U.S. Department of Labor

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

BRB No. 21-0120 BLA

HAL T. WOODS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY/APOGEE COAL COMPANY, LLC	)	
	)	
and	)	
	)	DATE ISSUED: 01/20/2023
ARCH RESOURCES, INCORPORATED (formerly ARCH COAL, INCORPORATED)	)	
	)	
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 and the Order Denying Motion for Reconsideration of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2018-BLA-05610) rendered on a subsequent claim[1] filed on September 28, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Apogee Coal Company, doing business as Arch of Kentucky (Apogee), is the responsible operator and Arch Coal, Incorporated (Arch Coal) is the responsible carrier. On the merits, he found Claimant established twenty years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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). Further, he found Employer did not rebut the presumption and thus found Claimant established a change in applicable condition of entitlement by establishing all the elements of his claim. 20 C.F.R. §725.309. Accordingly, he awarded benefits. After considering Employer's Motion for Reconsideration, he affirmed his prior findings.

On appeal, Employer argues the ALJ lacked authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[3] and the removal provisions applicable to the

[1] Claimant previously filed a claim in 1993 that was denied in 1994. Director's Exhibit 1. The basis for the denial is unclear, as the prior claim file was destroyed. *Id.*

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

ALJ rendered his appointment unconstitutional. Employer also contends the Department of Labor (DOL)'s destruction of Claimant's prior claim file and the ALJ's denial of certain discovery requests violated Employer's due process rights. It further argues the ALJ erred in finding Arch Coal is the liable insurance carrier. On the merits, Employer argues the ALJ erred in finding Claimant established total disability, and thus erred in invoking the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.[4]

Claimant responds in support of the award of benefits.[5] The Director, Office of Workers' Compensation Programs (the Director), filed a response, urging the Benefits Review Board to reject Employer's constitutional and due process challenges and its arguments with respect to the responsible carrier. In a reply brief, Employer reiterates its contentions on the merits.

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

---

> [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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[5] The Board granted Claimant's Unopposed Motion to Accept Claimant's Response to Employer's Petition for Review and Brief Out of Time and accepted his brief as part of the record. *Woods v. Arch of Ky.*, BRB No. 21-0120 BLA (Oct. 28, 2021) (Order) (unpub.).

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

Appointments Clause

Employer urges the Board to vacate the ALJ's decision 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 12-16. Although it acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[8] it maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] *Id.*

---

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4-5; Hearing Transcript at 20.

[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 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 (DOL) has conceded the Supreme Court's holding in *Lucia* applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor (Secretary) 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 Morris.

[9] The case was transferred to the Office of Administrative Law Judges on March 29, 2018. Director's Exhibit 46.

The Director argues the ALJ had the authority to decide the case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Response at 7-9. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 9. 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 8 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had 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*, 857 at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to 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. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

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. He specifically identified ALJ Morris and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Morris. The Secretary further stated he was acting in his "capacity as head of the [DOL]" when ratifying the appointment of ALJ Morris "as an [ALJ]." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts," but generally speculates the ratification was made without "genuine consideration." Employer's Brief at 15. It therefore has not overcome the presumption of

regularity.[10] *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification 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) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 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 service. Employer's Brief at 20. 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 Morris's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 16-20. 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*, 138 S. Ct. 2044. Employer's Brief at 18-20. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting*

[10] While Employer avers the Secretary's ratification letter was a form letter and unaccompanied by any ceremony, Employer's Brief at 14-15, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

Oversight Bd., 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (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 (2021). *Id*. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Due Process – Destruction of the Prior Claim Record

Employer next argues its due process rights have been violated because the DOL destroyed the file of the record from Claimant's 1993 claim. Employer's Brief at 30-32. We disagree.

Due process requires an employer be given notice and the opportunity to respond or mount a meaningful defense. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). The pertinent inquiry is whether the complainant suffered prejudice. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999).

In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the DOL loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 997-98 (7th Cir. 2005). Specifically, Employer must establish the claim proceedings included a "prejudicial, fundamentally unfair element." *Oliver*, 555 F.3d at 1219 (citing *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 501 (4th Cir. 1999)). Thus, Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met its burden.

Employer contends the destruction of the file of Claimant's prior claim record deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement. Employer's Brief at 30. To obtain review of the merits of a subsequent claim, a claimant bears the burden of first establishing through new evidence that one of the applicable elements of entitlement that defeated entitlement

in the prior claim has changed since that denial. 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The ALJ considered the claim and found Claimant established all the elements of entitlement since the denial of his prior claim, necessarily establishing a change in an applicable condition. Decision and Order at 11-12, 34. Given the evidence in Claimant's current claim filed in 2016 established all of the elements of entitlement, Employer has not explained how the record from Claimant's prior claim, filed in 1993, is relevant to this current inquiry. *Oliver*, 555 F.3d at 1222-23.

Employer also alleges it was deprived of a "host" of potential defenses given that the contents of the record of the prior claim are unknown. Employer's Brief at 31. Specifically, it alleges the record of the prior claim may have contained information that the onset of Claimant's symptoms was delayed, thereby supporting Dr. Rosenberg's opinion that he does not have legal pneumoconiosis. *Id*. There is no indication, however, that Employer was deprived of the opportunity to develop evidence on this or any other alleged defenses. *Holdman*, 202 F.3d at 883-84. We therefore hold that Employer has failed to demonstrate any specific prejudice resulting from the destruction of the file of Claimant's prior claim record.[11] Decision and Order at 11-12. As the Director points out, Employer was timely notified of this subsequent claim as well as the existence of the prior claim, developed evidence, and participated in every stage of the adjudication. Director's Brief at 27. Accordingly, we reject Employer's assertion that its due process rights were violated.

Due Process - Order Granting the Director's Motion for Protective Order

While the case was before the ALJ, Employer sought discovery from the DOL related to the agency's deliberative process underlying the preamble to the 2001 revised regulations. *See* Employer's Interrogatories, Requests for Admissions and Documents

[11] Employer's reliance on *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) is misplaced. Employer's Brief at 31. In distinguishing *Holdman*, the United States Court of Appeals for the Tenth Circuit explained the district director "lost a critical part of the record (the transcript of the claimant's testimony) during an ongoing adjudication, making it impossible to evaluate the ALJ's findings on appeal." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1221 (10th Cir. 2009) (internal quotations omitted). The Board instructed the ALJ to reconstruct the record because it could not conduct meaningful review because of the deficiency; moreover, the ALJ concluded the missing evidence "was critical to the resolution of the claim" and "the case could not fairly be resolved without it." *Id.* In contrast, the loss of the record of a prior denied claim remote in time "cannot be said to be similarly critical to [the] adjudication" of a subsequent claim. *Oliver*, 555 F.3d at 1221.

Regarding the Preamble. In response, the Director moved for a Protective Order barring the requested discovery. *See* Director's Motion for Protective Order. Employer objected to the Director's motion. *See* Employer's Opposition to Motion for Protective Order. The ALJ granted the motion, finding Employer's discovery request would not lead to relevant information regarding the DOL's deliberative process or the science underlying the revised regulations that was not already set forth in the preamble. Order Denying Employer's Request to Issue Subpoenas and Granting the Solicitor's Motion for Protective Order at 10-14. Furthermore, the ALJ found Employer is "free to present other scientific evidence or research studies challenging the scientific data and conclusions by use of its own experts." *Id.* at 12.

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians' opinions as inconsistent with the science relied on in the preamble. Employer's Brief at 39-42. We disagree.

As the ALJ accurately observed, Employer had the opportunity to submit evidence invalidating the science set forth in the preamble but failed to do so. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). Therefore, Employer has not shown a due process violation. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm the ALJ's ruling. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and it was self-insured by Arch Coal on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack*, 6 BLR at 711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 10-11; Order on Reconsideration at 4-5 (unpaginated); Employer's Brief at 24. Rather it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Employer's Brief at 5; Director's Brief at 5-6; Director's Exhibits 4, 9; Hearing Transcript at 19. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to

1973. Director's Brief at 19. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. *Id.* at 15-18. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company. Director's Brief at 18-19; Decision and Order at 8-10; Order on Reconsideration at 4-7 (unpaginated).

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 23-38. It argues the ALJ erred in finding Arch Coal liable for benefits because: (1) the ALJ evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (2) the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (3) the Director did not prove that Arch Coal's self-insurance covered Apogee for this claim; (4) the DOL's issuance of the Black Lung Benefits Act (BLBA) Bulletin No. 16-01[12] reflects a change in policy under which the DOL began to retroactively impose new liability on self-insured mine operators and bypassed traditional rulemaking in violation of the APA; (5) the district director improperly "pierce[d] Arch [Coal]'s corporate veil [to] hold it responsible" for the benefits of Apogee's employee, Claimant; and (6) the ALJ abused his discretion and deprived Employer of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01. Employer's Brief at 21-30.

The Board has previously addressed these arguments and rejected them in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

In light of the foregoing, we affirm the ALJ's finding that Apogee, as insured by Arch Coal, is liable for the payment of benefits. 20 C.F.R. §§725.494, 725.495; Decision and Order at 10-11; Order on Motion for Reconsideration at 7 (unpaginated).

[12] The BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot Coal Corporation's bankruptcy.

Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found Claimant established total disability based on the arterial blood gas studies, medical opinion evidence, and the evidence as a whole.[13] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 16, 20.

Although Employer challenges the ALJ's finding that Claimant established total disability, Employer's Brief at 32-36, it conceded total disability in its post-hearing brief before the ALJ. Employer's Closing Brief at 12 ("While the evidence establishes fifteen years of underground coal mine employment and the presence of a totally disabling impairment, the totality of the evidence demonstrates the absence of pneumoconiosis and total disability due to it."); Decision and Order at 14. Stipulations of fact fairly entered into are binding on the parties. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 109 (1985). Based on Employer's concession below that Claimant is totally disabled, we affirm the ALJ's finding that Claimant established total disability.[14] Decision and Order at 14, 21.

[13] The ALJ found Claimant did not establish total disability based on the pulmonary function studies and had no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 15-16.

[14] Employer argues that it sufficiently raised the issue that Claimant is not totally disabled given its arguments below that the evidence demonstrates his impairments are due at least in part to old age and cardiovascular disease, which are not pulmonary in nature and are thus non-compensable. Employer's Reply at 1-2; Employer's Brief at 32-36; Employer's Closing Brief at 19-20. This argument confuses total disability with disability causation, which are two separate inquiries. 20 C.F.R. §718.204(b), (c). Moreover, the regulations provide that, "if a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

Thus, we also affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 21.

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,[15] 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.

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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit requires Employer to show that Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-06 (6th Cir. 2020).

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Dr. Rosenberg opined that Claimant does not have legal pneumoconiosis, but has mild restriction and severely reduced oxygenation and diffusion capacity due to a heart condition and bullous emphysema, caused by smoking and unrelated to coal mine dust exposure. Employer's Exhibit 2 at 3-4; Employer's Exhibit 3 at 4-5; Hearing Transcript at 58-59. Dr. Tuteur concluded Claimant does not have legal pneumoconiosis, but has an oxygen exchange impairment and restrictive defect due to his heart condition. Employer's Exhibit 4. The ALJ found Dr. Rosenberg's opinion unpersuasive and undermined as it is contrary to the principles underlying the preamble to the revised 2001

[15] "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).

regulations. Decision and Order at 28-29. He further found Dr. Tuteur's opinion vague and thus not sufficiently reasoned to rebut the presumption. *Id.* at 29. Thus, the ALJ found Employer failed to disprove legal pneumoconiosis. *Id.* at 32.

Employer argues the ALJ erred in finding Drs. Rosenberg's and Tuteur's opinions undermined, generally asserting he improperly relied on the preamble to discredit their opinions.[16] Employer's Brief at 38-43. We disagree.

The preamble sets forth the scientific evidence the DOL found credible in promulgating the regulations. 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011). The ALJ therefore permissibly considered the medical opinion evidence in conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 601; *Adams*, 694 F.3d at 801-03.

As the ALJ correctly observed, Dr. Rosenberg opined Claimant does not have legal pneumoconiosis based, in part, on his belief that coal-dust related lung disease does not progress after exposure to coal mine dust ceases. Decision and Order at 29-30; Employer's Exhibit 2 at 3; Employer's Exhibit 3 at 4-5; Hearing Transcript at 62-64, 74-76. Thus, the ALJ permissibly found Dr. Rosenberg's opinion conflicts with scientific evidence cited in the preamble, as also reflected in the regulations, that pneumoconiosis can be both latent and progressive and arise years after coal mine employment ceases. *See* 20 C.F.R. §718.201; *see* 65 Fed. Reg. at 79,971 ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the regulatory recognition that pneumoconiosis is a latent and progressive disease); Decision and Order at 34.

[16] Employer also states the ALJ improperly relied on the preamble to "supply proof missing from the record" to tie Claimant's emphysema to his coal dust exposure. Employer's Brief at 38. We note, however, that Section 411(c)(4) of the Act – not the preamble – presumes Claimant's disease/impairment is due to coal dust exposure. Because the presumption was invoked, it became Employer's burden to rebut that presumption. As discussed herein, the ALJ permissibly found Employer did not meet its burden.

Moreover, the ALJ did not find Dr. Tuteur's opinion undermined as being contrary to the principles cited in the preamble. Rather, he found the physician's opinion that Claimant's impairment was "fully explained" by his cardiac disease, without an adequate explanation as to why coal mine dust could not also be a contributing or aggravating factor, was vague and poorly reasoned.[17] Decision and Order at 29. Employer does not challenge this credibility finding; thus, we affirm it.[18] *Skrack*, 6 BLR at 711.

Employer next contends the ALJ ignored and mischaracterized the evidence to find Dr. Rosenberg's opinion regarding the CT scan evidence undermined. Employer's Brief at 37-38.[19] Employer's Brief at 38. We disagree.

The ALJ noted Dr. Rosenberg relied on a 2009 CT scan report to opine that Claimant has bullous emphysema, a form of emphysema he opined is unrelated to coal mine dust exposure, unless the miner also has progressive massive fibrosis. Decision and Order at 28-29; Employer's Exhibit 3 at 6; Employer's Exhibit 5 at 316; Employer's Exhibit 6 at 359, 621; Hearing Transcript at 55-57. The ALJ found this rationale unpersuasive, however, because Dr. Rosenberg did not adequately address the more recent CT scan obtained in 2018 which did not include a diagnosis of bullous emphysema.

---

[17] Dr. Tuteur indicated there was "no convincing evidence" of legal pneumoconiosis, including, but not limited to, that no emphysema was found on an x-ray or CT scan. Employer's Exhibit 4 at 7.

[18] Employer also asserts the ALJ erred in determining the extent of Claimant's smoking history, which he found could not be reliably estimated, but was "significant" and likely longer than twenty pack-years. Decision and Order at 5-7; Employer's Brief at 37. It argues the ALJ "refused" to discredit Dr. Alam's opinion based on his inaccurate assumption of 10.5 pack years. *Id.* at 38. The ALJ noted conflicts in the record regarding Claimant's smoking history and, based on this uncertainty, did not discredit any opinion on the basis of an inaccurate history. Decision and Order 7. Even assuming Dr. Alam's diagnosis of legal pneumoconiosis was discredited on this basis, it would not assist Employer in meeting its burden; thus, Employer has not explained how any alleged error in the ALJ's smoking history findings would have made a difference in the outcome of the case. *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").

[19] While it appears this argument is primarily directed at the ALJ's findings regarding clinical pneumoconiosis, we will address it here because the ALJ also evaluated this evidence in conjunction with his findings on legal pneumoconiosis. Decision and Order at 29.

As the ALJ found, Dr. Rosenberg opined that the bullous type of emphysema noted on the 2009 CT scan report was unrelated to coal mine dust exposure. But Dr. Rosenberg was unaware of the credentials of the physician who read the CT scan, he did not read the CT scan himself, and he did not address the more recent 2018 CT scan evidence beyond agreeing with Employer's counsel's assertion that if the CT scan reading was in the record, it would support his analysis.[20] Decision and Order at 27, 29; Hearing Transcript at 51-52, 72-73, 76-77, 81. On these facts, the ALJ reasonably found Dr. Rosenberg's diagnosis of bullous emphysema not well-reasoned or supported.[21] As it is supported by substantial evidence, we affirm the ALJ's finding. Decision and Order at 28-29; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

Thus, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 32. Employer's failure to disprove legal pneumoconiosis precludes a finding that it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[22] *See* 20 C.F.R. §718.305(d)(1)(i).

[20] The ALJ further noted that the most recent CT scan evidence identified changes consistent with chronic obstructive pulmonary disease but provided no description of bullae. Decision and Order at 29, 31; Employer's Exhibit 6 at 621.

[21] Employer argues the ALJ's finding that Dr. Rosenberg's opinion that bullous emphysema is unrelated to coal mine dust exposure wrongly interprets the preamble because the preamble addresses centrilobular emphysema, which is "distinct" from bullous emphysema. Employer's Brief at 42. Nevertheless, the ALJ permissibly found Dr. Rosenberg's diagnosis of bullous emphysema insufficiently reasoned and unsupported. Decision and Order at 29.

[22] Therefore, we need not address Employer's argument that the ALJ mischaracterized Dr. Rosenberg's opinion on the issue of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 37.

Disability Causation

The ALJ next addressed 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). Contrary to Employer's assertion, the ALJ identified the correct rebuttal standard and permissibly discredited the opinions of Drs. Rosenberg and Tuteur on disability causation because they did not diagnose legal pneumoconiosis, contrary to the ALJ's findings. *See Big Branch Res., Inc v. Ogle*, 737 F.3d 1063, 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 32-34; Employer's Brief at 43-44. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge