U.S. Department of Labor

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

BRB Nos. 22-0098 BLA
and 22-0099 BLA

SHERRY WILLIAMSON (o/b/o and Widow of DENNIS DALE WILLIAMSON)	)	
Claimant-Respondent	)	
v.	)	
BLACK ROCK TRUCKING	)	
and	)	DATE ISSUED: 7/26/2023
OLD REPUBLIC INSURANCE COMPANY	)	
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 Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

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

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2013-BLA-05747 and 2017-BLA-05445) 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 subsequent claim filed on April 9, 2012,[1] and a survivor's claim filed on October 3, 2016.

The ALJ initially found Black Rock Trucking (Black Rock) is the responsible operator. With respect to the miner's claim, the ALJ found Claimant established 12.94 years of coal mine employment, and thus was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, he found the Miner had legal pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). Therefore, he concluded Claimant established a change in an applicable condition of entitlement and awarded benefits.[3] 20 C.F.R. §725.309(c). Because the Miner was entitled to benefits at the time

[1] The district director denied the Miner's prior claim on December 28, 1998, for failure to establish any element of entitlement. Miner Claim (MC) Director's Exhibit 1. Claimant is the widow of the Miner, who died on September 29, 2016. Survivor Claim (SC) Director's Exhibit 7. She is pursuing the miner's claim on his behalf, along with her own 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] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *see*

of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer argues the ALJ lacked 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.[5] It further asserts the removal provisions applicable to the ALJ rendered his appointment unconstitutional. In addition, it challenges Black Rock's designation as the responsible operator. On the merits, Employer argues the ALJ erred in finding the Miner suffered from pneumoconiosis.[6] Claimant responds, urging the Benefits Review Board to reject Employer's arguments concerning Black Rock's designation as the responsible operator and to affirm the award of benefits. The Director, Office of Workers'

White v. New White Coal Co., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner failed to establish any element of entitlement in his prior claim, Claimant had to submit evidence establishing at least one element to obtain a review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; MC Director's Exhibit 1.

[4] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner was totally disabled by a pulmonary or respiratory impairment and therefore established a change in an applicable condition of entitlement at 20 C.F.R. §718.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28.

Compensation Programs (the Director), responds, urging rejection of Employer's constitutional challenges, as well as its challenge to Black Rock's responsible operator designation. Employer filed reply briefs to both Claimant and the Director, 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.[7] 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 and Removal Provisions

Employer requests that the Board vacate the ALJ's Decision and Order and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 37-39; Employer's Dec. 1, 2002 Reply Brief at 6;[9] Employer's Closing Brief before the ALJ at 20-22.[10] Although

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 1.

[8] *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.

[9] Employer filed two reply briefs. One is dated July 28, 2022, while the other is dated December 1, 2022.

[10] We reject Employer's assertion that the Board lacks authority to decide constitutional issues. Employer's Brief at 37 (citing *Carr v. Saul*, 141 S. Ct. 1352 (2021)); Employer's Reply Brief (July 28, 2022) at 3-4. Employer's reliance on *Carr* is misplaced as its holding is not on point. In *Carr*, the United States Supreme Court held that Social Security Administration (SSA) procedures did not require claimants for Social Security disability benefits to raise their Appointments Clause challenges to their respective SSA ALJs. 141 S. Ct. at 1356, 60-62. Contrary to Employer's assertion, the Board has both the inherent authority and vested authority to consider constitutional questions arising in cases

the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[11] Employer maintains the ratification 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 37-38; Employer's Closing Brief before the ALJ at 21-22. It 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*. Employer's Brief at 37; Employer's Closing Brief before the ALJ at 21-22. In addition, it 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), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *See id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-5 (May 26, 2023) and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Evidentiary Issue

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

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before it. *See McCluseky v. Zeigler Coal* Co., 2 BLR 1-1248, 1-1258-62 (1981); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). In addition, the United States Court of Appeals for the Sixth Circuit has held that the Board may address timely-raised Appointment Clause challenges. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019).

[11] 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 Golden.

Employer argues the ALJ erred in failing to admit its liability evidence at the hearing. Employer's Brief at 31-32; *see* Hearing Transcript at 18-35.[12] We disagree.

The designated responsible operator must submit documentary evidence relevant to its liability before the district director and must notify the district director of any potential witnesses whose testimony pertains to its liability. 20 C.F.R. §§725.408(b), 725.414(c), (d), 725.456(b)(1). Failure to do so renders such documentary evidence and testimony inadmissible before the ALJ unless "extraordinary circumstances" exist to excuse the untimely submission. 20 C.F.R. §§725.414(c), (d), 725.456(b)(1).

On April 26, 2021, the ALJ issued an Order addressing Employer's liability exhibits. Order on Employer's Liability Exhibits (ROEX) Nos. 1, 2, and 3. The ALJ detailed Employer's lack of diligence in developing evidence pertaining to the liability issue while the claim was at the district director level. *Id*. at 8-9. Specifically, the ALJ accurately noted Employer failed, as required by the regulations, to designate witnesses, obtain pertinent documentary evidence, and explain any difficulty it faced in developing evidence at the district director level.[13] *Id*. Moreover, the ALJ stated that Employer failed to provide "legal authority for the proposition that a district director's failure to employ reasonable diligence in determining that a potentially liable operator is unable to pay an award constitutes extraordinary circumstances." *Id*. at 9. Thus, contrary to Employer's assertion, the ALJ addressed whether the agency's actions were sufficient to establish extraordinary circumstances, but permissibly found Employer failed to meet its burden and therefore could not submit liability evidence at that point in the proceeding.[14] 20 C.F.R.

[12] At the hearing, the ALJ admitted MC Director's Exhibits 1-67, SC Director's Exhibits 1-22, Claimant's Exhibits 1-6 and 8-10 in both claims, Claimant's Exhibit 11 in the survivor's claim, and Employer's Exhibits 1-19 in both claims. Decision and Order at 2; Hearing Transcript 13-21, 40.

[13] Employer does not contest that it was aware the district director issued Notices of Claims for Black Rock Trucking (Black Rock) and Judith Trucking Co. Inc. (Judith Trucking) in May 2012 and that Judith Trucking was dismissed as a potentially liable responsible operator in August 2012. MC Director's Exhibits 21, 22, 34, 35. In addition, Employer had another opportunity to submit liability evidence in 2016 when the district director provided it sixty days to present liability evidence in the survivor's claim. SC Director's Exhibits 11, 12.

[14] We also reject Employer's assertions that the ALJ erred by not taking judicial notice of public documents from the Kentucky Department of Workers' Claims website showing federal coverage for Judith Trucking through Kentucky Employers' Mutual Insurance (KEMI) and Realm National Insurance, and that the ALJ erred in not admitting

§§725.414(d), 725.456(b)(1); Order on Employer's ROEX Nos. 1, 2, and 3; *see* Employer's Brief at 31. Consequently, we affirm the ALJ's exclusion of ROEX Nos. 1, 2, and 3. *Blake*, 24 BLR at 1-113.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed Claimant.[15] 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). The regulations impose a burden shifting framework which requires:

> In any case referred to the Office of Administrative Law Judges pursuant to §725.421 in which the operator finally designated as responsible

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the affidavit of Stanley Belcher, owner and operator of Judith Trucking, because it was testimonial, not documentary, evidence. Employer's Brief at 32-33; ROEX 1, 2. While the ALJ can take judicial notice of certain materials, he is not required to do so. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In addition, the requirement that liability evidence must be submitted to the district director, absent extraordinary circumstances, applies equally to the identification of liability witnesses. 20 C.F.R. §725.414(c). Moreover, as the Director argues, the excluded evidence, ROEX 1-3, is "completely immaterial" because it deals with the existence of a Realm insurance policy for Judith Trucking but the district director's 20 C.F.R. §725.495(d) statement indicates Realm was insolvent and in liquidation when the current claims were filed. Director's Brief at 19; MC Director's Exhibit 56. Therefore, this evidence would not support an argument that Judith Trucking is financially capable of assuming liability for the claims. *Id.*; *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.").

[15] 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).

> pursuant to §725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of §725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of §725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.

20 C.F.R. §725.495(d).

Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows 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 Miner worked for three coal mine operators after Black Rock. The district director determined that Mullins Enterprises Co., Inc. and Shiloh Carriers, Inc.,[16] did not qualify as potentially liable operators because they did not employ him for a full year. MC Director's Exhibits 35, 56. In addition, the district director found that while Claimant worked for Judith Trucking Co. Inc. (Judith Trucking) for at least one year after Black Rock, it was not financially capable of assuming liability because its carrier, Realm National, was insolvent. The district director also provided a 20 C.F.R. §725.495(d) statement to this effect. MC Director's Exhibits 25, 35, 56. Therefore, the district director determined that Black Rock and Old Republic Insurance Company are the responsible operator and carrier liable for benefits in this case. MC Director's Exhibits 35, 56.

Employer does not contest that Black Rock meets the definition of a potentially liable operator. Rather, Employer argues Black Rock is not the responsible operator because the district director's 20 C.F.R. §725.495(d) statement is based on the wrong name for Judith Trucking. It also alleges the responsible operator investigation was incomplete

[16] Claimant's Social Security Administration (SSA) earnings records provide that Claimant worked for Mullins Enterprises and Simmons Carriers in 1997. MC Director's Exhibit 7.

as neither the officers of Judith Trucking nor two Kentucky guaranty funds were notified of their potential liability for benefits in this case. Employer's Brief at 18-33.

The ALJ concluded, "[b]ased on the evidentiary record and presumption of regularity . . . [,]"[17] the Office of Workers' Compensation Program's (OWCP's) search of its files for insurance coverage for Judith Trucking was sufficiently reliable. Decision and Order at 10. We see no error in that determination. Initially, contrary to Employer's contention, the Director was not required to assert the OWCP's actions were protected by the presumption of regularity; rather, the presumption applies to actions by agency officials when they engage in regular activities and the burden then shifts to the petitioner to prove otherwise. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("There is a presumption of legitimacy accorded to the Government's official conduct."); *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001); *Kamara v. Att'y Gen. of U.S.*, 420 F.3d 202, 212 (3d Cir. 2005) ("Agency action is entitled to a presumption of regularity, and it is the petitioner's burden to show that the [agency] did not review the record when it considered the appeal."); Employer's Brief at 19-20.

We also reject Employer's assertion that the ALJ erred in finding the district director's 20 C.F.R. §725.495(d) statement unreliable because the OWCP's search allegedly used an incorrect name by listing "Judith Trucking Company, Inc." on the statement as opposed to "Judith Trucking Co." or "Judith Trucking Co., Inc."[18] Employer's Brief at 24-25. As the ALJ accurately noted, the record reveals various names were used interchangeably when referring to Judith Trucking. Decision and Order at 9-10. These names include "Judith Trucking Company," "Judith Trucking Co.," "Judith Trucking," "Judith Trucking Co. Inc," and "Judith Trucking Company, Inc." Decision and Order at 9-10; *see* MC Director's Exhibits 1 at 69-70, 82, 88, 96-97, 101-03, 106; 21 at 1, 3; 25; 31; 34. The ALJ further permissibly concluded that any minor discrepancy on the 20 C.F.R.

[17] 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 592, 603 (3d Cir. 2016) (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

[18] The district director issued Notices of Claim to "Judith Trucking Co Inc" and to Black Rock on May 25, 2012. Miner Director's Exhibits 21, 22. The Miner's Social Security Earnings Record shows that he worked for Black Rock from 1988 through part of 1991. Miner Director's Exhibits 6-8. It shows employment with "Judith Trucking Co., Inc." in 1993, 1995, 1996, and 1997, and for "Stanley G Belcher Judith Trucking Co." in 1991, 1992, 1993, and 1994. Miner Director's Exhibit 8.

§725.495(d) statement was "not fatal" because "the corporation's identity [was] apparent." Decision and Order at 10 (citing *Mercer v. Coal Mountain Trucking, Inc.*, BRB No. 19-0224 BLA (April 30, 2020) (unpub.) (upholding an ALJ's crediting of a 20 C.F.R. §725.495(d) statement despite misspelling of company name on that statement)).

We therefore see no error in the ALJ's conclusion that, given the presumption of regularity and the interchangeable names used to describe Judith Trucking, the district director's statement satisfies the requirements of Section 725.495(d) and is "prima facie evidence that Judith Trucking . . . is not financially capable of assuming liability."[19] Decision and Order at 10; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011).

Furthermore, having put forward prima facie evidence that Judith Trucking is not a potentially liable operator, the district director was not further required to investigate whether the corporate officers of that company possessed sufficient assets to secure the payment of benefits. 20 C.F.R. §725.495(d); Employer's Brief at 23. Rather, Black Rock, as the designated responsible operator, bore the burden of showing a more recent employer possesses sufficient assets to pay benefits including, if necessary, "presenting evidence" that the owner, partners, or president, secretary, and treasurer "possess sufficient assets to secure the payment of benefits . . . ." 20 C.F.R. §725.495(c); *see Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999) (en banc); *see also Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999) (en banc). Similarly, the district director was under no obligation to identify state guaranty funds as Employer had the burden to present evidence to the district director that these entities were liable for benefits.[20] Consequently, we affirm the ALJ's conclusion that Black Rock is the responsible operator. 20 C.F.R. §725.495(a)(1); Decision and Order at 12.

[19] Because we have affirmed the ALJ's finding that the district director's statement complies with 20 C.F.R. §725.495(d), we need not address Employer's additional arguments regarding the alleged flaws in the district director's investigation of the responsible operator issue. Employer's Brief at 18-23; Employer's Dec. 1, 2022 Reply Brief at 1-6.

[20] The Director also maintains that the state funds which Employer asserts were not properly notified (Kentucky Insurance Guaranty Association and Kentucky Uninsured Employers' Fund) cannot be held liable as a matter of law. Director's Brief at 13-19. Employer has not identified any legal authority to refute the Director's arguments on this point. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act without the Section 411(c)(4) presumption,[21] 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 one of these elements precludes an award of benefits. *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). The ALJ found Claimant established the Miner had legal pneumoconiosis and was totally disabled due to the disease.[22] 20 C.F.R. §§718.202(a)(4); 718.204(c).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a "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). The United States Court of Appeals for the Sixth Circuit has held that a Claimant can establish a lung impairment was significantly related to coal mine dust exposure "by showing that [the] disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

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[21] The ALJ determined Claimant did not establish complicated pneumoconiosis and, therefore, concluded she did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[22] 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). This definition encompasses 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).

The ALJ considered the medical opinions of Drs. Rosenberg, Forehand, Green, Fino, and Vuskovich. Decision and Order at 19-26. All of the physicians diagnosed the Miner with an obstructive respiratory impairment. MC Director's Exhibits 12, 13; Claimant's Exhibits 1, 5, 9; Employer's Exhibits 4-9. Drs. Forehand, Green, and Rosenberg opined that coal mine dust exposure was a contributing factor in the Miner's disabling respiratory impairment. *Id*. In contrast, Drs. Fino and Vuskovich indicated the Miner's respiratory impairment was due to asthma and unrelated to his coal mine employment. The ALJ found Drs. Forehand's and Rosenberg's opinions diagnosing legal pneumoconiosis were reasoned and documented. Decision and Order at 19-22. He gave little weight to Dr. Green's opinion because it was based on an inaccurate coal mine employment history. *Id*. at 20-21. Furthermore, he rejected the contrary opinions of Drs. Fino and Vuskovich as not adequately reasoned and contrary to the regulations and the medical science set forth in the preamble to the 2001 revised regulations. *Id*. at 22-25. Consequently, the ALJ found the weight of the medical opinion evidence establishes legal pneumoconiosis. *Id*. at 26.

Employer contends the ALJ applied the wrong standard of proof and erred in finding the medical opinion evidence established legal pneumoconiosis.[23] Employer's Brief at 34-36; Employer's July 28, 2022 Reply Brief at 1-3. We disagree.

As an initial matter, we reject Employer's assertion that the ALJ did not apply the proper standard of proof and erred in shifting the burden to Employer to "rule out" a contribution from coal dust. Employer's Brief at 33-35. The ALJ accurately stated that it is Claimant's burden to prove that the Miner's respiratory impairment was "significantly related to, or aggravated by, exposure to coal dust." Decision and Order at 18-19. As outlined below, he permissibly credited Dr. Rosenberg's opinion that the Miner "had legal" pneumoconiosis. Decision and Order at 21 (quoting Claimant's Exhibit 9 at 4); *see* Employer's Brief at 33-34. Further, as Employer's examples support,[24] the ALJ did not

[23] Employer also contends the ALJ "credited . . . Dr. Green without addressing how, or even whether [his] failure to consider [the Miner's] asthma . . . affected his decision to credit [him]." Employer's Brief at 36. As the ALJ gave Dr. Green's opinion little weight, we need not address Employer's contention concerning his opinion. *See Shinseki*, 556 U.S. at 413; Decision and Order at 21.

[24] To support its "rule out" contentions, Employer notes the ALJ's statements that Dr. Fino did not "sufficiently explain how he excluded the Miner's coal mine employment as an additional factor that significantly contributed to" his impairment and "failed to explain why the Miner's asthma was not significantly related to his history of coal dust exposure." Employer's Brief at 34-35 (quoting Decision and Order at 22-23). In addition, Employer points to the ALJ's statements that "Dr. Vuskovich failed to adequately explain

discredit the opinions of Drs. Fino and Vuskovich for failing to "rule out" a contribution from coal dust to the Miner's impairment. Rather, as discussed below, the ALJ found their opinions were not reasoned because they did not adequately explain their own conclusions that all of the Miner's respiratory impairment was due to non-coal-dust-related asthma. Decision and Order at 22-24; Employer's Brief at 34-35.

In his initial report, Dr. Fino acknowledged the Miner was a "nonsmoker" and stated that he "believe[s] [the Miner's obstructive impairment] can be explained with the diagnosis of asthma" based on the reversibility after bronchodilators on pulmonary function testing. Employer's Exhibit 4. In supplemental reports, Dr. Fino indicated that the pulmonary function studies showing "significant improvement following bronchodilator therapy" and the Miner's medical records noting treatment for chronic obstructive pulmonary disease (COPD) and recurrent bronchitis support his conclusion that coal dust did not contribute at all to the Miner's respiratory impairment. Employer's Exhibit 5; *see also* Employer's Exhibit 6. As the ALJ accurately observed, however, Dr. Fino did not adequately explain how he determined that coal dust could not also have "significantly contributed to or substantially aggravated the Miner's disabling obstructive impairment." Decision and Order at 22; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (affirming rejection of a medical opinion which failed to adequately explain why coal dust exposure did not exacerbate smoking-related impairments); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

Similarly, Dr. Vuskovich opined that the Miner "had inadequately treated asthma" and, "[b]ecause of airway remodeling from chronic asthma[,] adults with asthma rarely experience completely reversible airway obstruction." Employer's Exhibit 7; *see also* Employer's Exhibits 8, 9. He noted that the Miner "had no coalmine dust exposure after 1997" and "pulmonary impairment from coalmine dust exposure does not wax and wane." Employer's Exhibit 7 at 11. Therefore, he opined that the Miner did not have legal pneumoconiosis. *Id*. The ALJ permissibly found Dr. Vuskovich's reasoning contrary to the regulation recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. at 79,943; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that

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why the Miner's asthma was not significantly related to his history of coal dust exposure" or "explain how he was able to exclude the Miner's occupational history of coal mine dust exposure as an additional contributing factor." Employer's Brief at 35 (quoting Decision and Order at 25).

pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); Decision and Order at 24. Thus, we affirm the ALJ's decision to give little or no weight to Drs. Fino and Vuskovich.[25] Decision and Order at 23-24.

Employer also alleges the ALJ failed to consider that Dr. Forehand[26] did not believe the Miner had asthma, contrary to the Miner's treatment records, and thus failed to consider how this affected the credibility of his diagnosis of legal pneumoconiosis. Employer's Brief at 36. We consider the ALJ's error, if any, to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Employer's own expert, Dr. Rosenberg, diagnosed legal pneumoconiosis, and Employer does not specifically challenge the ALJ's rationale for finding Dr. Rosenberg's opinion on legal pneumoconiosis adequately reasoned, other than to erroneously assert the ALJ shifted the burden of proof. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983). Having concluded that the ALJ applied the correct legal standard, and as Employer raises no other challenges to the weight accorded Dr. Rosenberg's opinion, we affirm the ALJ's conclusion that it supports a finding of legal pneumoconiosis. Thus, we need not remand this case for the ALJ to further consider Dr. Forehand's opinion, as the ALJ permissibly rejected the contrary opinions of Drs. Fino and Vuskovich and substantial evidence supports the ALJ's conclusion that the Miner had legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Consequently, we affirm the ALJ's determination that Claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Disability Causation

To establish disability causation, Claimant must prove the Miner's legal pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition" or if it "[m]aterially worsens a

[25] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Fino and Vuskovich, we need not address Employer's remaining arguments regarding the weight the ALJ assigned to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 34-36.

[26] Dr. Forehand diagnosed obstructive lung disease, noted the Miner did not have a history of smoking or asthma, and concluded that coal mine dust was the "most likely cause" of the diagnosed impairment. MC Director's Exhibit 12.

totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Because the physicians agree that the Miner had disabling COPD, the ALJ's determination that the Miner's disabling COPD constitutes legal pneumoconiosis necessarily encompassed a finding that the Miner was totally disabled due to legal pneumoconiosis. *See* 20 C.F.R. §718.204(c)(1) (pneumoconiosis must be a "substantially contributing cause" of the totally disabling respiratory impairment); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where 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"); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015) ("no need for the ALJ to analyze the opinions a second time" at disability causation where the employer failed to establish that the totally disabling impairment was not legal pneumoconiosis); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249 (2019); Decision and Order at 21-22.

Further, contrary to Employer's assertion, the ALJ properly rejected the opinions of Drs. Fino and Vuskovich on the issue of disability causation because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that the Miner had the disease, which we have affirmed. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989); Decision and Order at 27-28; Employer's Exhibits 4-9; Employer's Brief at 33-36; Employer's July 28, 2022 Reply Brief at 1-3.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 22. Consequently, we affirm the ALJ's finding that Claimant established entitlement to benefits under 20 C.F.R. Part 718. Decision and Order at 28.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, 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 Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge