U.S. Department of Labor

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

BRB No. 22-0193 BLA

WILLIAM J. HENSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BOB & TOM COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY INCORPORATED	)	DATE ISSUED: 8/10/2023
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Jessica E. Matthis and Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2020-BLA-05380) rendered on a claim filed on February 14, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Bob & Tom Coal Company (Bob & Tom) is the responsible operator. He credited Claimant with 17.01 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 determined 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 lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[2] and the removal provisions applicable to ALJs render his appointment unconstitutional. Employer further challenges Bob & Tom's designation as the responsible operator. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment

[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); *see* 20 C.F.R. §718.305.

[2] 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.

necessary to invoke the Section 411(c)(4) presumption, and in finding it did not rebut the presumption.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation (the Director), filed a response urging the Benefits Review Board to reject Employer's constitutional challenges and its responsible operator arguments. The Director also argues the ALJ correctly found Claimant's coal mine employment was qualifying to invoke the Section 411(c)(4) presumption and properly assessed the medical evidence on rebuttal. In a reply brief, Employer reiterates its contentions.[3]

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.[4] 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).

Appointments Clause/Removal Protections

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, 2055 (2018).[5] Employer's Brief at 51-57; Employer's Reply at 9. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6] but maintains the ratification

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b); Decision and Order at 22.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] *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 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)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[6] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 57-62. It generally argues the removal provisions for ALJs contained 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.* In addition, it relies on the United States Supreme Court's holdings in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492-93 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2205-06 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970, 1982-83 (2021). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[7] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator,

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> 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 Morris.

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

The ALJ found Bob & Tom meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 11. Employer generally argues the district director did not carry his burden to identify the correct potentially liable operator and prove it is financially capable of assuming liability. Employer's Brief at 19 n.3 (citing 20 C.F.R. §725.495(b)). As Employer has not specifically identified any error in the ALJ's finding that Bob & Tom meets the definition of a potentially liable operator, including the requirement that it is financially capable of assuming liability for benefits, we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.494(a)-(e). Thus, Employer can avoid liability only by establishing that another financially capable operator more recently employed Claimant for at least one year.

The district director issued a Notice of Claim to Bob & Tom on March 22, 2019, stating it had been identified as a potentially liable operator. Director's Exhibit 31. Employer filed a response on April 5, 2019, generally asserting Bob & Tom is not the responsible operator. Director's Exhibit 39.

On June 20, 2019, the district director issued the Schedule for the Submission of Additional Evidence (SSAE) concluding Claimant worked for Bob & Tom for at least one year from 1982 to 1991 and identifying it as the responsible operator. Director's Exhibit 46 at 9. The district director stated he sought clarification from Claimant regarding whether any of his self-employment from 1992 to 2017 was related to coal mining, and Claimant indicated he hauled coal under the name K&J Trucking from August 2009 through 2012. *Id.* However, the district director indicated he did not identify K&J Trucking as a potentially liable operator because it was not insured at the time of Claimant's employment and is not financially capable of assuming liability. 20 C.F.R. §725.494(e); Director's Exhibits 29, 46 at 9.

In its response to the SSAE, Employer again generally contested Bob & Tom's designation as the responsible operator, Director's Exhibit 41, but did not submit any liability evidence. On November 20, 2019, the district director issued the Proposed Decision and Order awarding benefits and naming Bob & Tom as the responsible operator. Director's Exhibit 52. Employer requested a hearing on the issues of its liability and Claimant's entitlement to benefits, and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 58, 65.

At the hearing before the ALJ, Employer stated it was still reserving its challenge on the responsible operator issue. Hearing Tr. at 26. In its post-hearing brief and supplemental brief, Employer argued the district director should have named K&J Trucking as the responsible operator because it employed Claimant as a miner for more than a year. Employer's Post-Hearing Brief at 25; Employer's Supplemental Brief at 3-4. Employer also asserted the district director did not investigate or make a determination regarding whether K&J Trucking is financially capable of assuming liability for benefits. *Id.*

The ALJ found the district director did investigate whether K&J Trucking is financially capable of assuming liability because he submitted the requisite statement under 20 C.F.R. §725.495(d)[8] explaining that he searched the Department's files and found no record of insurance for K&J Trucking when it last employed Claimant. Decision and Order at 12; Director's Exhibit 29. He further found K&J Trucking did not employ Claimant as a "miner" as defined at 20 C.F.R. §725.202(b). Decision and Order at 12-13.

Employer argues for the first time on appeal that liability should transfer to the Trust Fund because the district director failed to investigate whether the Kentucky Uninsured Fund, Kentucky Insurance Guaranty Association, Kentucky Self-Insurance Fund, or Claimant, as the owner of K&J Trucking, are potentially liable for this claim. Employer's Brief at 19-27; Employer's Reply at 2-4. But, as the Director asserts, Employer did not raise either of these arguments before the district director or the ALJ; we therefore decline to address them. 20 C.F.R. §802.301(a) (Board's review authority limited to "findings of fact and conclusions of law on which the decision or order appealed from was based"); *see Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021) (black lung regulations require that an issue be "raised before the ALJ to preserve issue for the Board's review"); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6-7 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986).

Further, we affirm as unchallenged on appeal the ALJ's finding that the district director submitted the requisite statement for K&J Trucking explaining he searched the

[8] If the responsible operator the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs (OWCP) has no record of insurance coverage for that employer or of its authorization to self-insure. *Id.* Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. *Id.*

Department's files and found no record it was insured on Claimant's last day of employment. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §725.495(d); Decision and Order at 12; Director's Exhibit 29. Nor does Employer dispute that it failed to submit evidence before the ALJ establishing K&J Trucking is financially capable of assuming liability.

Because Employer has not established that another "potentially liable operator" financially capable of assuming liability more recently employed Claimant for at least one year, we affirm the ALJ's finding that Bob & Tom is the responsible operator. 20 C.F.R. §725.495(c)(2); Decision and Order at 11-13. Consequently, we need not reach the issue of whether Claimant worked as a miner for K&J Trucking. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.495(c)(2); Employer's Brief at 20, 28-30.

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

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or "substantially similar" surface coal mine employment.[9] 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director,* OWCP, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence.

Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment. Employer's Brief at 31-34. We disagree.

The ALJ found Claimant established 17.01 years of coal mine employment at underground mines between the years of 1974 and 1991 working for Terry Glenn Coal, Eastover Mining, Dry Lake Coal, Day Branch Coal, and Bob & Tom. Decision and Order at 8-10. Employer argues Claimant's work as a buyer for Bob & Tom was not at an underground mine. Employer's Brief at 31-32; Employer's Reply at 4-5. Contrary to Employer's argument, the ALJ permissibly credited Claimant's uncontradicted testimony

[9] The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

that he worked as a buyer for Bob & Tom on the surface of an underground mine.[10] *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *see also Brandywine Explosives v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015); Decision and Order at 10; Hearing Tr. at 10, 22; Suppl. Hearing Tr. at 5-6.

Employer also argues the ALJ erred in failing to address whether Claimant was regularly exposed to coal mine dust when working for Bob & Tom. Employer's Brief at 32-33. This argument has no merit. The type of mine (underground or surface), rather than the location of where the particular miner worked (below ground or aboveground), determines whether a miner is required to show substantially similar conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). Thus, a miner who worked aboveground at an underground mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29.

Because we affirm the ALJ's finding Claimant worked at an underground mine for Bob & Tom and Employer does not otherwise challenge his finding Claimant worked for 17.01 years at underground mines, we affirm it. *See Skrack*, 6 BLR at 1-711. Thus, contrary to Employer's contention, Claimant established at least fifteen years of underground coal mine employment and was not required to establish he was regularly exposed to coal mine dust during that employment. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29.

[10] We also reject Employer's argument Claimant's work as a buyer does not constitute coal mine employment. Employer's Brief at 31-32; Employer's Reply at 4-5. As the ALJ found Claimant's work took place at an underground mine, the regulations provide a "rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). Employer has not identified any evidence that rebuts this presumption. Moreover, as the ALJ observed, Claimant testified that as a buyer, he was a "jack of all trades." His job was physically demanding. He performed maintenance, was an underground supervisor, loaded timbers, shoveled, ordered supplies for the mine such as rock dust and timbers, loaded trucks, worked on the belt line, and "took care of the outside, [where] the coal [was] coming out." He did not work in an office, but worked outside and went in and out of the underground mines. Decision and Order at 3, 11; Hearing Transcript at 10-11, 22-23.

Therefore, we affirm the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[11] 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 establish rebuttal by either method. Decision and Order at 33-34.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Dahhan and Jarboe that Claimant does not have legal pneumoconiosis.[12] Decision and Order at 30-32. Dr. Dahhan opined Claimant has chronic obstructive pulmonary disease (COPD) and centriacinar emphysema related to cigarette smoking, and not coal mine dust exposure. Director's Exhibit 20 at 5. Dr. Jarboe diagnosed Claimant with combined pulmonary fibrosis and emphysema (CPFE) syndrome

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). 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). "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).

[12] The ALJ correctly observed that Dr. Harris's opinion that Claimant has legal pneumoconiosis does not aid Employer in rebutting the presumption. Decision and Order at 28 n.39; Director's Exhibits 17, 25. Thus, we decline to address Employer's argument his opinion is not credible. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 42-43.

due to smoking, and unrelated to coal mine dust exposure. Employer's Exhibit 4 at 7-8. The ALJ found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 30-32.

We initially reject Employer's assertion that the ALJ erred in relying on the preamble to the revised 2001 regulations as a basis for discrediting the opinions of Drs. Dahhan and Jarboe, and that he improperly treated it as a binding rule that created an "impossible burden of proof." Employer's Brief at 36-38, 41-50; Employer's Reply at 6-8.

Federal circuit courts have consistently held that an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Additionally, contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment. *Adams*, 694 F.3d at 801-02; Employer's Brief at 37, 48-49.

Here, the ALJ permissibly evaluated the opinions of Drs. Dahhan and Jarboe in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; Decision and Order at 30-32. Moreover, his references to the preamble did not, as Employer suggests, result in substituting his own opinion for that of the physicians; rather, as discussed below, he properly evaluated whether the physicians satisfied Employer's burden by credibly explaining their opinions that Claimant does not have legal pneumoconiosis. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Employer's Brief at 38.

Employer argues the ALJ erred in discrediting Dr. Dahhan's opinion. Employer's Brief at 36-41. We disagree.

Dr. Dahhan acknowledged Claimant had seventeen years of coal mine dust exposure but opined it did not cause his COPD because "the literature indicates . . . a coal miner will lose between 5 and 9cc of his FEV1 per year of coal dust exposure," which is insufficient to cause the loss of FEV1 he demonstrated. Director's Exhibit 20 at 5. Instead, Dr. Dahhan opined Claimant's COPD is due to smoking because "a susceptible smoker will lose up to 90cc of his FEV1 per pack year," which is sufficient to cause the loss of FEV1 seen on his

pulmonary function study. *Id.* The ALJ permissibly found Dr. Dahhan's rationale conflicts with the DOL's recognition set forth in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease as measured by a reduction in FEV1. *See Sterling*, 762 F.3d at 491; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 30. Additionally, he permissibly rejected Dr. Dahhan's opinion as based on statistical generalities rather than the specific facts of Claimant's case. *See Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-09 (6th Cir. 2020); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. at 79,941 (statistical averaging can hide the effect of coal mine dust exposure in individual miners); Decision and Order at 30-31; Employer's Brief at 40-41.

Further, Dr. Dahhan opined that coal mine dust exposure causes focal emphysema and that Claimant's condition is consistent with centriacinar emphysema, which is caused by smoking and not coal mine dust exposure. Director's Exhibit 20 at 5. The ALJ acted within his discretion in finding Dr. Dahhan's opinion inadequately explained given the DOL's recognition in the preamble that coal mine dust can cause centriacinar emphysema and that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See Adams*, 694 F.3d at 801-02; 65 Fed. Reg. at 79,942-43; Decision and Order at 31.

Employer also argues the ALJ erred in discrediting Dr. Jarboe's opinion. Employer's Brief at 43; Employer's Reply at 6. Again, we disagree.

Dr. Jarboe opined Claimant's "relatively preserved spirometric values (FVC, FEV1, and total lung capacity) and a significantly impaired diffusion capacity" are "classical findings of a recently described syndrome, that is combined pulmonary fibrosis and emphysema" syndrome. Employer's Exhibit 4 at 7. He stated that coal mine dust exposure does not cause CPFE syndrome and that ninety-eight percent of patients with CPFE syndrome are smokers like Claimant. *Id.* at 7-8. He further stated that smoking causes the two pathological changes which make up CPFE syndrome – emphysema in the upper lung and pulmonary fibrosis in the lower lung. *Id.* at 8.

The ALJ permissibly found that Dr. Jarboe did not adequately explain why, if both emphysema and pulmonary fibrosis can be caused by coal mine dust exposure, combined pulmonary fibrosis and emphysema syndrome is not caused by coal mine dust exposure. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; 20 C.F.R. §718.201(a); 65 Fed. Reg. at 79,939; Decision and Order at 32. Thus he did not adequately explain why Claimant's pulmonary fibrosis and emphysema were not significantly related to, or substantially aggravated by coal mine dust. *Id.*

Moreover, while Drs. Dahhan and Jarboe attributed Claimant's obstructive impairment to smoking, the ALJ permissibly found neither physician persuasively explained, in light of the DOL's recognition that the effects of smoking and coal mine dust exposure can be additive, why Claimant's history of coal mine dust exposure did not significantly contribute, along with smoking, to his obstructive disease.[13] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,939-41; Decision and Order at 31-32.

We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 33. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[14] *See* 20 C.F.R. §718.305(d)(1)(i).

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 33-34. He permissibly discredited the opinions of Drs. Jarboe and Dahhan because they failed to diagnose legal pneumoconiosis, contrary his finding that Employer did not rebut the disease. Decision and Order at 34. Because Employer raises no specific arguments on disability causation apart from its assertion that the ALJ erred in finding it failed to disprove the existence of pneumoconiosis, we affirm the ALJ's determination that the opinions of Drs. Jarboe and Dahhan are not sufficient to prove that no part of Claimant's total disability

[13] Employer alleges the ALJ's credibility determinations are based on "mandatory language" contained in a set of April 2015 ALJ training materials that it alleges "[demand] outcomes in fact-specific cases." Employer's Brief at 39-40; Employer's Reply at 7. To the extent Employer argues the ALJ was biased because of a training program, it has not supported its claim with evidence in the record that the ALJ was instructed to reject certain evidence, or that he attended the training or rendered an improper decision based on such training. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992) ("Charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence."). Therefore, Employer's claim of bias is rejected.

[14] Because we affirm the ALJ's findings on legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 35-36.

was due to pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 34. We therefore affirm the ALJ's finding that Employer failed to rebut disability causation. 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge