U.S. Department of Labor

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

BRB No. 21-0326 BLA

BETTY GREATHOUSE (o/b/o GARY DALE GREATHOUSE, deceased)	)	
Claimant-Respondent	)	
v.	)	
OLD BEN COAL COMPANY	)	
and	)	DATE ISSUED: 03/07/2023
TRAVELERS INSURANCE COMPANY	)	
Employer-Petitioner	)	
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 Order Denying Employer's Motion for Reconsideration of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for Claimant.

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

Jeffrey S. Goldberg (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) Larry A. Temin's Decision and Order Awarding Benefits (2009-BLA-05725) rendered on a subsequent claim filed on April 17, 2007,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the fourth time.[2]

The ALJ credited the Miner with 29.18 years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to

[1] The Miner filed his first claim for benefits on December 11, 2000, which was denied for failing to establish any element of entitlement. Director's Exhibit 1 at 9, 65. The Miner died on November 14, 2007. Director's Exhibit 10. Claimant is the Miner's widow, who is pursuing his subsequent claim on his behalf. Director's Exhibit 20.

[2] We incorporate the lengthy procedural history of the claim as set forth in the Board's prior decisions. *Greathouse v. Old Ben Coal Co*., BRB No. 18-0127 BLA (Apr. 24. 2018) (unpub. Order); *Greathouse v. Old Ben Coal Co*., BRB No. 15-0253 BLA (Mar. 10, 2016) (unpub.), recon. denied, BRB No. 15-0523 BLA (Jun. 17, 2016) (unpub. Order); *Greathouse v. Old Ben Coal Co.*, BRB No. 12-0252 BLA (Feb. 19, 2013) (unpub.). Most recently, Employer appealed Associate Chief ALJ William S. Colwell's award of benefits and the Board granted the motion of the Director, Office of Workers' Compensation Programs, to remand the case in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018). *Greathouse*, BRB No. 18-0127 BLA, Order at 1. On remand, Judge Colwell determined a new hearing before a new ALJ was required under *Lucia* and returned the case to the docket of the Office of Administrative Law Judges for reassignment. Sept. 27, 2018 Order.

pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). The ALJ found Employer did not rebut the presumption and awarded benefits.[4]

On appeal, Employer argues the ALJ lacked the 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,[5] and the removal provisions applicable to ALJs render his appointment unconstitutional. It further argues the ALJ erred in finding Old Ben Coal Company ("Old Ben") is the responsible operator and Travelers Insurance Company ("Travelers") is the correct surety. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and that it did not rebut the presumption.[6]

Claimant responded in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief urging rejection of Employer's constitutional challenges and its arguments regarding the responsible operator and surety. He also urges the Board to reject Employer's argument that benefits are

[3] Section 411(c)(4) of the Act provides that a miner's total disability was 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.

[4] On February 18, 2021, the ALJ denied Employer's request for reconsideration.

[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 the Miner had 29.18 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

precluded as a matter of law because the Miner's lung cancer was not a chronic disease. Employer filed a reply reiterating its arguments on the issues the Director addressed.

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

Employer urges the Board to vacate the Decision and Order and again 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).[8] Employer's Brief at 18-22. Although the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* at 20-22. The Director

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

[8] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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*, 138 S. Ct. at 2055 (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] The Secretary issued a letter to ALJ Temin 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 Temin. ALJ Temin issued no orders in this case until his November 22, 2019 Notice of Hearing and Prehearing Order.

responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 10-13. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 11. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Id.* at 11 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *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 shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter but rather specifically identified ALJ Temin and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Temin. The Secretary further acted in his "capacity as head of the [DOL]" when ratifying the appointment of the ALJ "as an [ALJ]." *Id.*

Employer does not assert the Secretary had no knowledge of all material facts, but instead generally speculates he ratified the ALJ's appointment without "genuine consideration of the candidate's qualifications."[10] Employer's Brief at 19-21. It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient 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)

[10] While Employer asserts the Secretary signed the ratification letter "with a robo-pen," Employer's Reply at 3-4, 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").

(appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper).[11] Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Protections

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 23-26. 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 23-26; Employer's Reply at 4. 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), and 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). Employer's Brief at 26. 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.

Responsible Operator and Surety

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

[11] While Employer states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 26-27, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. 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). Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Temin's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

criteria set forth at 20 C.F.R. §725.494(a)-(e).[12] The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

On July 2, 2007, the district director issued the Notice of Claim (NOC) identifying Old Ben as a potentially liable operator and notifying Travelers of its potential interest as the surety on an indemnity bond Old Ben obtained as a self-insured operator. Director's Exhibits 13, 15, 17. The NOC identified the specific bond (2S100302631) that covered Old Ben's black lung benefits liability for the period when Old Ben employed Claimant. Director's Exhibits 13, 15, 17. Employer timely responded, arguing that Old Ben's successor, Horizon Natural Resources, not Old Ben, should be named the responsible operator, and denying Travelers was the surety for this claim because the bond identified in the NOC was no longer valid. Director's Exhibits 14, 16, 18. It further denied that the district director had jurisdiction to decide that Travelers carried surety coverage for the claim or that it was the correct surety. Director's Exhibits 14, 18. The district director declined to dismiss Old Ben and designated it as the responsible operator. Director's Exhibits 15, 17.

The ALJ determined Old Ben was correctly named the responsible operator and failed to meet its burden to establish it is financially incapable of paying benefits. Decision and Order at 7. He acknowledged Employer's arguments that Travelers was not the correct surety but concluded he lacked jurisdiction to make a finding regarding the bond and that the Director may seek to enforce liability on the identified bond in federal district court. *Id.*

[12] 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).

Employer asserts the ALJ's responsible operator designation violated the APA[13] by relying on speculation regarding the Miner's last day of employment and ignoring BLBA Bulletin 11-01,[14] which it argues precluded the DOL from naming Old Ben and Travelers when the Miner's last day of employment was between July 20, 1990 and April 29, 2001. Employer's Brief at 27-29; Employer's Reply at 9. It also argues the ALJ erred in finding Old Ben is the responsible operator when it is no longer a viable entity. Employer's Brief at 31; Employer's Reply at 11. Further, it contends Travelers was incorrectly identified as the surety because a bond that Frontier Insurance Company held replaced the bond that the NOC identified as covering Old Ben on the last day of Claimant's employment.[15] Employer's Brief at 29-30. It acknowledges that questions concerning the validity of a surety bond must be resolved in federal court, but argues that the existence of a bond is a separate determination from its validity, and that the Director provided no evidence on this issue. *Id*. at 30. Thus, it contends the Black Lung Disability Trust Fund (Trust Fund) must assume liability. *Id*. Employer's arguments are unpersuasive.

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[13] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[14] BLBA Bulletin 11-01 provides, in part: "Our Office of the Solicitor has reached a tentative settlement with Frontier Insurance Company, which issued the bond that covered Zeigler/Old Ben claims in which the date of last CME was during the period from July 20, 1990 to April 29, 2001. These claims can now be converted to Trust Fund claims."

[15] Employer also asserts it was denied due process because the Notice of Claim came too late for Employer to "meaningfully defend" the claim, given the Miner's death and Old Ben's bankruptcy. Employer's Brief at 29; Employer's Reply at 10. Due process requires only notice and an opportunity to be heard. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). A delay in receiving notice of a claim may violate due process if it deprives an operator of a fair opportunity to mount a meaningful defense against the claim. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Here, however, there is no indication Employer was denied notice or the opportunity to defend the claim; it was notified of the claim on July 2, 2007, only three months after the Miner filed the claim, and it has participated in the proceedings since that time. Director's Exhibits 2, 13. Thus, we reject Employer's argument that it was deprived of due process.

First, Employer's argument misstates the burden of proof. The regulations presume that "in the absence of evidence to the contrary," the designated responsible operator is capable of assuming liability for the payment of benefits. 20 C.F.R. §725.495(b). Thus, Old Ben may be relieved of liability only if it proves either it is financially incapable of assuming liability or another operator that more recently employed the Miner is financially capable of doing so. 20 C.F.R. §725.495(c); Decision and Order at 7. The ALJ found no evidence demonstrating Employer was incapable of assuming liability.[16] Decision and Order at 7. While Employer argues the bond identified in the NOC has been replaced and the district director provided no evidence that it is still valid, it is not the Director's burden to establish Employer is not capable of paying benefits. 20 C.F.R. §725.495(b); Employer's Brief at 29-30.

Second, the ALJ permissibly rejected Employer's argument that the Trust Fund is liable because the Travelers bond had been replaced by a Frontier bond by the time Claimant's employment with Old Ben ended. As the Director asserts, the ALJ reasonably relied on the Miner's statements and Old Ben's own employment verification letter identifying May 31, 1990, as the last day of the Miner's employment.[17] Director's Brief at 19; Decision and Order at 6; Director's Exhibit 3-5. While Employer argues the Miner's increased earnings in 1990 as compared to 1989 demonstrate the Miner was still employed beyond May 31, 1990, the ALJ permissibly rejected Employer's argument as speculative because both the employment history Old Ben provided and the Miner indicate his last date of employment was May 31, 1990. *See N. Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d

[16] An operator is "deemed capable of assuming liability for a claim" by purchasing commercial insurance, qualifying as a self-insurer during the time period that the operator last employed the miner, or possessing sufficient assets to secure payments of benefits. 20 C.F.R. §725.494(e).

[17] The employment verification letter states the Miner was employed as a supervisor for Employer "From 01-01-90 . . . To 05-31-90." Director's Exhibit 5. Employer argues this letter only provided the dates of the Miner's employment as of May 31, 1990, without indicating when his employment actually ended. Employer's Brief at 28; Employer's Reply at 9. Even if that is a permissible inference to be drawn from the language of the letter, Employer has not established the ALJ's inference was unreasonable. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (the Board cannot reweigh the evidence or substitute its inferences for those of the ALJ). Moreover, Employer's argument does not preclude a finding that this date was also the Miner's last date of employment with Employer given the ALJ's permissible finding that the date identified in the letter is corroborated by the Miner's specific statement in his claim application that his last day of employment with Employer was "05-31-90." Director's Exhibit 3.

871, 873 (10th Cir. 1996) (it is the ALJ's job to weigh the evidence, draw inferences, and determine credibility); Employer's Brief at 29-31; Decision and Order at 6; Director's Brief at 19.

Contrary to Employer's argument, the ALJ did not base his findings merely on speculation; he explained why *Employer's* argument was speculative given the direct, documentary evidence he credited indicating the Miner's last day of employment. Decision and Order at 6. Therefore, substantial evidence supports the ALJ's determination that the Miner's employment with Old Ben ended on May 31, 1990, and thus BLBA Bulletin 11-01, which pertains to a settlement involving miners whose employment ended after July 20, 1990, does not apply to this claim or preclude naming Old Ben as the responsible operator. *See Pickup*, 100 F.3d at 873; *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 6. Employer's arguments as to date the Miner's employment ended are a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ permissibly found Old Ben did not meet its burden to establish it is financially incapable of paying benefits, we affirm the ALJ's determination that Employer was properly named the responsible operator. Moreover, as the ALJ held, questions concerning enforcement of the Travelers surety bond to satisfy Old Ben's black lung benefits liability are not within the ALJ's or this Board's jurisdiction, but rather must be decided in federal court. Employer's Brief at 29-30; *see generally Peabody Coal Co. v. Director, OWCP* [*Ayers*], 40 F.3d 906, 909-10 (7th Cir. 1994) (district court is the appropriate forum for enforcing black lung benefits liability because administrative proceedings are limited to "questions in respect of such claim"); 28 U.S.C. §1345; 30 U.S.C. §934. We therefore decline to address Employer's arguments with regard to the surety bond and affirm the ALJ's determination that Old Ben is the responsible operator.

Section 411(c)(4) Presumption — Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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. 20 C.F.R. §718.204(b)(1). A 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 medical opinion evidence, and the evidence as a whole.[18] Decision and Order at 27-28.

The ALJ considered the medical opinions of Drs. Perper, Istanbouly, Rosenberg, and Tuteur. Decision and Order at 27-28; Director's Exhibit 11; Employer's Exhibits 1, 15, 16, 19. He found all the experts opined that the Miner was totally disabled and unable to perform his usual coal mining work. Decision and Order at 26-27; Director's Exhibit 11; Claimant's Exhibits 9; Employer's Exhibits 1, 15-16, 19. Dr. Istanbouly found the Miner had a severe impairment and did not have the capacity to perform his last coal mine work. Director's Exhibit 11 at 5. Dr. Rosenberg opined that the Miner's pulmonary functions deteriorated to a disabling level after he developed lung cancer. Employer's Exhibits 1 at 12. Dr. Tuteur determined that the Miner was totally disabled in the last year of his life due to lung cancer and its treatment, which would have prevented him from performing the duties of his last coal mine employment. Employer's Exhibit 16 at 1-2, 10. The ALJ credited Drs. Istanbouly's, Rosenberg's, and Tuteur's opinions as well-reasoned and well-documented to find the medical opinion evidence supported a finding of total disability.[19] Decision and Order at 28.

Employer argues the ALJ erred in finding Drs. Rosenberg's and Tuteur's opinions support total disability as they opined the Miner's "fast-acting" lung cancer was the cause of his impairment, but Claimant did not prove the Miner's lung cancer was a chronic disease compensable under the Act. Employer's Brief at 31, 33; Employer's Reply at 11. We disagree.

The threshold issue is whether a miner "has, or had at the time of his death," a totally disabling pulmonary impairment. 20 C.F.R. §§718.204(a), 718.305(b)(1); Director's Brief at 2, n. 1. Contrary to Employer's argument, nothing in the Act or regulations requires a showing that the Miner's total disability was from a "chronic" disease to invoke the Section

[18] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(i)-(iii); Decision and Order at 26. In addition, the ALJ noted that while a large mass was identified in the Miner's lungs, it was diagnosed as carcinoma and no physician diagnosed complicated pneumoconiosis; accordingly, he found Claimant could 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); Decision and Order at 26 n.49.

[19] While Dr. Perper also found the Miner totally disabled, the ALJ found his opinion vague and unsupported, and accorded it less weight. Decision and Order at 27.

411(c)(4) presumption. *Tanner v. Freeman United Coal Co*., 10 BLR 1-85 (1987). In *Tanner*, the Board directly addressed this issue, holding that, "[u]nder the plain language of Section 411(c)(4) of the Act and the implementing regulation, . . . [a miner] is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic" and arose out of coal mine employment in order to invoke the Section 411(c)(4) presumption.[20] *Tanner*, 10 BLR at 1-86-87. We note that consideration of the cause of total disability, i.e. whether the disability was caused by a chronic disease or respiratory or pulmonary impairment arising out of coal mine employment, occurs after the presumption is invoked. *See* 20 CFR §718.305(d).

The ALJ correctly indicated that both Drs. Rosenberg and Tuteur opined the Miner was totally disabled from a respiratory perspective; thus, we affirm, as supported by substantial evidence, the ALJ's finding that their opinions support total disability. *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370. Therefore, we affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27-28. As Employer raises no arguments regarding the ALJ's weighing of the evidence together as a whole, we further affirm the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; *Rafferty*, 9 BLR at 1-232; Decision and Order at 27-28.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[21] or that "no part of [his] respiratory or pulmonary total

[20] Employer's reliance on *Hunter v. Director, OWCP*, 8 BLR 1-120 (1985), is misplaced. Employer's Brief at 32. In *Hunter*, the Board addressed whether the claimant was entitled to the Section 411(c)(2) presumption, 30 U.S.C. §921(c)(2), which Congress repealed for claims filed on or after January 1, 1982. It provided a rebuttable presumption of death due to pneumoconiosis when a miner with at least ten years of coal mine employment died "from a respirable disease." *Hunter*, 8 BLR at 1-121-22. The implementing regulation for Section 411(c)(2) specifically required proof of death from a chronic dust disease or other chronic disease of the lung. *Id.* at 1-121. Thus, this precedent is inapplicable here.

[21] "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as

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.[22]

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

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Decision and Order at 34-35. Both physicians found no evidence of legal pneumoconiosis, but found mild obstruction due to emphysema, as well as reduced function due to lung cancer, which they opined were both caused by cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 2 at 12-13; 15 at 3-4; 19 at 14; 13 at 5; 16 at 1, 8. The ALJ found both opinions insufficiently reasoned and inconsistent with the medical science that the DOL accepts as set forth in the preamble to the 2001 amended regulations, and thus insufficient to rebut the presumption.[23] Decision and Order at 34-37.

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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).

[22] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 33.

[23] Dr. Perper opined the Miner had legal pneumoconiosis based on his pulmonary cancer and chronic obstructive pulmonary disease (COPD), and concluded that the Miner's cancer and COPD were the result of exposure to both cigarette smoke and coal dust. Claimant's Exhibits 2 at 10-11; 3 at 18. Dr. Istanbouly diagnosed the Miner with pneumoconiosis, COPD, and lung cancer related to coal mining and smoking. Director's Exhibit 11 at 4-5. Employer argues the ALJ erred in crediting their opinions; however, any error is harmless as their opinions do not support rebuttal. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 33-36; Decision and Order at 37.

Employer contends the ALJ discredited the opinions of Drs. Rosenberg and Tuteur for "factually-incorrect" reasons and "misused" the preamble to supply proof missing from the record. Employer's Brief at 36. We disagree.

Initially, the ALJ permissibly relied on the preamble to assess the credibility of the physicians' opinions. *Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 831 (10th Cir. 2017); *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015); Decision and Order at 34-36. Moreover, as addressed below, the ALJ permissibly found neither physician sufficiently explained why the Miner's coal mine dust exposure was not an additive or contributing factor along with smoking and cancer to his COPD, which they both acknowledged was present.

The ALJ reasonably rejected Dr. Rosenberg's opinion as not well-reasoned because he relied on a reduced FEV1/FVC ratio on pulmonary function testing to find the Miner's obstruction was unrelated to coal mine dust exposure, contrary to the scientific principles set forth in the preamble which indicate that coal mine dust exposure may result in obstruction associated with a reduced FEV1/FVC ratio. Decision and Order at 34-35; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Blackburn*, 857 F.3d at 831; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483 (6th Cir. 2014). Employer does not specifically contest this credibility finding; thus, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Moreover, the ALJ permissibly discredited Dr. Tuteur's opinion because he relied on statistical generalities suggesting that smokers have a greater risk of developing COPD than coal miners, without adequately explaining why, in this case, the Miner's nearly thirty years of coal dust exposure did not contribute to his impairment.[24] *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014) (ALJ may reject opinions that are based on statistical generalities); Decision and Order at 34-35.

Finally, Employer disagrees with the ALJ's findings regarding Drs. Rosenberg's and Tuteur's opinions regarding whether silica in coal mine dust could have contributed to the Miner's cancer. Employer's Brief at 37-38. The ALJ acknowledged that any connection between coal mine dust and lung cancer in this case may be "tenuous," but found legal pneumoconiosis unrebutted (as discussed above, in the form of COPD due in

[24] Dr. Tuteur opined that the Miner's COPD was due to his extensive smoking history and not his coal mine dust exposure as based on general statistics indicating "that only about 1% of coal miners develop clinically significant COPD compared to the 20% of cigarette smokers who develop significant pulmonary disease." Employer's Exhibit 17 at 1-4.

part to coal mine dust exposure), even assuming the Miner's lung cancer does not constitute legal pneumoconiosis. Decision and Order at 36. Thus, any error by the ALJ in finding Employer failed to establish the Miner's lung cancer did not constitute legal pneumoconiosis is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As the ALJ permissibly discredited Drs. Rosenberg's and Tuteur's opinions,[25] we affirm his findings that they are insufficient to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; Decision and Order at 37.

Disability Causation

To rebut disability causation, Employer must establish "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). The ALJ found Drs. Rosenberg's and Tuteur's opinions undermined on disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Goodin*, 743 F.3d at 1346; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 38. Employer argues that because the ALJ credited opinions finding the Miner's disability was due entirely to lung cancer, and because there is no evidence to support the conclusion that the Miner's condition was chronic, "denial of the claim is compelled as a matter of law." Employer's Brief at 33. We disagree.

Initially, nowhere does the ALJ credit opinions finding the Miner's disability was entirely due to lung cancer. Moreover, the ALJ specifically found that even assuming "the Miner's lung cancer is not considered to be legal pneumoconiosis, . . . neither Dr. Rosenberg nor Dr. Tuteur has offered a creditable explanation for why the Miner's COPD [which the ALJ found to constitute legal pneumoconiosis] did not contribute to or aggravate his disability." *Goodin*, 743 F.3d at 1336-37; Decision and Order at 38. Thus, we affirm the ALJ's determination that Employer failed to establish no part of the Miner's disability was caused by legal pneumoconiosis and thus Employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 38-39.

[25] As the ALJ provided permissible bases for finding Drs. Rosenberg's and Tuteur's opinions regarding legal pneumoconiosis undermined, we need not address Employer's remaining contentions of error on the issue. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge