U.S. Department of Labor

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

BRB No. 21-0274 BLA

RICHARD E. McLAIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
and	)	
	)	
SAFECO INSURANCE/ LIBERTY MUTUAL SURETY	)	DATE ISSUED: 11/14/2022
	)	
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 A. Temin, Administrative Law Judge, United States Department of Labor.

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), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits (2016-BLA-05053) rendered on a claim filed on October 28, 2010,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 18.75 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[3] and the removal provisions applicable to ALJs render his appointment unconstitutional. Employer further argues its lack of access to Claimant's prior claim record constitutes a due process violation and thus liability for benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). It also contends liability

[1] As explained further below, Claimant withdrew his initial claim. *See infra* at 9-11; [2016] Hearing Transcript at 34-35. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306. Claimant filed another claim (now considered his first claim) on October 28, 2010, which is the subject of the instant appeal. Director's Exhibit 3.

[2] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

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

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

should transfer to the Trust Fund because the district director's failure to timely identify the proper surety precludes its liability. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established total disability, and thus erred in finding he invoked the Section 411(c)(4) presumption. It finally argues the ALJ erred in finding it did not rebut the presumption.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation (the Director), argues Employer's due process and constitutional arguments have no merit. In a reply brief, Employer reiterates its contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and 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).[6] Employer's Brief at 12-20; Employer's Reply Brief at 1-8. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] Employer maintains the ratification was

[4] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established 18.75 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6.

[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[7] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim

insufficient to cure the constitutional defect in the ALJ's prior appointment.[8] *Id.* The Director argues the ALJ had authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 8-10. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* We agree with the Director's arguments.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 9 n.5 (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, 372 (D.C. Cir. 2017); *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 on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress 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. Rather, he specifically identified Judge Temin and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Temin. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Temin "as an [ALJ]." *Id.*

> 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; *see* Employer's Brief at 14.

[8] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Employer does not assert the Secretary had no knowledge of all the material facts but generally speculates the Secretary's "signing" individual letters "does not reflect genuine, let alone thoughtful, consideration of potential candidates for these positions." [9] Employer's Reply Brief at 3. Thus, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-20; Employer's Reply Brief at 5-8. It generally argues the removal provisions in the Administrative Procedure Act, 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 14-20; Employer's Reply Brief at 3-4. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), vacated, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 17-20; Employer's Reply Brief at 6-8.

We reject Employer's arguments as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

[9] While Employer asserts the Secretary's ratification letter was signed by a "robo-pen," Employer's Reply Brief at 3, 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").

Further, in rejecting a similar argument raised with respect to the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise Fund* [10] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Calcutt*, 37 F.4th at 315. Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Calcutt*, 37 F.4th at 315-16. Employer in this case has not alleged it suffered any harm due to the ALJ's removal protections.

Nor does *Arthrex* support Employer's argument. In *Arthrex*, the Supreme Court explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." 141 S. Ct. 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound

[10] In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1.

manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established the removal provisions at 5 U.S.C. §7521 are unconstitutional as applied to DOL ALJs. *Pehringer*, 8 F.4th at 1137-38.

Due Process

We reject Employer's argument that its due process rights have been violated because the Office of Workers' Compensation Programs (OWCP) failed to include the record from Claimant's prior 2001 claim. Employer's Brief at 20-24; [2016] Hearing Transcript at 34-35.

Due process requires an employer be given notice and the opportunity to respond or mount a meaningful defense. *See Sandefur v. Dart*, 979 F.3d 1145, 1156 (7th Cir. 2020); *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 997-98 (7th Cir. 2005). The pertinent inquiry is whether the complainant suffered prejudice. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1999).

In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting an employer's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Williams*, 400 F.3d at 997-98. Specifically, Employer must establish the claim proceedings included a "prejudicial, fundamentally unfair element." *Oliver*, 555 F.3d at 1219 (citing *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 501 (4th Cir. 1999)). Thus Employer must "demonstrate that the contents of [the] lost claim file were so vital to its case that it would be fundamentally unfair to make the company live with the outcome of this proceeding without access to those records." *Oliver*, 555 F.3d at 1219. Employer has not met its burden.

Employer argues the DOL's failure to include this evidence in the record of the current claim deprived it of the opportunity to adequately evaluate whether Claimant established a change in an applicable condition of entitlement. Employer's Brief at 20-24. But as a withdrawn claim is considered to have never been filed, 20 C.F.R. §725.306, the ALJ properly found that the record from Claimant's prior 2001 claim was not included in the record of his current claim. Decision and Order at 6. Thus, as the Director correctly notes, because Claimant withdrew his prior claim, that claim "is *properly* not in the record" and is treated as "a nullity" or, rather, as having never been filed. Director's Brief at 16

(emphasis in original). Thus, the current claim, filed on October 28, 2010, is treated as Claimant's initial claim, not as a subsequent claim requiring Claimant to establish a change in an applicable condition of entitlement. Director's Brief at 15-18; *see* 20 C.F.R. §725.309(c).

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 criteria set forth at 20 C.F.R. §725.494(a)-(e).[11] 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 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 December 2, 2010, the district director issued a Notice of Claim (NOC), identifying Old Ben as a potentially liable operator and notifying Insurance Company of North America (INA) of its potential interest as the surety on an indemnity bond that Old Ben obtained as a self-insured operator. Director's Exhibit 16. The district director issued the Schedule for the Submission of Additional Evidence on February 23, 2011, and served it on Old Ben and INA as its insurer. DX 17. On July 13, 2011, the district director issued a Revised Proposed Decision and Order (PDO)[12] awarding benefits and identifying Old

[11] 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).

[12] On May 25, 2011, the district director issued an initial Proposed Decision and Order awarding benefits to Claimant. Director's Exhibit 20. On June 24, 2011, Employer requested the district director revise the Proposed Decision and Order to deny benefits because Claimant did not prove he had pneumoconiosis based on his Department of Labor-sponsored medical examination but, rather, based on an independent medical examination he received. Director's Exhibit 21. In response, the district director issued the Revised

Ben as the responsible operator. DX 22. Old Ben requested a hearing and that INA be permitted to intervene as a party-in-interest. DX 23, 25.

After the district director referred the case to the Office of Administrative Law Judges (OALJ) for a hearing, the Director ascertained that Safeco, rather than INA, should have been identified as the surety for Old Ben. ALJ Christine Kirby remanded the claim to the district director for resolution of the correct identification of Old Ben's surety. DX 27. On remand the district director issued another Notice of Claim on April 29, 2014, identifying Safeco as Old Ben's surety and allowing ninety days for the submission of employment and medical evidence. Director's Exhibit 28. On July 27, 2015, after the ninety days had elapsed, Employer submitted medical evidence and again requested a hearing. Director's Exhibit 29. The district director informed Safeco that the deadlines for the submission of evidence had passed and, without issuing another Proposed Decision and Order, again referred the case to the OALJ for a hearing. Director's Exhibits 31, 32.

The case was then assigned to ALJ Temin.[13] He denied Employer's motion seeking its dismissal from the case due to the late identification of Safeco as its surety. Order Denying Safeco's Motion to Dismiss or Compel. In his Decision and Order, the ALJ determined Old Ben was correctly named as the responsible operator. Decision and Order at 5. He acknowledged Employer's arguments contesting Safeco's responsibility for the payment of benefits but again rejected Safeco's argument that its due process rights were violated by ALJ Kirby remanding the case to the district director to identify and name the correct surety. *Id.* at 5-6. In addition, he rejected Employer's argument that the late notice given to Safeco violated its due process rights. *Id.* at 6.

On appeal, Employer argues the ALJ erred in finding Old Ben is the responsible operator because it is no longer a viable entity; rather, it asserts its successor, Horizon, should have been named. Employer's Brief at 24-25. It further contends liability must transfer to the Trust Fund due to the late identification of Safeco as its surety and because

---

Proposed Decision and Order denying Employer's request and again awarding benefits. Director's Exhibit 22.

