U.S. Department of Labor

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

BRB No. 20-0463 BLA

TONY D. SETLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 8/15/2022
	)	
PEABODY ENERGY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2018-BLA-06318) on a claim filed on June 30, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Eastern Associated Coal Company (Eastern), self-insured through Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He credited Claimant with twenty-eight years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine, and found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it liable for the payment of benefits. Alternatively, Employer asserts the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a response, contending the ALJ properly determined Employer is responsible for payment of benefits. But the Director further asserts that if the Board remands the case for reconsideration of Employer's liability to pay benefits, it should instruct the ALJ to determine whether

[1] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22.

extraordinary circumstances justify the admission of Employer's untimely submitted liability evidence into the record.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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, 362 (1965).

Responsible Insurance Carrier

We first turn to Employer's arguments on the merits of why it believes it cannot be held liable for this claim.

Eastern employed Claimant in coal mine employment from 1970 until 1998, and it was the last potentially liable operator to do so. Director's Brief at 3; Director's Exhibit 4; Hearing Tr. at 37. At the end of Claimant's employment, Eastern was a subsidiary of, and self-insured for black lung benefits liabilities through, Peabody Energy. Director's Brief at 3.

In 2007, nine years after Claimant's coal mine employment ended, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). Director's Exhibit 52 at 15-68 (Separation Agreement). In 2011, the Department of Labor (DOL) authorized Patriot to self-insure for black lung benefits liabilities relating to the Peabody Energy subsidiaries it purchased, including Eastern, retroactive to July 1, 1973. Director's Exhibit 52 at 12-14 (Steven Breeskin's March 4, 2011 Letter to Patriot and Decision Granting Authority to Act as a Self-Insurer).[4] This authorization determined the amount of potential liability to insure the obligation, acknowledged Patriot's deposit of U.S. Treasury funds with the Federal Reserve Bank on behalf of the DOL in satisfaction of the liability obligation, and released a letter of credit Patriot financed under Peabody Energy's self-insurance program.[5] *Id*. In 2015, Patriot went bankrupt. Director's Brief at 2; Director's Exhibit 25.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 33.

[4] Steven Breeskin is the former Director of the Division of Coal Mine Workers' Compensation (DCMWC).

[5] The monetary values are redacted. Director's Exhibit 15 at 58-59.

Employer does not directly challenge Eastern's designation as the responsible operator.[6] Hearing Tr. at 11-12. Rather, it asserts that the Black Lung Disability Trust Fund (Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 18-30. It argues the ALJ erred in finding it liable for benefits because: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security Patriot gave to secure its self-insurance status; (3) the DOL released Peabody Energy from liability and transferred liability to Patriot; (4) the Director did not establish Peabody Energy's self-insurance authorization covers this claim, as self-insurance liability is triggered by the date a claim is filed, while commercial insurance liability is triggered by the date of a miner's last coal mine employment; and (5) the Director is equitably estopped from imposing liability on Peabody Energy. *Id*. In addition, it maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

Before the ALJ, Employer relied on the separation agreement between Peabody Energy and Patriot; DOL's authorization of Patriot to self-insure; a March 4, 2011 letter from Mr. Breeskin to Patriot; a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; an undated letter from Michael Chance, the Director of the Division of Coal Mine Workers' Compensation (DCMWC), regarding Patriot's self-insurance reauthorization audit requiring coverage for all claims retroactive to July 1, 1973; a March 4, 2011 indemnity agreement releasing Bank of America from liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance, because the DOL had either lost or destroyed it; documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Trust Fund; and Peabody Energy's indemnity bond. Director's Exhibit 52. It also relied on deposition testimony from Mr. Breeskin and another DOL employee, David

[6] Eastern Associated Coal Company (Eastern) qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of his employment with Eastern; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed Claimant as a miner for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Eastern is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Eastern was the last potentially liable operator to employ Claimant, the ALJ designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 12; Hearing Tr. at 12.

Benedict.[7] Employer's Exhibits 11, 12. The ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 12-18.

Letter of Credit and Indemnity Agreement

Employer first maintains Mr. Breeskin's March 4, 2011 letter to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program and authorizing Patriot to self-insure "retroactive to July 1, 1973" for black lung benefits liabilities absolves Peabody Energy from liability under the Act. Employer's Brief at 19-23. It argues the release of the letter of credit establishes the DOL "was switching the self-insurance from Peabody Energy to [Patriot] and no longer treating Peabody Energy as the insurer" for Eastern. *Id*. at 23. Further, it argues that if "the intent of the [DOL] was for Peabody Energy to maintain self-insurance status for these liabilities, the Department would not have released [the letter of credit] but would have required Peabody Energy to maintain it" to cover these claims. *Id*.

The ALJ properly rejected this argument. He correctly found neither the Act nor the regulations support Employer's argument that liability is created only when a self-insurer posts a security, and that the subsequent release of a self-insurer's security absolves it of liability. Decision and Order at 15. Operators are authorized to self-insure if, among other requirements, they obtain security approved by the DOL. 20 C.F.R. §726.101(a), (b)(4). In addition to obtaining "adequate security," a self-insurance applicant "shall [also] as a condition precedent to receiving such authorization, execute and file . . . an agreement . . . in which the applicant shall agree" to "pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners." 20 C.F.R. §726.110(a)(1). Further, Employer's liability is created by statute, as the Act itself requires that during any period after December 31, 1973, coal mine operators "shall be liable for and shall secure the payment of benefits."[8] 30 U.S.C. §932(a), (b).

Thus, we agree with the Director's argument that "the security deposit is an additional obligation separate from the responsibility to pay benefits." Director's Response at 11. Before the ALJ, and now before the Board, Employer has failed to cite any authority expressly allowing the DOL to release a designated responsible operator from liability, notwithstanding whether the DOL released its posted security. Based on the foregoing, we

[7] David Benedict is a former DCMWC employee.

[8] For the same reasons, the ALJ correctly found the DOL's authorization for Patriot to self-insure for claims retroactive to July 1, 1973, does not release Peabody Energy from liability. 30 U.S.C. §932(a), (b); 20 C.F.R. §726.110(a)(1); Decision and Order at 16.

reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.[9]

Peabody Energy's Self-Insurance

Employer argues the Director did not submit evidence establishing the DOL continued to "require[] Peabody Energy to be the self-insurer for [Eastern] claims" after it authorized Patriot to self-insure for claims retroactive to 1973. Employer's Brief at 26. Employer misconstrues the burdens in this case. The Director bears the burden of establishing the named responsible operator meets the criteria for being a potentially liable operator as set forth in 20 C.F.R. §725.494(a)-(e). *See* 20 C.F.R. §725.495(b). "[I]n the absence of evidence to the contrary," the regulation presumes the designated responsible operator is capable of assuming liability for the payment of benefits.[10] *Id.* The named responsible operator may be relieved of liability only if it proves either it is financially incapable of assuming liability or another potentially liable operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c).

Employer does not dispute that Peabody Energy provided self-insurance coverage to Eastern on Claimant's last date of employment with it. Nor does it contest that Peabody Energy is financially capable of paying benefits. Rather, it argues the ALJ erred in finding that self-insurance coverage applies to this claim because a "company is not [a] self-insurer

[9] We also reject Employer's assertion that Mr. Chance's undated letter to Patriot establishes the DOL released Peabody Energy from its liabilities. Employer's Brief at 20-22. Employer notes this letter does not state liability would rest with Peabody Energy should Patriot's self-insurance be discontinued. *Id.* However, Employer's conclusion that the absence of such a statement indicates the DOL in fact released Peabody Energy from liability is illogical and unsupported. The letter simply outlines the conditions necessary for Patriot to be reauthorized to self-insure. Director's Exhibit 52 at 75-76.

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

for a designated period of time and is forever responsible for claims made by employees in that period." Employer's Brief at 22-23. It asserts self-insurance liability is triggered by the date a claim is filed, while commercial insurance liability is triggered by the date of a miner's last coal mine employment. *Id.* To support this argument, Employer generally cites to the regulations applicable to self-insurance authorization, but fails to cite any specific authority. *Cox v. Director*, 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); Employer's Brief at 22-26.

But the regulations applicable to self-insurance authorization at 20 C.F.R. §§726.101-726.115 govern only how an operator must secure its existing liability. Having identified no regulatory authority to support its argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment, we reject Employer's contention. Employer's Brief at 22-26.

Nor does 20 C.F.R. §725.494(e)(2) support Employer's argument that Patriot might be liable for the claim "[i]f any of the funds from the surety posted by Patriot remain." That section addresses the financial ability of an "operator qualified as a self-insurer . . . *during the period in which the miner was last employed by the operator*[.]" 20 C.F.R. §725.494(e)(2) (emphasis added); *see* Director's Brief at 17-18 (citing 20 C.F.R. §725.494(e)(2) for the proposition that "liability attaches to the potentially liable operator that most recently employed the miner . . . so long as that operator is capable of providing for benefits"). Employer does not dispute that Patriot never employed Claimant, Peabody Energy qualified as a self-insurer and its coverage included Eastern when Eastern last employed Claimant, and Peabody Energy remains financially capable of paying benefits.[11] Thus, we reject Employer's argument.

Equitable Estoppel

Employer also argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 23-26. To invoke equitable estoppel, Employer must show the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010); *Reich v. Youghiogheny & Ohio Coal Co.*, 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite

[11] The Director also disputes that Patriot's security deposit has not been exhausted. Director's Brief at 18 n.6.

intent." *See U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116.

Employer alleges the DOL entered into "a contractual agreement" with Peabody Energy to "release [] Peabody's letter of credit" and transfer liability to Patriot, and Peabody Energy "justifiably relied upon that agreement to their detriment . . . ." Employer's Brief at 24. It also contends the Director's release of Peabody Energy from liability without securing proper funding from Patriot constitutes affirmative misconduct. *Id*. at 23-25. Employer, however, identifies no admissible evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release. Further, as the Director asserts, Employer does not allege the DOL acted either intentionally or recklessly. Director's Brief at 15-16; *see Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. Because Employer has failed to establish the necessary elements, we affirm the ALJ's rejection of Employer's equitable estoppel argument. Decision and Order at 16; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116; *Graham v. Eastern Associated Coal Co.*, ___ BLR ___, BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022).

20 C.F.R. § 725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[12] Employer next contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability and places it on the Trust Fund. Employer's Brief at 26-27. This argument lacks merit.

Section 725.495(a)(4) transfers liability to the Trust Fund in certain cases in which "the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability" and that operator no longer possesses sufficient funds

[12] Under Section 725.495(a)(4):

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495](a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

20 C.F.R. §725.495(a)(4).

to pay benefits. 20 C.F.R. §725.495(a)(4). In this case, however, Claimant's "most recent employment by an operator" for over one year was with Eastern, and that employment ended in August 1998 while Eastern was authorized to self-insure through Peabody Energy. Director's Exhibit 4. As Patriot never employed Claimant, 20 C.F.R. §725.495(a)(4) cannot apply by its unambiguous language. Rather, the ALJ properly found Employer meets the requirements for liability under the Act: Eastern, a coal mine operator, employed Claimant in coal mine employment for one year or more; Claimant was not employed by any other potentially liable operator after Eastern; and Eastern was self-insured through Peabody Energy during Claimant's employment and at the time his employment ended in August 1998. Decision and Order at 14-15, 17. Employer identifies no error in these findings. *Cox v. Director*, 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 Peabody Energy is unable to assume liability for benefits. Decision and Order at 15; *see* 20 C.F.R. §§725.494(e), 725.495(a)(3); *Graham*, ___ BLR ___, BRB No. 20-0221 BLA, slip op. at 9-10.

Employer raises two additional arguments: (1) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond, and (2) the ALJ was required to find the DOL exhausted Patriot's bond before Peabody Energy could be held liable. Neither argument is persuasive. Employer's Brief at 27-30. These arguments incorrectly presume Patriot, rather than Peabody Energy, meets the requirements for primary liability under the Act because it was the last self-insurer for Eastern. 20 C.F.R. §§725.494(e), 725.495(a)(1). Peabody Energy's liability, however, flows from the following facts: (1) Claimant was last employed by Eastern, the properly designated responsible operator in this claim; (2) Peabody Energy provided self-insurance to Eastern on the last day of Claimant's employment; (3) although the Director subsequently authorized Patriot to insure Peabody Energy's black lung liabilities, there is no evidence he released Peabody Energy from liability as part of that authorization or any other agreement; (4) Patriot was liquidated and thus is incapable of assuming Peabody Energy's liabilities; and (5) there is no dispute Peabody Energy, which insured Eastern on Claimant's last day of work, is financially capable of paying benefits. 20 C.F.R. §725.495(c); *Graham*, ___ BLR ___, BRB No. 20-0221 BLA, slip op. at 9; Decision and Order at 14-15.

For the foregoing reasons, we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[13] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.[14]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Zaldivar and Tuteur that Claimant does not have legal pneumoconiosis. Director's Exhibit 21; Employer's Exhibits 3, 8, 9. Dr. Zaldivar opined Claimant has adult-onset asthma and a moderate irreversible airway obstruction related to his life-long smoking history and unrelated to coal mine dust exposure.[15] Director's Exhibit 21; Employer's Exhibit 8 at 21-22, 24, 26-27, 43. Dr. Tuteur opined Claimant has chronic obstructive pulmonary disease (COPD) due to his smoking history, and unrelated to coal mine dust exposure. Employer's Exhibits 3, 9 at 23. The ALJ found neither opinion adequately reasoned. Decision and Order at 31. He further found Dr. Tuteur's opinion contrary to the regulations.

[13] "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). "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).

[14] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 30.

[15] Dr. Zaldivar also opined Claimant has a mild restriction of forced vital capacity, a mild diffusion abnormality and mild hypoxemia at rest, but he did not identify the etiology of these conditions. Director's Exhibit 21 at 3; Employer's Exhibit 8 at 44-46.

We reject Employer's argument that the ALJ found the opinions of Drs. Zaldivar and Tuteur insufficient to rebut the presumption of legal pneumoconiosis simply because they acknowledged it is possible that coal mine dust exposure can cause obstructive respiratory impairments. Employer's Brief at 4-7. The ALJ properly evaluated the underlying reasoning for each medical opinion and addressed whether the doctor persuasively explained why the lung disease or impairment he diagnosed is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); Decision and Order at 30-31. He discredited Dr. Zaldivar's opinion as inadequately reasoned and Dr. Tuteur's opinion as inadequately reasoned and contrary to the regulations. Decision and Order at 31.

We also reject Employer's argument that the ALJ provided invalid reasons for finding the opinions of Drs. Zaldivar and Tuteur not credible. Employer's Brief at 7-18. Dr. Zaldivar stated Claimant "has destroyed his lungs through a life-long habit of smoking and tobacco exposure that began even before birth," which has caused him to develop asthma. Director's Exhibit 21 at 4. He opined Claimant's "asthma is manifested in this case not only by [his] response to bronchodilators and symptoms, but by [a] preserved diffusion capacity in spite of the severity of the airway obstruction." *Id*. Further, he opined Claimant's lungs have undergone airway remodeling because he has experienced "episodes of inflammation and healing, which has resulted in [the lungs'] inability . . . to bronchodilate at least by objective testing." *Id*. Thus Dr. Zaldivar opined Claimant has a moderate, irreversible airway obstruction. *Id*. at 3.

During a subsequent deposition, however, Dr. Zaldivar clarified he "cannot prove that [Claimant] has asthma because none of his breathing tests actually show bronchospasm." Employer's Exhibit 8 at 21. But he noted Claimant has a "history of the wheezing, the cough, [and] the frequent colds, and he is taking medication with bronchodilators, so it is reasonable" to conclude Claimant has asthma. *Id*. He testified that because "the diffusing capacity is not very abnormal," Claimant's "obstruction is in a large part due to inflammation" associated with asthma and "not due to destruction of lung tissue" associated with coal mine dust exposure. *Id*. at 23. Again, he stated that Claimant's lungs underwent airway remodeling and concluded Claimant's irreversible obstructive impairment "is really due to tobacco smoke, which is what causes the asthma and the bronchospasm." *Id*. at 24-25. During cross-examination, Dr. Zaldivar conceded "[c]oal workers' pneumoconiosis should cause irreversible airway obstruction once it affects the lungs." *Id*. at 44. He stated that if legal pneumoconiosis were present, it would present itself "in the form of an irreversible airway obstruction." *Id*. at 49.

Because Dr. Zaldivar conceded coal mine dust exposure causes an irreversible obstructive impairment, the ALJ rationally found Dr. Zaldivar's opinion excluding legal pneumoconiosis "contradict[ed]" by his own diagnosis of an irreversible airway obstruction.[16] Decision and Order at 31; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). He also permissibly found that even if smoking-related asthma caused Claimant's obstructive impairment Dr. Zaldivar did not adequately explain why Claimant's irreversible obstructive impairment is not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); 20 C.F.R. §718.201(b).

Dr. Tuteur opined Claimant does not have legal pneumoconiosis because he does not have "sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic change." Employer's Exhibit 3 at 5. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because the regulations provide that a claim shall not be denied solely on the basis of a negative chest x-ray and further recognize that legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009) (affirming the discrediting of a physician's opinion because the ALJ "fairly read" it as requiring radiographic evidence of clinical pneumoconiosis before he would diagnose legal pneumoconiosis); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 31.

As the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the explanations the experts give for their diagnoses, and to assign those opinions appropriate weight. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 314-15. Employer's general contention that the opinions of Drs. Zaldivar and Tuteur are reasoned is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah,*

[16] Because Dr. Zaldivar conceded coal mine dust exposure causes an irreversible obstructive impairment, we reject Employer's argument that the ALJ substituted his opinion for that of a medical expert. Employer's Brief at 11.

Inc., 12 BLR 1-111, 1-113 (1989). Because the ALJ permissibly discredited their opinions, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis,[17] we affirm his finding that Employer failed to disprove the existence of the disease.[18] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Thus, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 32.

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32-33. He discredited the disability causation opinions of Drs. Zaldivar and Tuteur because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease.[19] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 33. Employer raises no specific allegations of error regarding the ALJ's findings other than its assertion that Claimant does not have legal pneumoconiosis, which we have rejected. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6

[17] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Tuteur, we need not address Employer's arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 31; Employer's Brief at 10, 12, 15.

[18] Because Employer has the burden of proof and we affirm the ALJ's discrediting of its medical experts, we need not address its argument that the ALJ erred in weighing the opinions of Drs. Nader and Green that Claimant has legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibits 15, 23; Claimant's Exhibits 2, 4; Employer's Brief at 10, 18.

[19] Each physician rested his opinion that legal pneumoconiosis played no part in Claimant's disability on his determination that Claimant does not have legal pneumoconiosis.

BLR 1-710, 1-711 (1983); Decision and Order at 33. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.[20]

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[20] Claimant's counsel filed an itemized fee petition requesting a fee of $987.50 for legal services performed in this appeal pursuant to 20 C.F.R. §802.203. Because the appeal was pending, the Board denied counsel's petition for an attorney's fee as premature but noted he may refile his attorney's fee petition upon successful conclusion of the litigation. *Setliff v. Eastern Associated Coal Co.*, BRB No. 20-0463 BLA (Apr. 14, 2021) (Order) (unpub.).