U.S. Department of Labor

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

BRB No. 20-0027 BLA

JERRY W. PHELPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	DATE ISSUED: 11/29/2022
	)	
And	)	
	)	
PEABODY ENERGY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger, Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Awarding Benefits (2018-BLA-05987) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on September 24, 2015.

The ALJ initially rejected Employer's contentions that liability for benefits rests with Patriot Coal Corporation (Patriot) and determined Heritage Coal Company (Heritage) and Peabody Energy Corporation (Peabody Energy) are the responsible operator and responsible carrier liable for the payment of benefits. On the merits, he determined that Claimant does not have complicated pneumoconiosis and therefore the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act does not apply. 20 C.F.R. §718.304. He next credited Claimant with 14.8 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Considering Claimant's entitlement under 20 C.F.R. Part 718, the ALJ accepted Employer's concession that Claimant has a totally disabling respiratory impairment, and he found Claimant established clinical and legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2). He further found Claimant is totally disabled due to pneumoconiosis and awarded benefits. 20 C.F.R. §718.204(c).

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It

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

[2] 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

also asserts the duties performed by the district director create an inherent conflict of interest that violates its due process. It further argues the ALJ erred in finding it liable for the payment of benefits. In addition, it asserts he erred in calculating Claimant's coal mine employment and in finding Claimant totally disabled by legal pneumoconiosis.[3] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's conflict of interest and Appointments Clause challenges. The Director also contends the ALJ properly determined Employer is responsible for payment of benefits.

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.[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).

Due Process Challenge

"Out of an abundance of caution," Employer identifies a due process challenge with the stated goal of preserving the issue for appeal. Employer's Brief at 11-15. Employer generally asserts that the regulatory system whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Black Lung Disability Trust Fund (Trust Fund), creates a conflict of interest that violates its due process right to a fair hearing. *Id.* For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 18-19 (Oct. 25, 2022) (en banc), we reject Employer's argument.[5]

> 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 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 15.

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit because Claimant performed his last coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13.

[5] Employer also states it seeks to preserve its argument that its due process rights were violated because the ALJ "cut off" discovery prematurely. Employer's Brief at 51-52. Employer neither asks the Board to address this issue nor sets forth any argument that

Responsible Insurance Carrier

We next address Employer's arguments on the merits of why it believes Peabody Energy cannot be held liable for this claim.

Claimant last worked in coal mine employment for Heritage from 1978 through part of 1984.[6] Director's Exhibits 15, 16. Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and it was self-insured by Peabody Energy on the last day Heritage employed Claimant; thus we affirm these findings.[7] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 6-12. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 34. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id*. Although Patriot's

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would permit our review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[6] Claimant testified he worked for Peabody Coal, but his Social Security Administration earnings record indicates he worked for Heritage. Hearing Transcript at 45-46; Director's Exhibit 16. Claimant's last coal mine employment was in 1989. Director's Exhibit 16; Hearing Transcript at 45. The district director acknowledged Heritage was not the operator that most recently employed Claimant but was the last operator to employ Claimant for at least one cumulative year. Director's Exhibit 43.

[7] Employer also seeks to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 52-53. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act. *Id*. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of the issues identified. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibit 35; *see* Director's Brief at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 6-12.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 15-53. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[8] (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on the company; and (6) in executing an indemnity agreement with Bank of America on March 4, 2011,[9] the DOL terminated Peabody Energy's self-insurance status and became contractually bound to hold Peabody Energy and its surety harmless; 7) the DOL violated

[8] Employer first challenged the constitutionality of the district director's appointment before the ALJ. Employer's Post-Hearing Brief at 23-29.

[9] Employer submitted the Indemnity Agreement to the ALJ in January and October of 2018 but never offered it as evidence at the hearing, and the ALJ never admitted it into the record. Hearing Transcript at 6-8 (identification of Employer's evidence); Employer's Submissions dated Oct. 8, 2018 and Jan. 14, 2018; *see* Director's Brief at 7 n.5. Notwithstanding, we fail to see how the execution of the Indemnity Agreement supports Employer's contentions. The Indemnity Agreement was between DOL and Bank of America, which issued the letter of credit. Employer's Submissions dated Oct. 8, 2018 and Jan. 14, 2018. In the agreement, the DOL simply requested cancellation of the letter of credit and agreed to hold Bank of America harmless under it. *Id.* The Indemnity Agreement is not a communication to Peabody Energy, nor does it mention the company. As the Director argues, the Indemnity Agreement "does not release any party from liability (aside from Bank of America), and it is not an agreement, in Employer's words, 'to hold Peabody [Energy] and its surety harmless.'" Director's Brief at 9-10, *quoting* Employer's Brief at 44. Based on the foregoing, we reject Employer's argument that the execution of the Indemnity Agreement or the DOL's release of the letter of credit absolves Peabody Energy of liability.

its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

The Board has previously considered and rejected these arguments in *Bailey*, BRB No. 20-0094 BLA, slip op. at 3-19); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

Thus we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Work as a Miner - Length of Coal Mine Employment

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal."[10] 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). Claimant bears the burden to establish the number of years he worked as a miner in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's length of coal mine employment determination if it is based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

Before the ALJ, Employer asserted Claimant "is not entitled to a finding of coal mine employment greater than 12 years, but certainly not more than 13.76." Employer's Post-Hearing Brief at 14. It alleged Claimant's work for Heritage from 1978 to 1983 at an enclosed shop a "couple of miles" away from the mine site, and for CDK Contracting Company (CDK) from 1985-1986 as a welder and painter at an inactive site, should not be

[10] The Seventh Circuit has held that this definition contains two elements, each of which must be satisfied. *Director, OWCP v. Zeigler Coal Co.* [*Wheeler*], 853 F.2d 529 (7th Cir. 1988); *Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988). First, the "situs" test requires work in or around a coal mine or coal preparation facility. Second, the "function" test requires performance of coal extraction or preparation work. *Wheeler*, 853 F.2d at 535.

considered employment as a miner.[11] Employer's Post Hearing Brief at 14-15; *see* Employer's Brief at 55, *quoting* Employer's Exhibit 8 at 13-14. The ALJ found that Claimant worked as a miner for the duration of his coal mine employment, which he calculated at 14.80 years. Employer generally asserts the ALJ failed to adequately explain how he resolved conflicts in Claimant's deposition and hearing testimonies. However, the ALJ permissibly found Claimant's hearing testimony credible. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Moreover, as explained below, Employer fails to identify any specific contradictions the ALJ failed to address regarding Claimant's work for Heritage that affect its designation as the responsible operator.[12] Employer's Brief at 53-56.

Contrary to Employer's argument, the ALJ considered its contention that Claimant's deposition testimony established he did not work as a miner during his employment with Heritage because he worked in a shop.[13] Decision and Order at 10, *citing* Employer's Closing Brief, Employer's Exhibit 8. He found, however, Claimant credibly testified at the hearing that he worked for Heritage from 1978 to 1983 as a welder at the Randolph Prep Plant, which was an active mine site. Hearing Transcript at 20. In reaching this conclusion, the ALJ relied on Claimant's explanation he worked part of the time at the shop and part of the time in the pit, welding equipment from the pit or reclamation area. Hearing Transcript at 21. Claimant testified he was exposed to coal mine dust at the shop because he and his colleagues had to clean dust and dirt off equipment. *Id*. at 21-22. Consistent with his deposition testimony, Claimant stated at the hearing that the shop "was kind of in the middle of the strip mine area. The land was stripped around it as they went through. But it was, generally it was a couple miles away from the pit, from where the pit was working." Employer's Exhibit 8 at 13. He further testified he worked "about 50/50, in shop and out," and his clothes would "be pretty dirty" at the end of his shift. *Id*. at 13, 15.

[11] It is unclear how Employer arrived at its calculation of no more than twelve years of coal mine employment, given its contention before us that at least six years must be deducted from the ALJ's calculation of 14.80 years. *See* Decision and Order at 11; Employer's Brief at 53-56.

[12] Claimant was deposed on May 23, 2017, regarding his work at CDK Contracting Company (CDK), Heritage, and Apogee Coal Company. Employer's Exhibit 8.

[13] During his deposition, Claimant testified he worked for Heritage at a repair shop located a few miles from the mine site. Employer's Exhibit 8 at 13. He also testified he worked for CDK in construction before the mine became operational. *Id*. at 10-11.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility of the evidence. *See Poole v. Freeman United Coal Mining Co*., 897 F.2d 888, 893 (7th Cir. 1990). Further, assessing the credibility of witness testimony is within the ALJ's discretion in his role as fact-finder, and the Board will not disturb his findings unless they are inherently unreasonable. *See Tackett.*, 12 BLR at 1-14. The ALJ considered all relevant evidence and permissibly found Claimant's hearing testimony "credible and detailed" and sufficient to establish that his work as a welder at an active mine satisfied the "situs" requirement; he was regularly exposed to coal mine dust performing his job duties; and, thus, Claimant worked as a miner for Employer. 20 C.F.R. §725.101(a)(19); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions of his employment were "very dusty" was sufficient to establish regular exposure); *Poole*, 897 F.2d at 893; *Director, OWCP v. Zeigler Coal Co.* [*Wheeler*], 853 F.2d 529 (7th Cir. 1988),Decision and Order at 11, 21.

Regarding Employer's contention that Claimant's one year of work for CDK should not be counted as coal mine employment,[14] we consider any error by the ALJ harmless as Employer has not explained why reducing Claimant's overall employment from 14.8 years to 13.8 years makes any difference to the outcome of this case. Because Claimant established less than fifteen years of coal mine employment, he was not eligible to invoke the Section 411(c)(4) presumption; he needed to establish only ten years to invoke the presumption at 20 C.F.R. §718.203 that his pneumoconiosis arose out of coal mine employment. Further, all of the physicians relied on a coal mine employment history either consistent with or only slightly more than the ALJ's finding of 14.8 years.[15] Decision and Order at 21. Because Employer has not explained what error, if any, resulted from the ALJ's crediting of Claimant's work with CDK, we affirm his finding that Claimant established at least 13.8 but less than 15 years of coal mine employment. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR

[14] The ALJ accurately found that CDK, the last operator that employed Claimant for longer than a year, was uninsured during Claimant's employment and therefore is not a potentially liable responsible operator. *See* 20 C.F.R. §§725.494, 725.495(d); *Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 10 n.7; Director's Exhibits 30, 53.

[15] As the ALJ noted, Dr. Cohen assumed Claimant had "14 years [coal mine employment] over 17 years," Dr. Houser noted coal mine employment of 14 to 17 years, Dr. Paul documented a history of 14 years, and Dr. Broudy relied on a history of 17 years. Decision and Order at 21 n.16, *quoting* Director's Exhibit 21; *see also* Claimant's Exhibit 3; Employer's Exhibits 3, 10.

1-1276, 1-1278 (1984); Decision and Order at 10-14; Employer's Brief at 55-56.

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3) and 411(c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

"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). To establish legal pneumoconiosis, Claimant must prove he has a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The ALJ considered the opinions of Drs. Cohen, Houser, Broudy, and Paul. Decision and Order at 19-22. Drs. Cohen and Houser diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) caused by a combination of cigarette smoking and coal mine dust exposure. Director's Exhibit 21; Claimant's Exhibits 3, 4. Drs. Broudy and Paul opined Claimant has COPD due entirely to cigarette smoking and thus does not have legal pneumoconiosis.[16] Employer's Exhibits 3, 4, 9, 10. The ALJ found Drs. Cohen's and Houser's opinions well-reasoned and consistent with the preamble to the revised 2001 regulations. Decision and Order at 21-22. Conversely, he discredited the opinions of Drs. Broudy and Paul as not well-reasoned and inconsistent with the scientific evidence found credible by the Department as discussed in the preamble. *Id*. at 20-22. He therefore found Claimant established the existence of legal pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Id*. at 22.

Employer does not specifically challenge the weight accorded Dr. Cohen's opinion that Claimant has legal pneumoconiosis. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710,

[16] Drs. Cohen and Houser described Claimant's obstructive impairment as emphysema and chronic bronchitis. Director's Exhibit 21; Claimant's Exhibits 3, 4. Dr. Broudy described the obstructive impairment as chronic bronchitis with an asthmatic component, and Dr. Paul diagnosed emphysema and asthma. Employer's Exhibits 3, 4, 9, 10.

1-711 (1983). Rather it asserts the ALJ failed to adequately explain his rejection of Employer's experts. Employer's Brief at 60-62. We disagree.

The ALJ correctly noted that in excluding coal mine dust as a contributing factor to Claimant's COPD, Dr. Broudy cited to Claimant's pulmonary function studies, which he described as showing partial reversibility of Claimant's obstructive respiratory impairment after the administration of a bronchodilator.[17] Employer's Exhibit 10 at 17. The ALJ permissibly found Dr. Broudy's opinion unpersuasive because he did not adequately explain why Claimant's partial response to bronchodilators necessarily eliminated coal mine dust as significantly contributing to, or substantially aggravating, the fixed portion of Claimant's obstructive respiratory impairment. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 22; Employer's Exhibit 10 at 18.

Dr. Paul excluded coal dust exposure a causative factor for Claimant's COPD based on his belief that Claimant had "minimal" exposure to coal mine dust because he worked at strip mines,[18] wore masks or helmets that "prevent[ed] dust from entering" the lungs, was not exposed to "significant coal dust" while working in the shop,[19] and at times worked in the pit when the mines were not active.[20] Employer's Exhibits 3 at 1; 4 at 13-14, 20, 27.

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[17] Dr. Broudy stated Claimant has "a history of heavy smoking and he had obstruction, which is typical of the type of impairment associated with smoking. Plus there was a partial reversibility, which again is typical of smoking-related disease and not typical of disease caused by the inhalation of coal mine dust." Employer's Exhibit 10 at 17.

[18] According to Dr. Paul, "Coal dust is a causative agent of pneumoconiosis but you cannot get it from strip mining of coal dust [sic] and [Claimant] has certainly other causative factors for his chronic obstructive airway disease." Employer's Exhibit 3.

[19] When asked during his deposition about Claimant's dust exposure, Dr. Paul stated, "I assume in the shop there's no coal, so there probably wouldn't be significant coal dust." Employer's Exhibit 4 at 27.

[20] Dr. Paul testified that "[Claimant] worked fourteen years in strip mining, and most of what he did was welding and sandblasting and he wore a mask when he sandblasted, so to implicate the coal dust as a cause of his emphysema would be a stretch." Employer's Exhibit 4 at 30. Dr. Paul also noted Claimant wore a welding helmet while welding which he stated would "serve to prevent dust from entering into [Claimant's] lungs." *Id.* at 13. In addition, he stated that Claimant's work in the pit making repairs "when the mine was

Having affirmed the ALJ's finding that Claimant was regularly exposed to coal mine dust during his work for Employer, we see no error in the ALJ's assignment of "diminished weight" to Dr. Paul's opinion. *See Poole*, 897 F.2d at 893-94; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 21.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Poole*, 897 F.2d at 893-94; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *see also Banks*, 690 F.3d at 489; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997). Because the ALJ acted within his discretion in rejecting the opinions of Drs. Broudy and Paul[21] and Employer raises no challenge to the ALJ's crediting of Dr. Cohen's opinion,[22] we affirm his conclusion that Claimant established legal pneumoconiosis.[23] 20 C.F.R. §718.202(a)(4); *see Beeler*, 521 F.3d at 726; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.201(b); Decision and Order at 22.

Disability Causation

To establish his total disability is due to pneumoconiosis, Claimant must prove pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's total disability if it has "a material adverse effect on the

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not actively mining coal" would make it "less likely that there would be a sufficient level of dust exposure to cause pneumoconiosis." *Id.* at 14.

[21] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Broudy and Paul, we need not address Employer's remaining allegations of error regarding the ALJ's other reasons for giving less weight to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 60-62.

[22] As we affirm the ALJ's finding that Claimant established legal pneumoconiosis based on Dr. Cohen's opinion, we need not address Employer's arguments the ALJ erred in also crediting Dr. Houser's opinion that Claimant has legal pneumoconiosis. Employer's Brief at 62-63.

[23] Because we have affirmed the ALJ's finding of legal pneumoconiosis, we need not address Employer's contentions of error regarding his finding that Claimant also established the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 16-18, 23; Employer's Brief at 56-60.

miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Banks*, 690 F.3d at 489. The ALJ found Claimant is totally disabled due to legal pneumoconiosis.[24] Decision and Order at 23-24.

We reject Employer's contention that the ALJ's discrediting of Dr. Paul's opinion on the issue of disability causation is "contrary to law" because "the burden shifting presumption does not apply." Employer's Brief at 63-64. To the extent Employer is alleging the ALJ applied an improper burden of proof, we disagree. The ALJ correctly stated "[a] miner must establish that his pneumoconiosis is a 'substantially contributing cause' of his totally disabling respiratory or pulmonary disability." Decision and Order at 24, *citing* 20 C.F.R. §718.204(c)(l).

The ALJ permissibly discounted the opinions of Drs. Broudy[25] and Paul that Claimant's totally disabling respiratory impairment is not caused by pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to his finding. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *see also Banks*, 690 F.3d at 489-90; *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the doctor's view on causation is independent of his mistaken belief the miner did not have pneumoconiosis); Decision and Order at 24.[26] We therefore affirm the ALJ's determination that Claimant established disability

[24] As the ALJ specifically found Claimant's total disability is due to legal pneumoconiosis, Employer has not explained how his weighing of x-ray evidence on the issue of clinical pneumoconiosis undermines that finding. *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"); Employer's Brief at 56-60. Thus, it is not necessary to address Employer's contentions concerning the ALJ's weighing of the x-ray evidence.

[25] As Employer contends, the ALJ mistakenly indicated "Drs. Paul and *Jarboe* determined [Claimant] does not have clinical or legal pneumoconiosis." Decision and Order at 24 (emphasis added). Because Dr. Jarboe did not offer an opinion in this case, and the ALJ previously discussed Dr. Broudy's opinion, we attribute the discrepancy to a scrivener's error. Decision and Order at 20-22; Employer's Exhibits 9, 10.

[26] Drs. Broudy and Paul did not address whether Claimant's total disability was due to legal pneumoconiosis independent of their conclusions he did not have the disease.

causation.[27] *See* 20 C.F.R. §718.204(c); Decision and Order at 24-25.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[27] Employer does not challenge, and we therefore affirm, the ALJ's finding that "[b]ecause [Claimant] is totally disabled due to his respiratory impairment and . . . his respiratory impairment constitutes legal pneumoconiosis, I also find that [Claimant's] disability is due to that pneumoconiosis." Decision and Order at 24-25; *see Skrack*, 6 BLR at 1-711.