[13] After the district director returned the case to the Office of Administrative Law Judges, it was assigned to ALJ Carrie Bland. On July 24, 2018, Employer filed a Motion to Remand arguing the case must be remanded to the district director because ALJ Bland had not been properly appointed. ALJ Bland determined that while remand was not necessary, Employer was entitled to a new hearing before a properly appointed ALJ. The case was then reassigned to ALJ Temin on August 20, 2019.

the district director failed to issue a revised PDO incorporating the medical evidence Safeco submitted. Employer's brief at 25-28. We disagree.

Employer does not challenge that Old Ben meets the criteria at 20 C.F.R. §725.494(a)-(d) to be the "potentially liable operator," but asserts Horizon should have been named as the responsible operator because it was Old Ben's successor. Employer's Brief at 24. As the Director correctly notes, however, Horizon never employed the Miner, and when a miner is not independently employed by the successor operator, the prior operator remains liable for the claim. 20 C.F.R. §725.493(b)(1).

Employer also maintains liability must fall to the Trust Fund because the district director initially named INA, not Safeco, as its surety. Employer's Brief at 25-26. It contends that because "DOL did not identify Safeco as a potential party before the district director," "the regulations [20 C.F.R. §725.418] preclude DOL from now identifying Safeco as a potentially interested party." *Id.* We are not persuaded.

The regulations list five entities who must be made parties to a claim: the claimant; anyone filing the claim on the claimant's behalf; a coal mine operator; the operator's insurance carrier; and the Director. 20 C.F.R. §725.360(a). Sureties of a self-insured operator are not included. Thus, we agree with the Director's contention that, as sureties are not required to be named parties to a claim, there is no requirement that sureties be notified of a claim. Director's Brief at 20-21.

As the Director points out, the regulations regarding operator notification support this contention. *Id.* Section 725.407 requires the district director to notify any potentially liable coal mine operators, and their insurance carriers, as potentially liable parties.[14] 20

[14] We note that the role of sureties differs from responsible operators and responsible carriers in at least two respects relevant to black lung proceedings. First, the Act and regulations contemplate responsible operators and responsible carriers, as required *parties,* may be subject to direct liability for payment of a claim in the original proceedings whereas a surety's liability is derivative from the liability of the purchaser of the surety bond, and only arises when the already properly named self-insured operator cannot satisfy the judgment against it. 33 U.S.C. §935, *incorporated by* 30 U.S.C. §932(a); 20 C.F.R. §§725.360(a)(4), 726.101(b), 726.104(b), 726.105; *see Warner Coal Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 804 F.2d 346, 347 (6th Cir. 1986); *Caudill Const. Co. v. Abner*, 878 F.2d 179, 181 (6th Cir. 1989); *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949 (4th Cir. 1990). Second, the regulations and applicable caselaw recognize a surety may be made a party at "*any stage* in the adjudication of a claim for benefits" upon a timely motion. 20 C.F.R § 725.360(a)(4), (d) (emphasis added)*; see*

C.F.R. §725.407(a), (b). That provision does not require sureties be notified. Similarly, other provisions make clear that adverse consequences occur only if the proper coal mine operator or carrier is not identified as liable for the claim. *See, e.g.*, 20 C.F.R. §725.418(d); *see also* 20 C.F.R. §725.407(d).

Moreover, as the ALJ found, Section 725.418(d) requires the district director to designate the liable operator but is silent regarding sureties. *See* June 5, 2020 Order Denying Safeco's Motion to Dismiss or Compel; *see also* Decision and Order at 5-6. Similarly, Section 725.407(d) prevents the district director from designating a new responsible operator once a case has been referred to the OALJ, but it too is silent regarding sureties. Thus, we reject Employer's argument that it was prejudiced by the district director's identification and notification of Safeco as its surety on this claim.

Employer next argues it was deprived of due process because the district director did not issue another revised PDO after identifying Safeco as its surety. Employer's Brief at 26-27. We disagree.

Again, due process requires that a party be given notice and the opportunity to respond or mount a meaningful defense.[15] *See Sandefur*, 979 F.3d at 1156; *Williams*, 400 F.3d at 997-98. Even assuming the district director erred in not issuing a new PDO, the record does not support a conclusion that Employer or Safeco were deprived of the opportunity to mount a meaningful defense to the claim. Safeco was able to develop and submit evidence in defense of the claim. *See* Director's Exhibit 30. Employer and Safeco have not demonstrated how the district director's not issuing a revised PDO prejudiced them or rose to the level of a due process violation. *See Energy West Mining Co. v. Oliver*, 555F.3d 1211, 1219 (10th Cir. 2009) (recognizing "litigation is rarely pristine and is filled with risk," and the Due Process Clause's interest is only in whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result);

Old Ben Coal Co. v. Dir., OWCP, 476 F.3d 418, 420 (7th 2007); *Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 442 (7th Cir. 2011).

[15] The district director did not name Safeco as a party. Rather, she notified Safeco of its potential interest and informed it of its right to request to intervene as a party-in-interest pursuant to 20 C.F.R. §725.360(d). *See* Director's Response to Safeco's Motion for Partial Reconsideration; *see also* Director's Response in Opposition to Safeco's Motion to Dismiss or Remand. Although Safeco never formally made a request to intervene, the Director presumed it was exercising its right, *id.*, and Safeco contends its attorney's Notice of Appearance and further participation in the proceedings "make[s] clear" its intervention to contest entitlement. *See* Safeco's Reply Brief dated February 26, 2014.

see also N. Am. Coal Co. v. Miller, 870 F.2d 948, 951 (3d Cir. 1989) (due process is violated when a party is given no opportunity to fully present its case). Thus, we reject Employer's assertion that it should not be held liable for payment of any benefits awarded in this case.

Invocation of the Section 411(c)(4) Presumption - Total Disability

To invoke the Section 411(c)(4) presumption, a claimant must establish he has 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 Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 pulmonary function study and medical opinion evidence.[16] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 15-19. Employer argues the ALJ erred in making these findings. Employer's Brief at 28-33. We are not persuaded by its arguments.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the ALJ considered the results of four pulmonary function studies, dated January 2, 2004, December 8, 2010, January 14, 2011, and January 14, 2016.[17] Decision and Order at 16-18; Director's Exhibit 11, 19; Employer's Exhibit 1, 3. He noted a discrepancy in the reported measurements of Claimant's height with the studies, which ranged from sixty-six to sixty-seven inches.

[16] The ALJ found Claimant did not establish total disability based on the blood gas studies, and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 18.

[17] The ALJ found pulmonary function studies administered on May 20, 2010, and January 5, 2015, were not valid and could not be used to assess Claimant's respiratory ability. Decision and Order at 15-16. Similarly, the ALJ held the pulmonary function studies referenced in Claimant's treatment records could not be used to assess his respiratory capacity as there was insufficient evidence to assess their reliability. *Id.*

Decision and Order at 8, 17. He resolved the evidentiary conflict by averaging the reported heights, finding Claimant's height is 66.58 inches.[18] *Id.* at 17.

The ALJ next considered Claimant's age at the time the pulmonary function studies were conducted. Claimant was seventy-two years old at the time of the January 2, 2004 study, seventy-nine years old at the time of the December 8, 2010 and January 14, 2011 studies, and eighty-four years old at the time of the January 14, 2016 study. Director's Exhibit 11, 19; Employer's Exhibit 1, 3. The ALJ noted the Board's holding that, absent contrary probative evidence, pulmonary function studies performed when a miner is over the age of seventy-one must be treated as qualifying if the values produced would be qualifying for a seventy-one year old, as that is the oldest age for which qualifying values are identified in the regulations. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); Decision and Order at 16. However, the ALJ further noted that the party opposing entitlement may offer medical evidence to prove pulmonary function studies that yield qualifying values for a miner who is seventy-one years old are actually normal or otherwise do not represent a totally disabling pulmonary impairment for a miner who is over the age of seventy-one. *Meade*, 24 BLR at 1-47.

The ALJ therefore considered Dr. Rosenberg's opinion that, using the "Knudson predictive equations," qualifying values could be extrapolated for the December 8, 2010 pulmonary function study for a seventy-nine year old miner. Director's Exhibit 29. Dr. Rosenberg opined that doing so revealed the study is not indicative of total disability. *Id.* However, the ALJ found Dr. Rosenberg's opinion unpersuasive. Decision and Order at 17. Consequently, he used the values for a seventy-one year old man as set forth in the tables at Appendix B of Part 718. *Id.*

Using the Appendix B tables for a seventy-one year old man of 66.5 inches in height, the ALJ found the pre-bronchodilator results for the January 2, 2004, December 8, 2010 and January 14, 2011 pulmonary function studies were qualifying, while the pre-bronchodilator results for the January 14, 2016 study were non-qualifying.[19] Decision and

[18] When assessing whether the pulmonary function studies were qualifying, the ALJ applied the next closest height listed in the table at 20 C.F.R. Part 718, Appendix B, which he noted was 66.5 inches. Decision and Order at 17.

[19] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

Order at 17. He also found the January 2, 2004 and January 14, 2016 studies produced qualifying post-bronchodilator results. *Id*. Crediting the qualifying pre-bronchodilator results over the non-qualifying post-bronchodilator results, the ALJ concluded a preponderance of the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer asserts the ALJ erred in discounting Dr. Rosenberg's opinion that the December 8, 2010 pulmonary function study is not indicative of total disability based on an application of the Knudson equations. Employer's Brief at 28-30. Specifically, Employer argues the ALJ failed to adequately explain why Dr. Rosenberg's opinion extrapolating qualifying values for a seventy-four year old miner was unpersuasive. *Id*. We disagree.

Contrary to Employer's argument, in finding Dr. Rosenberg's opinion inadequately explained, the ALJ correctly noted the doctor did not clearly explain where he obtained his formula and did not show his work using Claimant's actual age and height in the equations he provided. Decision and Order at 17; Director's Exhibit 29. Thus, the ALJ rationally concluded Dr. Rosenberg's application of the Knudson equation was unexplained. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 22. Moreover, the ALJ permissibly questioned Dr. Rosenberg's application of the Knudson formula because the doctor did not use the height that the ALJ found from averaging Claimant's reported heights.[20] Decision and Order at 17. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Consequently, we affirm the ALJ's finding Dr. Rosenberg's extrapolation to be unpersuasive.

Employer does not specifically challenge the ALJ's decision to credit the qualifying pre-bronchodilator values of the January 2, 2004, December 8, 2010 and January 14, 2011 pulmonary function studies over the non-qualifying pre-bronchodilator values of the January 14, 2016 pulmonary function study. Nor does it challenge the ALJ's decision to credit the qualifying values of the January 2, 2004, December 8, 2010 and January 14, 2011 pulmonary function studies over the non-qualifying values of the January 14, 2016 pulmonary function study. Therefore, those findings are affirmed. *See Skrack v. Island*

[20] The ALJ permissibly found Claimant's height was 66.5 inches, because it represented the average height among the conflicting reported heights in the record. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 17. Dr. Rosenberg reported a height of sixty-six inches. Director's Exhibit 29.

Creek Coal Co., 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability under 20 C.F.R. §718.204(b)(2)(i).

The ALJ weighed the medical opinions of Drs. Rosenberg and Istanbouly that Claimant is totally disabled by a respiratory or pulmonary impairment, and Dr. Tuteur's opinion that he is not.[21] Decision and Order at 18-19; Director's Exhibits 19, 29; Employer's Exhibits 1, 3, 6, 7. He found the opinions of Drs. Rosenberg and Istanbouly reasoned, documented, and consistent with the pulmonary function studies, but Dr. Tuteur's opinion inadequately explained. Decision and Order at 18-19.

We reject Employer's argument that the ALJ erred in finding Dr. Rosenberg's opinion supports the conclusion that Claimant is totally disabled from a pulmonary perspective. Employer's Brief at 28-30. After reviewing objective tests and medical records, Dr. Rosenberg opined Claimant "is totally disabled by a respiratory condition" because "his FEV1 [on pulmonary function testing] is severely reduced down to around 44% predicted or below with an FEV1/FVC ratio down to around 48%." Director's Exhibit 29. In his supplemental report, Dr. Rosenberg reviewed additional medical records and similarly observed that "[f]rom an impairment perspective, the data confirms [Claimant] has severe qualifying obstructive lung disease," which he noted was consistent with his prior opinion. Employer's Exhibit 7 at 4. Specifically, he found Claimant "has a marked reduction of his FEV1 and FEV1/FVC ratio, along with air trapping and low diffusing capacity measurements," and concluded "he is disabled from a pulmonary perspective."[22] *Id*. Thus, the ALJ rationally found Dr. Rosenberg's opinion supports a finding that Claimant is totally disabled from a pulmonary perspective. *See Jericol Mining, Inc. v.*

[21] The ALJ found Dr. Sanjabi did not address Claimant's ability to perform his last coal mine job and noted the physician's statement that Claimant's chronic obstructive pulmonary disease (COPD) was a "major limiting factor" did not constitute an opinion as to whether Claimant is totally disabled. Decision and Order at 19.

[22] Employer asserts the "January 2, 2016" pulmonary function study "convinced" Dr. Rosenberg that Claimant "is not disabled from a pulmonary perspective." Employer's Brief at 28 (citing Employer's Exhibit 7 at 7-8). The record does not contain a pulmonary function study dated January 2, 2016. While Dr. Rosenberg reviewed a January 14, 2016 pulmonary function study that yielded qualifying values, he definitively stated his original opinion that Claimant "is disabled from a pulmonary perspective" remained unchanged because the pulmonary function studies he reviewed demonstrated "a marked reduction of his FEV1 and FEV1/FVC ratio, along with air trapping and low diffusing capacity measurements." Employer's Exhibits 1, 7.

Napier, 301 F.3d 703, 712-14 (6th Cir. 2002); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 18.

The ALJ also did not err in weighing Dr. Istanbouly's opinion. Dr. Istanbouly opined Claimant cannot perform his usual coal mine work based on pulmonary function testing demonstrating a moderately severe obstructive defect, a moderate reduction in diffusing capacity, and his respiratory symptoms of daily sputum production and shortness of breath. Director's Exhibit 19. The ALJ observed Dr. Istanbouly, as Claimant's treating physician, was able to "physically examine the Claimant over a span of many years for pulmonary conditions and administer objective testing." Decision and Order at 18. He rationally found Dr. Istanbouly's opinion supported by the preponderance of the pre-bronchodilator pulmonary function studies that produced qualifying results. *Id.* Employer does not challenge this determination. Thus, we affirm it. *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). Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19.[23]

[23] Employer asserts the ALJ erred by failing to consider whether Claimant's heart disease was responsible for Claimant's disabling respiratory impairment. *See* Employer's Brief at 33. This argument has no merit. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the impairment is a distinct and separate issue. *See* 20 C.F.R. §§718.204(a),(c), 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

Moreover, citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), a decision interpreting a prior version of 20 C.F.R. § 718.204 (1999), Employer argues Claimant cannot be awarded benefits because he suffered from a disabling back injury that forced him to retire from his usual coal mine employment. Employer's Brief at 34-35. However, the DOL explicitly rejected the premise that a non-pulmonary disability precludes entitlement when promulgating the 2001 revised regulations. 20 C.F.R. §718.204(a) ("any non-pulmonary or non-respiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]."). Moreover, the revised regulation was held valid in *National Min. Ass'n v. Department of Labor*, 292 F.3d 849, 864-65 (D.C. Cir.

We likewise reject Employer's argument that the ALJ erred in his consideration of the arterial blood gas studies when weighing the evidence as a whole. Employer's Brief at 32-33. Contrary to Employer's argument, the ALJ permissibly found that because blood gas and pulmonary function studies measure different types of impairment, non-qualifying blood gas studies do not call into question valid and qualifying pulmonary function studies. Decision and Order at 19 (citing *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984)); *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993). Dr. Istanbouly and Rosenberg each acknowledged the non-qualifying arterial blood gas studies, but still found Claimant disabled based upon the pulmonary function studies. Director's Exhibits 19, 29; Employer's Exhibit 7. The ALJ permissibly found their opinions well-reasoned and well-documented, and permissibly discredited Dr. Tuteur for failing to adequately explain his opinion that Claimant is not disabled in light of the qualifying pulmonary function studies. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 24. Thus we affirm the ALJ's finding that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 19. Consequently, we affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[24] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to rebut the presumption by either method.[25]

2002) in cases, such as this one, arising within the jurisdiction of the Seventh Circuit after the effective date of the regulation.

[24] "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 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).

[25] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 21-23.

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

The ALJ considered the opinions of Drs. Tuteur and Rosenberg, who both opined Claimant does not have legal pneumoconiosis but has chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 29, Employer's Exhibits 1, 3, 7. The ALJ found neither physician's opinion persuasive or well-reasoned, and therefore determined Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 26.

Employer asserts the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 35-40. We disagree.

Initially, we reject Employer's argument that the ALJ applied an improper burden of proof in evaluating its experts' opinions. Employer's Brief at 41-42. As the Director correctly notes, Employer conflates the two distinct grounds for rebuttal and their respective standards. Legal pneumoconiosis and disability causation are separate, independent grounds for rebuttal under the Section 411(c)(4) presumption. Director's Brief at 24-25. Contrary to Employer's contention, there is no conflict between the circuit courts or the Board in applying the standards for rebutting the presumption. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (employer must establish that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine); *see also Minich*, 25 BLR at 1-156 ("under 20 C.F.R. §718.305(d)(1)(ii), employer must establish that no part of the miner's respiratory or pulmonary disability is due to pneumoconiosis"). Moreover, the ALJ did not reject Employer's experts because they failed to meet a heightened legal standard; rather, as discussed below, he found their opinions inadequately reasoned and thus not credible. Decision and Order at 24-26.

The ALJ accurately noted Dr. Tuteur opined Claimant's COPD was unrelated to his coal mine dust exposure based on a relative risk assessment between smoking and coal mine dust exposure. Decision and Order at 24; Employer's Exhibits 1, 3. Specifically, Dr. Tuteur acknowledged Claimant "was exposed to sufficient amounts of coal mine dust to

produce a coal mine dust related disease process in a susceptible host." Employer's Exhibit 1. However, he opined the sole cause of Claimant's COPD was cigarette smoking based on the concept of relative risk. *Id*. Thus, contrary to Employer's arguments, the ALJ permissibly rejected Dr. Tuteur's opinion as based on statistical generalities rather than the specific facts of Claimant's case. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 15; Employer's Brief at 7-12.

The ALJ also accurately noted Dr. Rosenberg attributed Claimant's COPD solely to cigarette smoking based in part on the marked reduction in his FEV1 in relationship to his FVC on pulmonary function testing. Decision and Order at 24; Director's Exhibit 29. Thus, the ALJ permissibly discredited his opinion because it is based on premises inconsistent with studies the DOL cited in the preamble to the 2001 revised regulations that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); 65 Fed. Reg. at 79,943; Decision and Order at 24.

In addition, the ALJ noted Dr. Rosenberg opined Claimant's COPD is due to smoking because smoking is more damaging to the lungs than coal mine dust, his emphysema is not characteristic of coal mine dust-induced emphysema, and the long period between the end of his coal mine employment and the onset of his symptoms demonstrates his chronic bronchitis could not be due to his coal mine dust exposure. Decision and Order at 24-26; Director's Exhibit 29; Employer's Exhibit 3. Contrary to Employer's arguments, the ALJ permissibly found Dr. Rosenberg's opinion not well reasoned as it is based on generalities; partial reversibility of Claimant's impairment after the use of bronchodilators does not preclude the possibility Claimant has legal pneumoconiosis, *see Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); and it is inconsistent with the regulations and the preamble which recognize that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.[26] *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Stallard*, 876 F.3d at 671-72 n.4; 20 C.F.R. §718.201(a)(2), (b), (c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 26.

[26] Contrary to Employer's argument, an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Beeler*, 521 F.3d at 726.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Employer's arguments amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the ALJ permissibly discredited the opinions of Drs. Tuteur and Rosenberg, we affirm his determination that Employer failed to establish Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(1); Decision and Order at 26.

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. 20 C.F.R. §718.305(d)(1)(i)(A).

Upon finding Employer did not disprove pneumoconiosis, the ALJ addressed whether Employer established that 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 rationally discredited the opinions of Drs. Tuteur and Rosenberg regarding the cause of Claimant's disability because they failed to diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 42-44. We therefore affirm the ALJ's determination that Employer failed to establish that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge