U.S. Department of Labor

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

BRB Nos. 21-0133 BLA
and 21-0134 BLA

THELMA VANCE (o/b/o and Widow of WILLIAM B. VANCE) Claimant-Respondent v. JEWELL SMOKELESS COAL CORPORATION c/o HEALTHSMART CASUALTY CLAIMS Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 8/30/2022 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer and its Carrier.

Sarah M. Hurley (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2013-BLA-05507 and 2014-BLA-05281) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on March 28, 2012,[1] and a survivor's claim filed on October 22, 2013.

The ALJ found the Miner had 14.7 years of coal mine employment and thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, the ALJ found the Miner had legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), (c). Consequently, she awarded benefits in the miner's claim. Based on the award of benefits in the miner's claim, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It further asserts the removal provisions applicable

[1] The Miner died on September 20, 2013, while his claim was pending. Survivor's Claim (SC) Director's Exhibit 5. Claimant, the Miner's widow, is pursuing the miner's claim on behalf of his estate and her survivor's claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

[3] 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

to ALJs render her appointment unconstitutional.[4] In addition, it avers it was deprived of due process because the Miner failed to attend scheduled examinations by its physicians before his death. On the merits, Employer argues the ALJ erred in finding that the Miner had legal pneumoconiosis and that his total disability was due to pneumoconiosis.[5]

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional and due process arguments. Employer filed a reply brief reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[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 Challenge

Employer urges the Board to vacate the ALJ's Decision and Order 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 12-14; Employer's Reply Brief

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> 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.

[4] Employer withdrew its argument that the Affordable Care Act, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Reply Brief at 3.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner is totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 25, 33.

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges of the United States Tax Court, SEC ALJs are "inferior officers" subject to

at 5-11. It does not dispute 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 the ALJ's prior appointment.[9] *Id*. The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance. Director's Brief at 5-6. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, 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 the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 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). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to

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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] Although this case was initially before ALJ Paul R. Almanza, it was ultimately reassigned to ALJ Applewhite in light of the United States Supreme Court's decision in *Lucia*.

[9] The Secretary of Labor issued a letter to the ALJ 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 Applewhite.

demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress 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 Applewhite and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Applewhite. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Applewhite "as an Administrative Law Judge." *Id*.

Employer does not allege the Secretary had no "knowledge of all the material facts" when he ratified ALJ Applewhite's appointment. *See* Employer's Brief at 13-14; Employer's Brief at 8-11. Thus, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient 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) (appointments of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where 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 appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive civil service. Employer's Brief at 13-14; Employer's Reply Brief at 8-11. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Applewhite's appointment, which we have held constituted a valid exercise of his authority that brought the ALJ's appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges (OALJ) for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer generally argues 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*. It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), vacated, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 15-18; Employer's Reply Brief at 11-17.

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).

Moreover, 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 administrative law judges" 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.

In *Seila Law*, the 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 where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[10] 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 APJs during

[10] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

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 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 [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[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. *Pehringer*, 8 F.4th at 1137-38.

The Miner's Claim

Due Process Challenge

Employer next asserts its due process rights were violated when the Miner failed to attend a medical examination by a physician of its choosing prior to his death.[11] Employer's Brief at 10-11; Employer's Reply Brief at 2-4. We disagree.

A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Grannis v. Ordean*, 234 U.S. 385 (1914). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has applied "a straightforward test for determining whether an employer has been denied due process by the government's processing of a claim: did the government deprive the employer of 'a fair opportunity to mount a meaningful defense to the proposed deprivation

[11] Employer scheduled the Miner to undergo a medical examination on four occasions. Employer's Brief at 2. It rescheduled one examination at the Miner's request. *Id.* He was unable to attend the other scheduled examinations due to a hospitalization, a lack of transportation, and declining health prior to his death, respectively. *See* Claimant's Response to Employer's Motion to Dismiss.

of its property.'" *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999) (citation omitted).

In this case, Employer argues it was denied the opportunity to mount a meaningful defense because it was unable to develop medical evidence based on an examination of the Miner conducted by a physician of its choosing. *See* Employer's Brief at 10-11. The record does not support a conclusion that Employer was deprived of the opportunity to mount a meaningful defense to the miner's claim. Employer was able to develop evidence in defense of the miner's claim and was able to respond to the evidence supportive of a finding of entitlement. Following the Miner's death, Employer submitted medical reports from Drs. Fino and Tuteur. Those doctors reviewed the Miner's medical records, the results of his chest x-rays, CT scans, pulmonary function study and arterial blood gas study, the report of the DOL-examining physician and the Miner's death certificate. Further, those doctors provided opinions on all the relevant issues in the miner's claim. *See Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148 (4th Cir. 1991); Employer's Exhibits 11, 13, 15, 16. Although the ALJ ultimately assigned the opinions of Drs. Fino and Tuteur less weight,[12] it was not due to those physicians' inability to examine the Miner prior to his death.[13] Because Employer has not demonstrated in this appeal how it was sufficiently prejudiced by its inability to have the Miner examined prior to his death in order to rise to the level of a due process violation, we reject its assertion that it should not be held liable for payment of any benefits awarded in this case. *See Energy West Mining*

[12] The ALJ found Dr. Tuteur's opinion regarding legal pneumoconiosis is based on generalities and thus entitled to lesser weight. Decision and Order at 10. The ALJ afforded Dr. Fino's opinion on legal pneumoconiosis lesser weight because she found his conclusion regarding the cause of Miner's chronic obstructive pulmonary disease is not fully explained. *Id.* Regarding disability causation, she found their opinions entitled to lesser weight because they failed to discuss the additive effect of the miner's smoking and coal mine dust exposure histories. *Id.* at 12.

[13] Employer argues it was prejudiced because the ALJ erred by failing to acknowledge Dr. Forehand was the only physician to examine the Miner. Employer's Brief at 20. As the ALJ neither gave additional weight to Dr. Forehand's opinion due to his having examined the Miner nor gave lesser weight to the opinions of the other physicians due to their not having examined the Miner, Employer has not explained why the ALJ's failure to acknowledge this fact undermines her discretionary credibility determinations. *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."); *see also Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 10, 12.

Co. v. Oliver, 555F.3d 1211, 1219 (10th Cir. 2009) (recognizing that "litigation is rarely pristine and is filled with risk" and that Due Process Clause's interest is only in whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result); *see also North American Coal Co. v. Miller*, 870 F.2d 948, 951 (3d Cir. 1989) (due process is violated when a party is given no opportunity to fully present its case).

Entitlement - 20 C.F.R. Part 718

In order to obtain benefits without the aid of a statutory presumption, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes an award. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish the Miner suffered from 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).

The ALJ considered three medical opinions. Dr. Forehand diagnosed the Miner with legal pneumoconiosis in the form of totally disabling chronic obstructive pulmonary disease (COPD), which he attributed to both coal mine dust exposure and cigarette smoking. Miner's Claim (MC) Director's Exhibit 9. Dr. Tuteur opined the Miner had disabling COPD, but opined it was due solely to cigarette smoking and unrelated to coal mine dust exposure. MC Employer's Exhibits 11, 16. Dr. Fino diagnosed the Miner with disabling COPD/emphysema due to cigarette smoking and unrelated to coal mine dust exposure. MC Employer's Exhibits 13, 16. In finding Claimant established legal pneumoconiosis, the ALJ credited Dr. Forehand's opinion as well-reasoned and documented and discredited the contrary opinions of Drs. Fino and Tuteur as inadequately reasoned. Decision and Order at 10, 12.

Employer raises several challenges to the ALJ's crediting of Dr. Forehand's opinion. First, it argues it is insufficient to meet the regulatory definition of legal pneumoconiosis. Employer's Brief at 19-24. We disagree. Dr. Forehand diagnosed disabling COPD based on the Miner's pulmonary function and arterial blood gas test results, and his symptoms of chronic cough and shortness of breath. MC Director's Exhibit 9. He explained the Miner's thirty-year history of cigarette smoking and twenty-year

history of coal mine dust exposure could both potentially cause the Miner to develop COPD. *Id*. In light of the severe degree of the COPD evidenced by the FEV1 value on pulmonary function testing that was twenty-nine percent of predicted, Dr. Forehand noted the Miner was more likely susceptible to the additive effects of coal mine dust exposure and cigarette smoking. *Id*. He opined the Miner's COPD was "the result of the combined effects of smoking cigarettes and working in dusty conditions." *Id.* Thus, he concluded the Miner's "exposure to coal mine dust substantially contributed to [his] respiratory impairment." *Id.*

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309, 314 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment."). A claimant need not establish that coal mine dust exposure was the sole cause of a miner's respiratory impairment. *Cochran*, 718 F.3d at 322-23. Thus, contrary to Employer's contention, Dr. Forehand's opinion satisfies the definition of legal pneumoconiosis.[14]

We also reject Employer's assertion that the ALJ erred in finding Dr. Forehand's opinion reasoned and documented. Employer's Brief at 19-24. The ALJ permissibly found Dr. Forehand's opinion credible because it is "supported by his observations and the objective medical evidence" and adequately reasoned. Decision and Order at 10; *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). Thus, we affirm the ALJ's determination that Dr. Forehand's opinion is sufficiently reasoned and documented to establish legal pneumoconiosis. Decision and Order at 10.

[14] We reject Employer's contention that Dr. Forehand's opinion is not reasoned because he did not specifically apportion the amount of the Miner's obstruction caused by smoking as opposed to coal mine dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006). A physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke as opposed to coal mine dust exposure to establish the existence of legal pneumoconiosis, provided that the physician has credibly diagnosed a chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000).

In addition, Employer argues the ALJ erred in crediting Dr. Forehand's opinion because he relied on an inaccurate cigarette smoking history and the ALJ did not reconcile the conflicting smoking histories of record. Employer's Brief at 22-23. We disagree. The ALJ reviewed Claimant's testimony and the medical opinions regarding the Miner's smoking history.[15] Decision and Order at 3, 7-9. Employer does not contest the accuracy of the ALJ's summaries. Consistent with her summary of the Miner's smoking history, the ALJ permissibly found Dr. Forehand understood the Miner's smoking history to be extensive. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 10; MC Director's Exhibit 9. Employer has therefore failed to demonstrate how the identification of a specific smoking history would have made any difference to the ALJ's decision to credit Dr. Forehand's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Employer next argues the ALJ erred in weighing the opinions of Drs. Tuteur and Fino. Employer's Brief at 24-27. We disagree. Dr. Tuteur opined the Miner "had advanced disabling [COPD]" and that this "COPD phenotype could have been due to both the inhalation of coal mine dust and the chronic inhalation of tobacco smoke." Employer's Exhibit 11. He excluded legal pneumoconiosis because twenty percent of "never mining cigarette smokers develop a clinical picture of COPD while only [one percent] or fewer never smoking coal miners do, [so] it is with reasonable medical certainty that in the case of [the Miner], his COPD was due to the inhalation of cigarette smoke." *Id.* Dr. Fino considered both the Miner's history of cigarette smoking and coal mine employment as possible causes of his COPD and emphysema. Employer's Exhibit 16. He opined that in light of the Miner's longer smoking history, it is more likely cigarette smoking caused the Miner's disabling emphysema. *Id.* Thus, Dr. Fino excluded coal mine dust exposure as a cause of the Miner's impairments. *Id.*

The ALJ permissibly found Drs. Tuteur and Fino did not sufficiently explain why the Miner's COPD was not caused by both coal dust inhalation and smoke.[16] Decision and

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[15] The ALJ acknowledged Claimant's testimony that "the Miner had started smoking when he was in his [thirties]." Decision and Order at 4 (citing Hearing Transcript at 28-29). She noted Dr. Forehand reported a thirty-year smoking history. Decision and Order at 7; (Miner's Claim) MC Director's Exhibit 9. Next, she noted Dr. Tuteur observed it was reported the Miner smoked "for at least [thirty] years or more at [one-half] pack to [two] packs a day." Decision and Order at 7 (citing Employer's Exhibit 11). Finally, she noted Dr. Fino relied on a smoking history of forty to sixty pack years. *Id.* at 8 (citing Employer's Exhibit 13).

[16] We reject Employer's argument that the ALJ erred by shifting the burden to Employer to disprove legal pneumoconiosis. Employer's Brief at 26-27. The ALJ noted

Order at 10, 12. Dr. Tuteur excluded legal pneumoconiosis based on a statistical assessment of claimant's cigarette smoke and coal mine dust exposures. Employer's Exhibit 11. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive to the extent he relied on statistical generalities, rather than the specifics of the Miner's case. *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); Decision and Order at 10.

Similarly, Dr. Fino excluded legal pneumoconiosis stating,

> Generally speaking, the longer an individual worked in the mines the more likely that individual would have a disabling obstructive impairment due to emphysema. The number of years [the Miner] spent working in the mining industry would place him at a low risk, obviously not at a zero risk, for developing significant emphysema. On the other hand, he had a very significant smoking history

Employer's Exhibit 13. The ALJ permissibly found that even if cigarette smoking is more likely the cause of the Miner's COPD, Dr. Fino did not adequately explain why his smoking-related emphysema is not significantly related to, or substantially aggravated by, coal mine dust exposure in light of the additive effects of the two factors. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000).

Employer finally argues the ALJ erred in failing to consider the qualifications of the three physicians. Employer's Brief at 24. Employer's arguments are not persuasive. The ALJ acknowledged Dr. Forehand is "[Board-certified] in Pediatrics, Allergy and Immunology." Decision and Order at 7. She further acknowledged Dr. Tuteur is "[Board-certified] in Internal Medicine and Pulmonary Disease." *Id.* Finally, she noted Dr. Fino is "[Board-certified] in Internal Medicine with a subspecialty in Pulmonary Disease." *Id.* at 8. Contrary to Employer's contention, while an ALJ may consider an expert's qualifications in resolving the conflicting evidence, the ALJ is not required to afford the interpretation of a physician with a certain credential greater weight. *See Adkins v.*

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it was Claimant's burden to establish all the elements of entitlement, including the existence of pneumoconiosis. Decision and Order at 6, 9. She did not shift the burden of proof to Employer or apply a heightened standard to its doctors; rather, she considered whether they credibly explained their opinions that the Miner does not have legal pneumoconiosis and permissibly found they failed to do so. *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); Decision and Order at 10, 12.

Directors, OWCP, 958 F.2d 49, 52 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993) (an ALJ may give greater weight to an expert based on the expert's credentials but must provide an explanation and such weight is not automatic); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because the ALJ permissibly credited Dr. Forehand's opinion over those of Drs. Tuteur and Fino, we affirm her finding that Claimant established legal pneumoconiosis. 20 C.F.R. §718.202.

Disability Causation

To establish the Miner was totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis was "a substantially contributing cause of [Miner's] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a "substantially contributing cause" if it has a "material adverse effect" on the Miner's respiratory or pulmonary condition or "[m]aterially worsen[ed]" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

We reject Employer's argument that Dr. Forehand's opinion cannot establish disability causation. Employer's Brief at 19-27. As discussed above, Drs. Forehand, Tuteur, and Fino all agreed the Miner's COPD is totally disabling, and Employer does not allege he is totally disabled by a respiratory condition other than COPD. Thus, the ALJ's determination that the Miner's COPD constitutes legal pneumoconiosis necessarily encompassed a finding that the Miner is totally disabled due to legal pneumoconiosis. *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner's death); *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to pneumoconiosis through Dr. Forehand's opinion. 20 C.F.R. §718.204(c); Decision and Order at 12. Consequently, we affirm the

ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718 and affirm the award of benefits in the Miner's claim. Decision and Order at 12.

Survivor's Claim

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*); Decision and Order at 12.

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim award, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge