U.S. Department of Labor

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

BRB Nos. 22-0204 BLA
and 22-0205 BLA

LINDA C. HALL (o/b/o and Widow of ROGER D. HALL) Claimant-Respondent v. TROJAN MINING COMPANY f/k/a SUN GLO COAL COMPANY INCORPORATED and OLD REPUBLIC INSURANCE COMPANY INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/06/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

David Casserly (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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2020-BLA-05239 and 2021-BLA-05030) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a miner's claim filed on May 11, 2015, and a survivor's claim filed on August 12, 2019.

The ALJ found Employer is the responsible operator and stipulated the Miner had fifteen years of coal mine employment. Finding Claimant established all of the Miner's coal mine employment was underground and the Miner had a totally disabling respiratory or pulmonary impairment, the ALJ concluded Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 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 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,[3] and the removal provisions applicable to the ALJ rendered

[1] Claimant is the widow of the Miner, who died on July 3, 2019. Survivor's Claim Director's Exhibits 2, 3.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner was total 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 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:

> [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

his appointment unconstitutional. It also challenges its designation as the responsible operator. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established the Miner had at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption. Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the ALJ had the authority to hear the case and urging affirmance of the ALJ's finding that Employer is the responsible operator. Employer filed a reply brief reiterating its contentions.[4]

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.[5] 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).[6] Employer's Brief at 23-33; Employer's Reply

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of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his last coal mine employment Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibits 3, 7 at 3.

[6] *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

Brief at 9-10. Although the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] 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 28-33. 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 29-32. It also relies on the Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), 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* Employer's Brief at 31-32. 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.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[8] Once the district director designates a

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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.

[7] 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.

[8] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen at least in part out of employment with the operator, the operator or its successor must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of

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).

To establish a full year of coal mine employment, the Sixth Circuit, within whose jurisdiction this case arises, has held a miner need only establish 125 working days during a calendar year. *See Shepherd v. Incoal, Inc*., 915 F.3d 392, 402 (6th Cir. 2019). If the beginning and ending dates of the miner's employment cannot be ascertained or last less than a calendar year, an ALJ may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual* (Exhibit 610).[9] 20 C.F.R. §725.101(a)(32)(iii). However, the dates and length of employment may be established by any credible evidence, and any reasonable method of computation utilized by the ALJ will be upheld if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Vickery v. Director*, OWCP, 8 BLR 1-430, 1-432 (1986).

Before the ALJ, Employer asserted that Aberry Coal Incorporated (Aberry) should have been named the responsible operator because it was the last coal mine operator that employed the Miner for a cumulative period of one year or 125 working days. Decision and Order at 5; Employer's Closing Brief at 10. The ALJ acknowledged the Miner indicated on his Description of Coal Miner Work Form CM-913 (CM-913) that he worked for Aberry for fifteen months between August 1990 and November 1991. However, based on the Miner's deposition testimony and records from his 1992 state workers' compensation claim, the ALJ determined Aberry employed the Miner between July 2 and November 28, 1990, a total of 150 days (or 21.4 weeks) of employment, and during that time the Miner had 109.4 working days. Decision and Order at 5-6; Director's Exhibit 7.

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not less than one year, at least one day of the employment must have occurred after December 31, 1969, and 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). Employer does not contest that it meets these requirements.

[9] Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, sets forth the average "daily earnings" of miners by year, and the "yearly earnings (125 days)" for employees in coal mining, as reported by the Bureau of Labor Statistics. https://www.dol.gov/sites/dolgov/files/OWCP/dcmwc/blba/indexes/Exh%20610-Mar2022.pdf (Exhibit 610).

Although the ALJ noted the Miner could have worked up to 129 days for Aberry if he were presumed to have worked "21 additional Saturdays [or] Sundays" during that 21.4-week period, the ALJ declined to draw that inference as it was "inconsistent" with the Miner's CM-913 form where he stated he worked "5-6" days per week for Aberry (i.e., sometimes he worked five days and sometimes he worked six days). *Id.* at 6.

Further, although the Miner's 1990 earnings with Aberry were greater than the 125-day average earnings for the industry as reported in Exhibit 610, the ALJ declined to rely on average industry earnings because the Miner provided his *actual* earnings rate with Aberry on his CM-913. *Id.* Because dividing the Miner's 1990 earnings with Aberry by his reported hourly pay rate of $20.80 yields only 109.4 eight-hour shifts for Aberry in 1990, the ALJ found Employer failed to establish the Miner worked for Aberry for at least 125 days and therefore Aberry did not satisfy the regulatory definition of a "potentially liable operator." 20 C.F.R. §725.494(c); Decision and Order at 7. He thus concluded Employer failed to carry its burden of proving another potentially liable operator more recently employed the Miner for at least a year. Decision and Order at 7. Contrary to Employer's assertions, we see no error in that finding.

Initially, we reject Employer's assertion that the ALJ erred in failing to rely on Exhibit 610 to find that the Miner's 1990 earnings with Aberry reflect at least 125 days of coal mine employment. Employer's Brief at 20. As noted above, an ALJ "may use" the formula at 20 C.F.R. §725.101(a)(32)(iii) and Exhibit 610 when the beginning and ending dates of a miner's employment are not ascertainable or the miner's employment lasted less than a calendar year. The ALJ found the Miner worked for Aberry for less than a calendar year, from July 2 to November 28, 1990. Although the ALJ could have used Exhibit 610 to calculate the Miner's length of coal mine employment, he was required only to rely on a reasonable method of calculation supported by credible evidence. 20 C.F.R. §725.101(a)(32)(ii), (iii); *see Vickery*, 8 BLR at 1-432.

In this case, the ALJ utilized the figure for the Miner's total earnings at Aberry that the Social Security Administration (SSA) reported and the hourly rate reported by the Miner on his CM-913 form to calculate the number of working days he had while employed by Aberry. Employer does not challenge the amount reported by the SSA as the Miner's actual 1990 earnings from Aberry; however, it argues that the ALJ erred in utilizing the $20.80 hourly rate the Miner reported on his CM-913 form.

First, it contends that the Miner was not credible and the information he provided about his hourly wage at Aberry could not be credited because the ALJ discounted his reporting of the dates of his employment. Employer's Brief at 20-21. To the contrary, although Employer accurately notes the ALJ discounted the Miner's CM-913 form statements concerning the precise beginning and ending dates of his employment because

it conflicted with more credible evidence, he was not required to discount the Miner's uncontradicted CM-913 form statement as to his $20.80 hourly rate of pay with Aberry. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487 (6th Cir. 2012) (affirming an ALJ's crediting of a portion of a physician's opinion while discrediting another portion of it); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011) (reviewing court must uphold decisions that rest within the realm of rationality); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting a miner's uncorroborated testimony); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (ALJ may rely on a miner's testimony especially if the testimony is not contradicted by any documentation of record); Decision and Order at 6.

Second, Employer argues it was unreasonable for the ALJ to rely on the Miner's reported hourly wage because it was twice the average industry wage as found in Exhibit 610 and was not in line with his wages with Employer. However, the ALJ has significant discretion in assessing the credibility of the evidence. We note further that an average means that some miners earned more and some earned less than the average amount as found in Exhibit 610, and the Miner was a foreman at Aberry (a job which is generally better paid than the jobs of those working under the foreman's direction). Accordingly, we cannot say that no reasonable person would accept the figure the Miner reported. *See Morrison*, 644 F.3d at 478.

As Employer does not otherwise challenge the ALJ's finding that dividing the Miner's 1990 income with Aberry by $20.80 per hour yields 109.4 eight-hour days,[10] we find that the ALJ's methodology was reasonable and affirm his conclusion that Employer failed to establish the Miner worked at least 125 days for Aberry and therefore failed to prove another potentially liable operator more recently employed the Miner for at least one year.[11] 20 C.F.R. §725.101(a)(32)(ii); *see Morrison*, 644 F.3d at 478; *Vickery*, 8 BLR at

[10] Employer generally asserts the Miner had to have worked more than 125 days because he worked the night shift, which it alleges is typically fewer hours than a day shift. But Employer does not specifically challenge the ALJ's assumption of an eight-hour workday nor does it identify any record evidence indicating the Miner worked less than eight-hour shifts. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (party forfeits any allegations that lack developed argument); Employer's Brief at 21.

[11] As all of the relevant evidence of record indicates the Miner began working for Aberry sometime in 1990 and Employer concedes the ALJ properly found the Miner last worked for Aberry on November 28, 1990, Employer cannot establish the Miner had a 365-day employment relationship with Aberry and, therefore, is not entitled to the regulatory presumption that he spent at least 125 working days in such employment. 20 C.F.R. §725.202(a)(32)(ii); *see* MC Director's Exhibits 4, 6, 28 at 20-21. We thus reject

1-432; Decision and Order at 6. We therefore affirm the ALJ's finding that Employer is the properly designated responsible operator.[12] Decision and Order at 7.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground or substantially similar surface coal mine employment and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Length of Qualifying Coal Mine Employment

The ALJ noted Employer stipulated to fifteen years of coal mine employment but did not stipulate that the Miner's employment was "qualifying" for purposes of invoking the Section 411(c)(4) presumption; thus Claimant was required to establish that the Miner's coal mine work was either in underground mines or in conditions substantially similar to an underground mine. Decision and Order at 4; Hearing Transcript at 8-9. In this regard, the ALJ noted that the Miner's SSA Earnings Record reflects more than nineteen full years of employment with coal mine operators (1972 to 1990, along with additional employment in 1970 and 1971), and the Miner indicated on his Employment History Form that he performed all of his coal mine employment in underground mines. Decision and Order at

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Employer's assertion that the ALJ erred in finding the Miner began working for Aberry on July 2, 1990, as the Miner's precise starting employment date in 1990 has no bearing on the reasonableness of the ALJ's finding that the Miner had 109.4 working days with Aberry in 1990. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 20, 22 n.4. Similarly, we reject Employer's assertion that the ALJ erred in interpreting the Miner's CM-913 statement that he worked "5-6" days per week for Aberry as indicating that he typically worked five days a week rather than six. Employer's Brief at 22 n.4. Even if Employer's assertion is true, this fact has no bearing on the reasonableness of the ALJ's determination to calculate the Miner's working days with Aberry using his actual 1990 earnings and pay rate to find he had 109.4 working days with Aberry that year. 20 C.F.R. §725.101(a)(32)(ii); *see Larioni,* 6 BLR at 1-1278.

[12] As we have affirmed the ALJ's determination that the Miner did not work for Aberry for one year and therefore Aberry did not satisfy the regulatory definition of a "potentially liable operator," we reject Employer's assertion that the district director failed to comply with the requirement of 20 C.F.R. §725.495(d). Employer's Brief at 20; *see* 20 C.F..R. §725.495(d) (requiring the district director to include a statement in the record that the most recent operator is not financially capable of assuming its liability for a claim *if* the district director designates another operator as the responsible operator for this reason).

4; Miner's Claim (MC) Director's Exhibit 3. Specifically with respect to his employment as a safety inspector for Elkhorn Coal for thirteen years, the Miner testified he went underground "basically every day." MC Director's Exhibit 28 at 13. Thus, the ALJ found Claimant established the Miner had at least fifteen years of qualifying, underground coal mine employment. Decision and Order at 4.

Employer asserts the ALJ erred in accepting the Miner's thirteen years of mine-inspector work as qualifying "without analyzing whether it satisfied the situs and function tests." Employer's Brief at 8-9.[13] But Employer conflates the issues of whether the Miner's work constitutes coal mine employment and whether his coal mine employment is "qualifying" for purposes of invoking the Section 411(c)(4) presumption. Employer is bound by its stipulation that the Miner had at least fifteen years of coal mine employment.[14] *See 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); Decision and Order at 4-5; Hearing Transcript at 8-9. Further, as Employer identifies no error in the ALJ's finding that all of the Miner's coal mine employment was underground, we affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of qualifying underground coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see Tenn. Consol. Coal*

[13] Employer notes the Miner testified to having twenty-three years of coal mine employment, thirteen of which he worked as a mine inspector for Elkhorn Coal. Employer's Brief at 8-9. It thus alleges that, if the Miner's safety inspector work is not "qualifying," the Miner cannot establish fifteen years of qualifying coal mine employment and cannot invoke the Section 411(c)(4) presumption. *Id.* at 9.

[14] Employer does not argue that its stipulation should not be binding. Employer's Brief 8-18. We further note the Miner's safety inspector duties for a private coal mine operator are not inherently excluded from the definition of "miner" under the Act. Based on his testimony that he went underground "basically every day," the situs requirement is not at issue; and his safety inspector duties can satisfy the "status" requirement so long as they were an "integral" or "necessary" part of the coal mining process. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 645-46 (6th Cir. 2014) (those "who perform tasks necessary to keep the mine operational and in repair" are generally classified as miners; differentiating between the "purely regulatory function" of federal mine inspectors and cases finding "private mine inspectors" were miners under the Act). Moreover, to the extent Employer suggested below that it was making an argument as to whether the Miner's employment constituted the work of a miner, it forfeited that by failing to include any argument on the issue in its brief to the ALJ. *See Jones Bros.*, 898 F.3d at 677; Hearing Transcript at 10-11; Employer's Closing Brief. Thus, it cannot raise the issue before us now.

Co. v. Crisp, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 5. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; 20 C.F.R. §718.204(b)(2)(i),(iv); Decision and Order at 10.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had 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 did not establish rebuttal by either method.[16]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did 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)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit has held this standard requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Dahhan's opinion to disprove the existence of legal pneumoconiosis. Dr. Dahhan diagnosed totally disabling chronic obstructive pulmonary disease (COPD) due to smoking and not coal dust exposure. MC Director's Exhibit 22 at

[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 that is 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).

[16] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 12.

4-5. The ALJ found his opinion not well-reasoned and inconsistent with the preamble to the revised 2001 regulations. Decision and Order at 13-14. Employer asserts the ALJ improperly relied on the preamble and failed to adequately explain his credibility determination. Employer's Brief at 9-18. We disagree.

The preamble sets forth the DOL's review of the scientific literature concerning certain matters related to the elements of entitlement. 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014). The ALJ permissibly considered Dr. Dahhan's opinion in conjunction with the scientific evidence that the DOL found credible and discussed in the preamble.[17] *See Sterling*, 762 F.3d at 491; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

The ALJ noted correctly that Dr. Dahhan eliminated coal mine dust exposure as a cause of the Miner's disabling obstructive impairment, in part, because he believes smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 13-14; MC Director's Exhibit 22 at 4-5. The ALJ permissibly found this explanation unpersuasive in light of the DOL's recognition in the preamble of credible scientific studies showing coal dust exposure may cause clinically significant airways obstruction in the absence of smoking and that the risks of smoking and coal dust exposure are additive. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Sterling*, 762 F.3d at 491; Decision and Order at 14 (citing 65 Fed Reg. at 79,940-43). He further permissibly found Dr. Dahhan's opinion unpersuasive to the extent the doctor relied on generalities drawn from medical literature, rather than the specifics of the Miner's case. *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 13. Moreover, we see no error in the ALJ's finding that Dr. Dahhan failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating the Miner's COPD. *See* 20 C.F.R. §718.201(a)(2), (b); *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 14.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ provided valid reasons for discrediting Dr. Dahhan's opinion on legal pneumoconiosis, we reject Employer's assertion that the ALJ applied a higher

[17] Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990), and does not constitute evidence outside the record requiring the ALJ to give Employer notice and an opportunity to respond. Employer's Brief at 15-17; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-03 (6th Cir. 2012).

legal standard by requiring it to "rebut conclusions in the preamble that establish general causation." Employer's Brief at 13. We therefore affirm the ALJ's conclusion that Employer failed to establish the Miner did not have legal pneumoconiosis. Accordingly, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Next, the ALJ addressed whether Employer established that no part of the Miner'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 14-15. The ALJ permissibly discounted Dr. Dahhan's opinion because he did not diagnose pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the presence of pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 15. Moreover, Employer raises no specific arguments on disability causation. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory

or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.304(d)(1)(ii); Decision and Order at 14-15.

The Survivor's Claim

The ALJ found Claimant entitled to derivative survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 32. Employer raises no specific error with regard to the ALJ's award in the survivor's claim. We therefore affirm it. *See Skrack*, 6 BLR at 1-71.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge