U.S. Department of Labor

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

BRB No. 21-0390 BLA

RANDY VITATOE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY MAY MINING COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 03/16/2023
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 of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy and Ryan M. Stratton (Baird & Baird, P.S.C.), Pikeville, Kentucky, for Employer.

Steven Winkelman (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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2019-BLA-06240) rendered on a claim filed on March 1, 2018,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least twenty-two years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in conducting a telephonic hearing over its objection, and violated its due process rights by investigating and addressing a prior claim not in the record without providing the parties notice and the opportunity to respond. On the merits, it argues the ALJ erroneously found Claimant had twenty-two years of qualifying coal mine employment and thus erred in invoking the Section 411(c)(4) presumption. Employer finally contends the ALJ erred in finding it failed to rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's procedural, evidentiary, and due process arguments. Employer filed a reply, addressing the Director's 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

[1] The ALJ found Claimant's prior claim for benefits, filed on August 8, 2002, was withdrawn and is therefore considered not to have been filed. *See* 20 C.F.R. §725.306(b); Decision and Order at 2 n.4; Director's Exhibit 2. Employer contests this issue, as addressed below. Employer's Brief at 4; Employer's Reply at 4-5.

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

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Telephonic Hearing

After an initial notice of hearing issued November 1, 2019, the ALJ issued two Amended Notices of Hearing on June 5, 2020, and July 15, 2020, which informed the parties of a scheduled telephonic hearing in lieu of an in-person hearing. *See* June 5, 2020 Amended Notice of Hearing (by Telephone), Case Schedule, and Prehearing Order; July 15, 2020 Notice of Hearing. While not explicit in the ALJ's Amended Notices of Hearing, he was acting in accordance with the Office of Administrative Law Judge's (OALJ) suspension of all in-person hearings due to the COVID-19 pandemic. Administrative Order and Notice, In Re Continued Suspension of In-Person Hearings Due to COVID-19 National Emergency, No. 2020-MIS-00008 (June 1, 2020) (June 2020 Admin Order)[5]; *see* Director's Response at 6-7. The ALJ held a telephonic hearing on September 10, 2020, with counsel for Employer, counsel for Claimant, and Claimant all participating. Hearing Transcript at 4-5.

The June 5 Notice indicated that the parties agreed to a telephonic hearing, and the July 15 Notice stated, "Employer's counsel confirmed that Employer desires a telephonic hearing instead of an in-person hearing." *See* July 5, 2020 Notice of Hearing; July 15, 2020 Notice of Hearing. Once the hearing commenced, however, Employer objected to proceeding telephonically, expressing concern with how the evidence would be admitted or identified. Hearing Transcript at 6, 8, 13; Employer's Brief at 4. The ALJ overruled Employer's objection, finding it waived an in-person hearing by previously confirming its desire to proceed with a telephonic hearing. Additionally, he found no issues with the way the evidence was handled, as it was very similar to the way it would have been handled had an in-person hearing been held. Hearing Transcript at 6, 13, 18-19, 41-42. After admission of the evidence, the ALJ asked if Employer's concerns were addressed or if it

[4] We will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 22.

[5] The Administrative Order "indefinitely" extended a previous suspension of hearings where parties are physically in the same location given the risks attendant to the COVID-19 pandemic. June 2020 Admin Order. Hearings already scheduled were automatically converted to a telephone or video hearing. *Id.* Parties could file motions for hearings with all the parties at the same location, which the ALJ could grant for "compelling reasons." *Id.*

wished to expound on its objection, to which counsel responded: "I think we addressed that." Hearing Transcript at 17-19. At the conclusion of the hearing, the ALJ once again asked if Employer had any issues with the way exhibits were handled, to which counsel responded: "Not today your honor, but we do ask for written closing arguments." *Id.* at 41-42. In a footnote in its closing argument, Employer noted its objection to the telephonic hearing due to "the ALJ's pre-hearing instruction/discussion as to how exhibits are going to be admitted and/or identified," but did not further expound on its objection or identify any specific issues with how the exhibits were actually admitted or identified. Employer's Closing Brief at 2 n.1.

On appeal, Employer argues the ALJ erred in conducting a telephonic hearing because the requirement of a written waiver at 20 C.F.R. §725.461(a) was not satisfied in this case. Employer's Brief at 4; Employer's Reply at 4-5. But Employer did not raise this argument before the ALJ; thus, it is forfeited. *Joseph Forrester Trucking v. Director, OWCP*, 987 F.3d 587-88 (6th Cir. 2021); Director's Response at 7 n.4. Moreover, even if properly raised, we would reject Employer's argument.

The Director submits Employer affirmatively waived an in-person hearing by its repeated indications it wished to proceed telephonically and, even if it had not done so, the ALJ was within his discretion to hold the hearing telephonically. *Id.* at 6-8. We agree.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that 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).

Employer points to 20 C.F.R. §725.461(a)[6] and caselaw addressing the regulation in support of its position that the parties must waive an in-person hearing in writing. Employer's Brief at 4; Employer's Reply at 3-4. Under the regulation Employer cites, an ALJ is not required to conduct "an oral hearing" if the parties file a written "waiver of the right to appear." 20 C.F.R. §725.461(a). As the Director asserts, however, the ALJ in this case held an oral hearing, with oral testimony obtained and the parties participating

[6] The regulation provides, in part:

> If all parties waive their right to appear before the [ALJ], it shall not be necessary for the [ALJ] to give notice of, or conduct, an oral hearing. A waiver of the right to appear shall be made in writing . . . .

20 C.F.R. §725.461(a).

contemporaneously via telephone, and doing so is consistent with the OALJ procedural rules that permit an ALJ to hold hearings at which the parties participate "by contemporaneous transmission from a different location" so long as it is done "for good cause and with appropriate safeguards." 29 C.F.R. §18.81(b)-(c).

Employer does not argue there was not good cause to hold the hearing telephonically; indeed, it would be difficult to argue given the COVID-19 pandemic, ensuing national emergency, and resulting suspension of all "in-person" hearings. *See* June 2020 Admin Order. Furthermore, the ALJ specifically addressed Employer's concerns regarding how the evidence would be handled, and counsel ultimately did not identify any problems or error with how the evidence was handled at the hearing.[7] Hearing Transcript at 17-19, 42. Accordingly, we find no abuse of discretion in the ALJ's determination to proceed with the hearing telephonically. *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63.

Evidentiary Ruling - Prior Claim File

The existence of a prior claim file is noted in the record; however, the relevant exhibit contains only a one-page memorandum noting the claim number, the claim's status as "closed," and the number of pages included in the file. Director's Exhibit 2. At the hearing, the parties were uncertain as to how the prior claim had been resolved, although the ALJ noted the CM-1025 hearing referral sheet indicated the current claim is a subsequent claim. Hearing Transcript at 12, 19; Director's Exhibit 62. The ALJ indicated the parties could address the issue in their briefs, and Employer raised concerns about the prior claim file in its closing brief. Hearing Transcript at 20-21; Employer's Closing Brief at 25-26. In his Decision and Order, the ALJ explained that his staff had obtained the prior claim file and had confirmed the claim was filed in 2002 and later withdrawn; accordingly, it was not a part of the record and would not be considered, noting it is therefore considered not to have been filed. 20 C.F.R. §725.306(b); Decision and Order at 2-3 nn.4 & 9.

Employer argues the ALJ abused his discretion by obtaining Claimant's prior claim file, thus considering evidence outside the record. Employer's Brief at 5-8. It further contends the ALJ's actions resulted in changing the legal standard for the claim.[8]

[7] On appeal, Employer provides no further explanation or basis for its objection; rather, it only vaguely notes "concerns" counsel had after an off-record discussion immediately before the hearing. Employer's Brief at 4.

[8] While Employer does not explain how the ALJ changed the legal standard, it seems to be referring to a claimant's requirement to demonstrate a change in an applicable

Employer's Brief at 7-9; Employer's Reply at 4-5. The Director argues the ALJ did not consider evidence outside of the record, as the ALJ expressly declined to consider the evidence contained within the withdrawn claim file. Director's Response at 8. He further contends that even if Employer is correct that the ALJ erred in reviewing the prior claim file to ascertain how it had been resolved, the error was harmless. *Id.* at 9-10. We agree with the Director's position.

As an initial matter, Employer does not contest the ALJ's determination that the prior claim was withdrawn and thus is considered not to have been filed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §725.306(b). But even assuming the ALJ's efforts to determine the status of the prior claim without notice to the parties could be considered error, Employer has failed to explain how the ALJ's determination to treat this claim as an initial claim, as opposed to a subsequent claim, would have made any difference in the outcome. *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"); Director's Response at 8-10. Regardless of whether this claim was considered an initial or a subsequent claim, the ALJ found Claimant established all elements of entitlement based on the new evidence, which necessarily subsumes the change in applicable condition inquiry if this were a subsequent claim. 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Director's Response at 10. Thus, we find any error in the ALJ's researching the status of the prior claim to be harmless. *See Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Due Process Challenge

Related to its previous arguments, Employer argues its due process rights were violated as the ALJ was required to make his "evidentiary ruling" prior to issuing his decision and failed to give the parties notice and an opportunity to review and respond to the prior claim. Employer's Brief at 5-7. It further contends it was the Director's duty to include the prior claim file in the record and the missing prior claim file "impaired its ability to defend against the claim." *Id.* at 7-9. We disagree.

To demonstrate a due process violation, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999).

---

condition of entitlement in a subsequent claim. 20 C.F.R. §725.309(c); *see* Employer's Brief at 8; Director's Response at 9.

Initially, contrary to the Employer's implication, the Director is not required to include a withdrawn claim in the record. 20 C.F.R. §725.306(b); Director's Response at 11. However, even assuming the Director was required to do so, or that the ALJ was required to provide notice that the claim was withdrawn prior to issuing his decision,[9] Employer has not met its burden to demonstrate a due process violation. While Employer generally argues it was precluded from properly defending against issues such as the latency and progressivity of pneumoconiosis, Employer was timely notified of the current claim, was aware of a prior claim, developed evidence, and participated in every stage of the litigation.[10] Director's Response at 13. While clarification of the withdrawn status of the prior claim would have avoided any confusion as to whether this current claim is considered a subsequent or initial claim, this does not amount to a due process violation. Thus, we reject Employer's arguments. *See Lockhart*, 137 F.3d at 807; *Holdman*, 202 F.3d at 883-84; Decision and Order at 2.

Invocation of the Section 411(c)(4) Presumption – Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must initially establish he had at least fifteen years of underground or "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(ii). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985).

[9] Employer cites *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc) for the proposition that the ALJ must make such evidentiary rulings before issuing his decision and order. Employer's Brief at 5-6. The Board in *Preston* emphasized that evidentiary rulings should be made "[c]onsistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations," and held that if the "ALJ determines the evidentiary limitations preclude the consideration of the proffered evidence, the [ALJ] should render his or her evidentiary rulings before issuing the Decision and Order." *Preston*, 24 BLR at 1-63. Here, unlike in *Preston*, evidentiary limitations are not at issue and no proffered evidence was excluded.

[10] Employer disagrees that it did not adequately pursue access to the prior claim file. Employer's Brief at 10. Initially, we have already rejected its argument that the Director was required to make the withdrawn claim a part of the record. Further, while the Director concedes Employer sent a letter to the claims examiner requesting a copy of any "previous claim" file, Director's Response at 13, Employer made no further attempt to obtain any such evidence or compel a response. *See* Decision and Order at 3 n.9.

The ALJ noted Claimant alleged more than twenty-three years of coal mine employment. Decision and Order at 4; Director's Exhibit 4; Hearing Transcript at 23. For much of that time, from 1971 until 1983, and again from 1990 until 1993, Claimant indicated he worked for Island Creek Coal Company (Island Creek) as a mechanic, working on mine machinery at a central repair shop. Director's Exhibit 28 at 29, 34-35, 39-40; Hearing Transcript at 23-26. Claimant explained the repair shop was "maybe half a mile, a mile" from the closest mine. Director's Exhibit 28 at 40; Hearing Transcript at 25.

Applying the situs-function test, the ALJ evaluated whether Claimant established this work constituted coal mine employment. Decision and Order at 5-6; *see Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014) (to satisfy the situs-function test, a miner must have worked in or around a coal mine or coal preparation facility and performed work necessary to the extraction or preparation of coal). As the ALJ noted, Employer does not contest that Claimant's work repairing mining equipment was "imperative" to the extraction of coal and thus meets the function requirement. Decision and Order at 5-6; *see Director, OWCP v. Consolidation Coal Co*. [*Petracca*], 884 F.2d 926, 929-31 (6th Cir. 1989). Rather, it argues Claimant's employment, which was performed "off-site," does not meet the situs requirement. Employer's Brief at 10-13.

With respect to the situs requirement, the ALJ considered Claimant's testimony that he worked at a central repair shop on Island Creek's property which served approximately six shaft mines. Decision and Order at 7. He also considered Claimant's testimony that he sometimes entered the mines to assemble mining equipment; Claimant testified he would go underground two to three times a month and sometimes work underground for months at a time. *Id.* Thus, the ALJ found Claimant's employment at the central shop met the situs requirement and thus constituted coal mine employment. *Id.*

Employer argues that a repair shop, which was "up to a mile away and over the state road," does not meet the situs requirement and contends this "off-site" repair shop was not "on or near a coal mine." Employer's Brief at 11-13 (citing *Maxxim Rebuild Co., LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 848 F.3d 737 (6th Cir. 2017)). It contends Claimant's testimony as to the location of the repair shop in proximity to the working mine is "legally insufficient" to establish his work was performed at a coal mine site. Employer's Brief at 12. Finally, it argues the ALJ erroneously applied *Petracca*, as the ALJ did not address the "extent and regularity" of Claimant's exposure to coal mine dust. *Id.* at 12-13. Employer's arguments are unpersuasive.

In *Petracca*, the Sixth Circuit addressed whether a repair facility "physically removed from the extraction site" was located "around a coal mine." *Petracca*, 884 F.2d at 931-35. Contrary to Employer's implication, the court did not hold there was a fixed

distance from a mining site at which a claimant's work location ceases to be considered "around" a mine. *Id*. It held that "[w]here a mine operator maintains [a repair] facility for its own benefit, it would be grossly unfair to allow it to escape liability for illnesses which occur as a result of occupational exposure to coal dust and we do not believe that Congress intended such a result." *Id*. Thus, in instances "where a mine operator maintains a repair shop in the general vicinity of one or more extraction sites in order to avail itself of the economies of an on-site repair facility, the shop should be presumed to be 'around a coal mine'" under the Act.[11] *Id*.; *see also Baker v. U.S. Steel Corp.*, 867 F.2d 1297, 1300 (11th Cir. 1989) (miner's work met the situs test because he worked at a "centrally located repair shop maintained for the company's convenience").

As discussed above, Claimant testified that the repair shop where he worked was located on Island Creek's property. Director's Exhibit 28 at 35, 39; Decision and Order at 7. The repair shop was centrally located and served six underground shaft mines from which equipment would be brought to the shop for repair. Director's Exhibit 28 at 34-35, 39-40; Decision and Order at 6-7. He also testified he went underground to assemble equipment, sometimes for months at a time, which the ALJ found further supported his finding that Claimant worked "in or around a coal mine." Director's Exhibit 28 at 36; Hearing Transcript at 25; Decision and Order at 7-8.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant's testimony establishes he worked "around a coal mine" when he worked for Island Creek at its central repair shop.[12] 20 C.F.R. §725.202(a); Decision and Order at 5,

[11] The court in *Petracca* declined to follow the Seventh Circuit's view of what constitutes a work location "around" a coal mine: that employees working in facilities "technically adjacent to the actual extraction site could be considered miners working 'around' a mine only 'if their normal duties brought them into frequent contact with the extraction site and the accompanying dust exposure.'" *Director, OWCP v. Consolidation Coal Co*. [*Petracca*], 884 F.2d 926, 932-33 (6th Cir. 1989) (citing *Director, OWCP v. Zeigler Coal Co.* [*Wheeler*], 853 F.2d 529 (7th Cir. 1988)). As the law of the Sixth Circuit applies to this case, Employer's arguments applying *Wheeler* are unpersuasive.

[12] Employer's reliance on *Maxxim Rebuild Co., LLC v. Fed. Mine Safety & Health Rev Comm'n*, 848 F.3d 737 (6th Cir. 2017) is misplaced. In that case, the court held that for an equipment repair shop to be considered as located "around" a coal mine and thus under the jurisdiction of the Mine Safety and Health Administration, it must be in the vicinity of a *working mine*. *Maxxim Rebuild Co.*, 848 F.3d at 740-42. The mine previously located in the vicinity of the equipment shop in *Maxxim Rebuild* had been shut down. *Id.* at 739. In this case, in contrast, Claimant testified he repaired equipment for, and in the

7-8; *see Karst Robbins Coal Co. v. Director, OWCP* [*Rice*], 969 F.3d 316, 323 (6th Cir. 2020) (substantial evidence is such relevant evidence "as a reasonable mind might accept as adequate to support a conclusion"); *Petracca*, 884 F.2d at 935-36 (determination of what constitutes a central repair shop "must necessarily be left to the reasoned decisionmaking of [ALJs]"); *see also Baker*, 867 F.2d at 1300 (situs requirement is necessarily dependent on the circumstances underlying each particular claim).

Employer does not otherwise challenge the ALJ's findings regarding the character or length of Claimant's coal mine employment; thus, we also affirm the ALJ's finding that Claimant established twenty-two years of coal mine employment. Decision and Order at 8-9.

The ALJ further found all of Claimant's coal mining work constituted qualifying employment for purposes of invoking the Section 411(c)(4) presumption, as it was performed aboveground at an underground mine site. 20 C.F.R. §718.305; Decision and Order at 7. Relying primarily on its argument that Claimant's Island Creek employment was not performed "in or around a coal mine," an argument we have rejected, Employer argues the ALJ erred in finding Claimant's coal mine employment was qualifying to support invocation of the Section 411(c)(4) presumption. Employer's Brief at 12-13. It also generally contends the ALJ did not adequately explain whether Claimant's employment conditions were substantially similar to those in underground coal mines. Employer's Brief at 13.

Employer, however, does not address the ALJ's finding that Claimant need not establish substantially similar conditions given that he worked aboveground at an underground mine site. Decision and Order at 7; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1057-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). As Employer does not contest this finding beyond those arguments already addressed and rejected, we affirm the ALJ's findings that Claimant's employment is qualifying under Section 411(c)(4) and thus Claimant invoked the presumption. 20 C.F.R. §718.305; *see Skrack*, 6 BLR at 1-711; Decision and Order at 8-9.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[13] or that "no

---

vicinity of, multiple working mines. Director's Exhibit 28 at 40; Decision and Order at 6-7.

[13] "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

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.[14] Decision and Order at 21-22.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds that this standard requires Employer to show Claimant'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). The "in part" standard is met if Employer establishes coal mine dust exposure "had at most only a *de minimis* effect on [Claimant's] lung impairment." *Id.* at 407.

Employer relies on the opinions of Drs. Broudy and Tuteur, who both opined that Claimant's chronic obstructive pulmonary disease (COPD) was due to tobacco smoke and unrelated to coal mine dust. Employer's Exhibits 4 at 4-5; 6 at 2; 7 at 3-4; Director's Exhibit 26 at 4. The ALJ found their opinions unreasoned and undocumented and inconsistent with the premises underlying the regulations. Decision and Order at 16-21. Thus, he found their opinions insufficient to rebut legal pneumoconiosis. *Id.* at 21.

Employer argues the ALJ erroneously rejected Drs. Broudy's and Tuteur's opinions because they distinguished the effects of cigarette smoke and coal mine dust on Claimant's COPD. Employer's Brief at 16. Employer's argument is unpersuasive.

Dr. Broudy found Claimant's COPD was typical of that due to smoking and not an impairment due to coal mine dust exposure, which he opined usually causes a restrictive impairment. Director's Exhibit 26 at 4. The ALJ permissibly discredited Dr. Broudy's

---

definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[14] The ALJ found Employer rebutted clinical pneumoconiosis. Decision and Order at 15.

opinion because he did not address the fact that coal mine dust exposure may result in an obstructive, as well as a restrictive, impairment. 20 C.F.R. §718.201(a)(2); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638-39 (6th Cir. 2009) (affirming ALJ's discrediting of opinions as contrary to the regulations when indicating pneumoconiosis generally causes a restrictive pattern, when the miner had an obstructive disease); Decision and Order at 17-18.

Dr. Tuteur excluded coal mine dust as a contributing factor in Claimant's lung disease, emphasizing the "more potent" effects of cigarette smoking and the statistical rarity of COPD due to coal mine dust. Employer's Exhibits 4 at 3-5; 7 at 3-4. He opined that cigarette smoke is far more likely to cause obstruction than coal mine dust exposure and given Claimant's exposure histories, found it highly unlikely that his COPD was caused by coal mine dust. Employer's Exhibits 4 at 3-5; 7 at 3-4. The ALJ reasonably accorded diminished weight to Dr. Tuteur's opinion as it heavily relied on general statistics but failed to explain why, even assuming coal dust-induced COPD is rare, Claimant could not have been among the group of miners whose coal mine dust exposure aggravated his COPD. *See* 65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000) (statistical averaging can hide the effect of coal mine dust exposure in individual miners); *Young*, 947 F.3d at 407; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 20.

Therefore, we affirm the ALJ's determinations that Drs. Broudy's and Tuteur's opinions were neither well-reasoned nor well-documented and failed to adequately explain why Claimant's coal mine dust exposure was not a contributing or aggravating factor in his obstructive disease. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 18-21.

Employer's arguments amount to a request to reweigh the evidence,[15] which we are not empowered to do. *Anderson v. Valley Camp of Utah*, Inc., 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1); Decision and Order at 21.

[15] Contrary to Employer's argument that the ALJ did not "fully weigh" Claimant's treatment records as he failed to consider that Claimant's treating physician diagnosed asthma, the ALJ specifically addressed these records. Employer's Brief at 14-15; Decision and Order at 13 (citing Employer's Exhibit 9 at 11, 13, 15, 17, 19, 21).

[16] The ALJ also considered the medical opinions of Drs. Green and Nader, who both diagnosed Claimant with legal pneumoconiosis in the form of chronic obstructive

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). The ALJ permissibly found the opinions of Drs. Broudy and Tuteur on the cause of Claimant's disability unpersuasive because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Ramage*, 737 F.3d at 1062; Decision and Order at 22. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory impairment was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 22. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

pulmonary disease. Director's Exhibits 14, 17-18; Claimant's Exhibits 1-2. As the ALJ found, their opinions do not support Employer's burden; thus, we need not address Employer's arguments that the ALJ erred in crediting their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 16, 21; Employer's Brief at 14-16.

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

MELISSA LIN JONES
Administrative Appeals Judge