. Forehand had an adequate understanding of the exertional requirements of Claimant's usual coal mine employment. Employer's Brief at 40. We disagree. Dr. Forehand found total disability based upon Claimant's job as a shuttle car operator, Director's Exhibit 15, which the ALJ found did not require heavy labor. Decision and Order at 5. However, the ALJ also found Claimant's job required him to work as a general inside laborer performing additional heavy labor. *Id*. Employer has failed to explain why the consideration of less strenuous labor would render Dr. Forehand's opinion that Claimant cannot perform such work less

[25] The ALJ first determined Claimant's usual coal mine employment was working as a shuttle car operator and general inside laborer. Decision and Order at 5. The ALJ found Claimant's work as a shuttle car operator, which also required lifting bags of rock dust weighing ten to twenty pounds, did not require heavy labor. *Id*. However, he found Claimant's work as a general inside laborer, hanging tubing in place of curtains for ventilation, "required heavy exertion and heavy manual labor." *Id*. We affirm this determination as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

persuasive. *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, 1-1278 (1984). As Employer raises no other specific challenges to the ALJ's credibility findings, we affirm his determination that Dr. Forehand's opinion is well-reasoned and well-documented. Decision and Order at 11, 13.

The ALJ accurately noted Dr. Rosenberg initially opined that Claimant is totally disabled based upon the July 11, 2017 exercise blood gas study. Director's Exhibit 24. Dr. Rosenberg later examined Claimant on July 19, 2019, when a resting blood gas study yielded non-qualifying results, but no exercise study was performed. Employer's Exhibit 2. He opined in a September 4, 2018 report that Claimant is not totally disabled at he has only a mild impairment indicated by his pulmonary function study. Employer's Exhibit 2 at 3. However, after reviewing additional evidence in an October 25, 2018 report, Dr. Rosenberg opined Claimant is disabled from a pulmonary perspective based on the "existence of qualifying exercise-induced hypoxemia" in Claimant's past records. Employer's Exhibit 2 at 36. After an additional record review on April 12, 2019, Dr. Rosenberg again changed his opinion and opined Claimant is not disabled from a pulmonary perspective, and does not have a qualifying gas exchange. Employer's Exhibit 19 at 5.

The ALJ permissibly found Dr. Rosenberg's opinion contradictory and unexplained. *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 12. The ALJ further found his opinion entitled to reduced weight because, while he considered Claimant's less strenuous duties as a shuttle car operator, he did not consider the heavy labor that his usual coal mine employment performing general inside labor required. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 587 (6th Cir. 2000); Decision and Order at 11. Employer does not challenge these findings, which we therefore affirm. *Skrack*, 6 BLR at 1-711. Thus, we affirm the ALJ's determination that Dr. Rosenberg's opinion is entitled to little weight. Decision and Order at 12.

The ALJ accurately noted Dr. Tuteur opined that Claimant does not have a totally disabling respiratory impairment. Decision and Order at 13; Employer's Exhibits 3, 20. In addition, the ALJ noted Dr. Tuteur reviewed Claimant's qualifying exercise blood gas study, and considered both Dr. Forehand's opinion that the study would render Claimant totally disabled and Dr. Rosenberg's similar earlier opinion. Decision and Order at 13-14. The ALJ found Dr. Tuteur's opinion unpersuasive, as he failed to explain his determination that Claimant is not disabled in light of Claimant's qualifying exercise blood gas study and failed to address the conflicting opinions. *Id*. As Employer does not challenge these credibility findings, we affirm them. *Skrack*, 6 BLR at 1-711.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinions establish total disability.[26] Decision and Order at 13; 20 C.F.R. §718.204(b)(2)(iv).

Employer further contends the ALJ erred in not explaining why he "credited the blood gas tests over the pulmonary function tests." Employer's Brief at 39-40. We disagree, as pulmonary function studies and blood gas studies measure different types of impairments. *See Larioni*, 6 BLR at 1-1278; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). We therefore affirm the ALJ's determination that the evidence as a whole establishes total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §718.204(b)(2); Decision and Order at 14.

We therefore affirm the ALJ's determinations that Claimant invoked the Section 411(c)(4) presumption and established a change in an application condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309.

**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[27] nor clinical pneumoconiosis,[28] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as

[26] Because the ALJ's reasons for discrediting the opinions of Drs. Rosenberg and Tuteur are unchallenged, we need not address Employer's other arguments challenging the ALJ's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 40-41.

[27] "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).

[28] "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).

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.[29]

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 Co.*, 25 BLR 1-149, 159 (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 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)).

The ALJ considered the opinions of Drs. Rosenberg and Tuteur that Claimant does not have legal pneumoconiosis, but instead has chronic obstructive pulmonary disease (COPD) due solely to cigarette smoking.[30] Director's Exhibit 24; Employer's Exhibits 2, 3, 19, 20. He found neither physician's opinion sufficiently reasoned to carry Employer's rebuttal burden. Decision and Order at 21-25.

Employer contends the ALJ erred in finding the opinions of Drs. Rosenberg and Tuteur inadequately reasoned to establish Claimant does not have legal pneumoconiosis. Employer's Brief at 41-46. We disagree.

The ALJ accurately found Dr. Rosenberg attributed Claimant's emphysema solely to smoking based, in part, on his opinion that coal mine dust exposure does not cause a reduced FEV1/FVC ratio on pulmonary function testing. Decision and Order at 21; Director's Exhibit 24; Employer's Exhibits 2, 19. Contrary to Employer's arguments, the ALJ permissibly found this aspect of Dr. Rosenberg's rationale conflicts with the medical science that the DOL accepts, recognizing coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*],

[29] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 16.

[30] The ALJ also considered the opinion of Drs. Forehand that Claimant has legal pneumoconiosis and found it did not assist Employer in rebutting the presumption. Decision and Order at 25; Director's Exhibits 15, 23; Employer's Exhibit 22.

762 F.3d 483, 491-92 (6th Cir. 2014); Decision and Order at 21-23; Employer's Brief at 42-43.

The ALJ further accurately noted Dr. Tuteur relied on his opinion that 20% of non-mining cigarette smokers developed clinical meaningful COPD while only 1% of never smoking miners do in order to exclude coal mine dust exposure as a cause of Claimant's COPD. Decision and Order at 24; Employer's Exhibit 3 at 7. However, the ALJ noted Claimant "was a miner who also smoked" and did "not fit into either of the categories [Dr. Tuteur] discussed." Decision and Order at 24. The ALJ permissibly found Dr. Tuteur's opinion entitled to less weight because it was based on generalities and statistics rather than the specific facts of Claimant's condition. *See 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).

Because the ALJ permissibly discredited the opinions of Drs. Rosenberg and Tuteur,[31] the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding that Employer failed to establish that Claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i); Decision and Order at 25. Accordingly, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis.[32] *See* 20 C.F.R. §718.305(d)(2)(i).

Finally, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Because Drs. Rosenberg and Tuteur did not diagnose Claimant with legal pneumoconiosis, contrary to the ALJ's findings, and they tied their disability causation analyses to their pneumoconiosis analyses, the ALJ reasonably discounted their opinions on the issue of disability causation. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 25-26. Thus, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption.

[31] Because the ALJ provided valid reasons for discrediting Drs. Rosenberg's and Tuteur's opinions, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele, 6 BLR at 1-382 n.4*.

[32] 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).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge