U.S. Department of Labor

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

BRB Nos. 21-0283 BLA
and 21-0284 BLA

FRIEDA F. HARMAN (o/b/o and Widow of BOBBY E. HARMAN)	)	
Claimant-Respondent	)	
v.	)	
EASTERN ASSOCIATED COMPANY, LLC	)	
and	)	DATE ISSUED: 11/21/2022
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2019-BLA-05344 and 2020-BLA-05073) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a miner's claim filed on June 8, 2016,[2] and a survivor's claim filed on March 4, 2019.

The ALJ found Eastern Associated Company, LLC (Eastern), self-insured through its parent company Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He found the Miner had twenty-eight years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also determined Claimant is

[1] Employer's appeal in the miner's claim was assigned BRB No. 21-0283 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0284 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[2] Claimant is the widow of the Miner, who died on February 15, 2019. Survivor's Claim (SC) Director's Exhibit 4. She is pursuing both his claim and her survivor's claim. Miner's Claim (MC) Director's Exhibit 2; SC Director's Exhibit 3.

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

automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer contends 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.[5] It also asserts the duties the district director performs create an inherent conflict of interest that violates its due process rights. In addition, Employer contends it should be dismissed as the responsible operator for lack of jurisdiction and the Black Lung Disability Trust Fund (Trust Fund) must assume liability for the payment of benefits. Alternatively, it contends the ALJ erred in finding Peabody Energy is liable for the payment of benefits. Finally, it asserts the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption in the Miner's claim.[6]

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 conflict of interest and Appointments Clause arguments and affirm the ALJ's determination that Employer is liable for benefits.

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[4] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

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

U.S. Const. Art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established twenty-eight years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption in the Miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 10-23.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator: Due Process

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). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than one year.[8] 20 C.F.R. §725.494(c). 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 properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The district director issued a Notice of Claim on June 13, 2016, naming Peabody Coal Company (Peabody Coal), self-insured by Peabody Energy, as a potentially liable operator. Miner's Claim (MC) Director's Exhibit 32. In a letter dated June 24, 2016, Ms. Sandy L. Downey, a third-party administrator for Peabody Energy, responded. MC Director's Exhibit 35. She did not specifically address the district director's identification of Peabody Coal as the Miner's employer but, rather, identified the matter as pertaining to

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[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

[8] For a coal mine operator to meet the regulatory definition of a "potentially liable operator": 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).

Eastern, another operator self-insured by Peabody Energy. *Id.* She contended Eastern was a subsidiary of Patriot Coal Company (Patriot) and therefore the district director should dismiss Peabody Energy as a party and issue an Amended Notice of Claim naming Patriot as the potentially liable self-insured operator. *Id.* She also filed a separate Operator Response to Notice of Claim form, controverting Peabody Coal's liability as the responsible operator and Peabody Energy as its insurer. *Id.*

The district director issued a Schedule for the Submission of Additional Evidence (SSAE) on February 28, 2017, naming Eastern, also self-insured through Peabody Energy, as the designated responsible operator. MC Director's Exhibit 36. On March 23, 2017, Eastern and Peabody Energy responded to SSAE, disputing their designation as the responsible operator and insurer. MC Director's Exhibit 37. Thereafter the district director issued a Proposed Decision and Order on September 21, 2018, designating Eastern as the responsible operator. MC Director's Exhibit 43.

Employer requested a formal hearing, and the case was forwarded to the Office of Administrative Law Judges and assigned to the ALJ. MC Director's Exhibits 51, 54. On May 6, 2020, Employer filed a Motion to Dismiss alleging lack of jurisdiction because the Notice of Claim initially designated Peabody Coal, not Eastern, as the potentially liable operator. Employer acknowledged the SSAE named Eastern as the designated responsible operator, but argued the district director was required to first issue an Amended Notice of Claim naming it as the potentially liable operator. The ALJ rejected Employer's argument that a "Notice of Claim form" is a "prerequisite to jurisdiction." July 6, 2020 Order at 3. He found Employer neither submitted any evidence that the district director's "failure to issue a new Notice of Claim violated any due process rights in its ability to defend the claim" nor caused it to "suffer[] any prejudice by the [alleged] ministerial error." *Id.* He also found the "Director's Exhibits clearly establish that Employer received notice of the claim, had the opportunity to submit information in defense of its opposition to liability and in fact actually submitted documents in this regard." *Id.* Thus he denied Employer's motion to dismiss. *Id.*

During a September 23, 2020 telephonic hearing, Employer's counsel stated he wanted to preserve the issue of jurisdiction with regard to "whether notice was correct for Peabody Energy." Hearing Tr. at 6. In his Decision and Order, the ALJ pointed out that Employer "did not contest that it [i.e., Eastern] was the last qualifying coal mine employer of the Miner" or that "Peabody Energy was [Eastern's] self-insurer on the last day of [his] employment." Decision and Order at 3. He therefore reaffirmed his Order denying Employer's motion to dismiss for lack of jurisdiction. *Id.*

On appeal, Employer argues liability must transfer to the Trust Fund because the district director named the wrong operator in the Notice of Claim and thus lacked

jurisdiction.[9] Employer's Brief at 24-27. It asserts that because the Notice of Claim initially named Peabody Coal as the potentially liable operator, Eastern should be relieved of liability. *Id.*

To the extent Employer argues it was denied due process because of the manner in which the district director processed this claim, we find no merit in its argument. The Due Process Clause of the Constitution, which applies to adjudicative administrative proceedings, requires an employer receive notice and an opportunity to be heard before it is held liable for an award of benefits. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009). Notice must be reasonably calculated to inform the employer of the claim for benefits. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048 (6th Cir. 1990). A delay in notifying an employer of its potential liability violates due process only if the employer is deprived of a fair opportunity to mount a meaningful defense against the claim. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998); *see also Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Due process "is concerned with procedural outrages, not procedural glitches." *Energy West Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009).

The pertinent issue is whether Employer received adequate notice and an opportunity to be heard. *See Richardson*, 402 U.S. at 401; *Mullane*, 339 U.S. at 313; *Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807. Peabody Coal was identified as the potentially liable operator in the June 13, 2016 Notice of Claim. MC Director's Exhibit 32. However, as noted above, in response to the Notice of Claim, Ms. Downey, the third-party administrator for Peabody Energy, identified the matter as pertaining to Eastern, Patriot, and Peabody Energy, and stated "[t]he above named company has received your notification indicating they are being considered as the responsible operator in this claim." MC Director's Exhibit 35. Further, Eastern was correctly identified within the district

[9] Employer argues the ALJ's rejection of its motion to dismiss for lack of jurisdiction "fails to recognize that Personal jurisdiction is not established by satisfying the Due Process Clause alone." Employer's Brief at 26. It asserts a Notice of Claim is "equivalent" to the statutory procedure of the "two-step approach that must be utilized to establish personal jurisdiction in a federal district court." *Id.* at 26-27. We agree with the Director that "Employer's arguments based on the personal jurisdiction of federal district courts are irrelevant, as jurisdiction under the [Black Lung Benefits Act (BLBA)] is not governed by the same rules." Director's Response Brief at 31-32 n.21.

director's SSAE dated February 28, 2017 and Proposed Decision and Order dated September 21, 2018, and at all times thereafter. MC Director's Exhibits 36, 43.

Employer does not explain how the district director's reference to Peabody Coal as a potentially liable operator, rather than Eastern, at the outset of the claim prejudiced it. *See Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807; *Lemar*, 904 F.2d at 1048. Moreover, Employer does not contest that it is the last coal mine operator that employed the Miner. 20 C.F.R. §§725.494, 725.495(a)(1); Employer's Brief at 28. Contrary to Employer's assertion, the ALJ properly found Employer received adequate notice and an opportunity to be heard in this case. *See Richardson*, 402 U.S. at 401; *Mullane*, 339 U.S. at 313; *Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807; July 6, 2020 Order at 3. Thus, we reject Employer's argument that it should be dismissed for lack of jurisdiction and liability should transfer to the Trust Fund. The district director's error of initially naming Peabody Coal as the potentially responsible operator in the Notice of Claim, at most, constitutes a procedural glitch. *Oliver*, 555 F.3d at 1219.

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and was self-insured by Peabody Energy on the last day it employed the Miner; thus we affirm these findings. *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 5.

Responsible Insurance Carrier

Employer next contends Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy.[10] Patriot was initially another Peabody Energy subsidiary. MC Director's Exhibit 27. In 2007, ten years after the Miner ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, 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. MC Director's Exhibit 28. Although

[10] Employer also states it wants to "preserve" its "ability to challenge" BLBA Bulletin No. 16-01 as an invalid rule. Employer's Brief at 58. Employer generally argues the Bulletin contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act (APA). *Id.* at 57-58. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *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).

Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. MC Director's Exhibits 24, 39. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 6-10.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits:[11] (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[12] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when at the same time the DOL administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) 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; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on the company; (7) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced; and (8) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's

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[11] Employer also argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the APA. Employer's Brief at 58. That regulation specifies "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1). Employer has not identified any documentary evidence relevant to liability that the ALJ excluded. Further, although ALJ [Morris] rendered the decision at issue in the present appeal, Employer asserts "ALJ [John P. Sellers, III] and the Director's actions in this matter ultimately devest [sic] the ALJ of any control over the discovery and development of the record on the liability issue which is inconsistent with the Act." Employer's Brief at 58. Employer has failed to identify any action or finding by either ALJ Sellers or "the Director" pertinent to this case which implicates the issue raised in its argument. Thus we decline to address this argument. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[12] Employer raised this argument for the first time at the June 5, 2019 hearing before the ALJ and waited until filing its October 4, 2019 post-hearing brief to provide any substantive argument supporting its position. Hearing Tr. at 8-9; Employer's Post-Hearing Brief at 24-29.

bond and failing to comply with its duty to monitor Patriot's financial health.[13] Employer's Brief at 28-65. Moreover, 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.

The Board has previously considered and rejected these arguments in *Bailey v. Eastern Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 4-29 (Oct. 25, 2022); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *Graham v. Eastern 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 Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Miner's Claim - Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

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[13] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 52. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b).

[14] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment 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).

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. Zaldivar and Rosenberg that the Miner did not have legal pneumoconiosis.[15] Decision and Order at 27-29. Drs. Zaldivar and Rosenberg each opined the Miner had diffuse emphysema and pulmonary fibrosis related to cigarette smoking, and not coal mine dust exposure. MC Director's Exhibit 24; MC Employer's Exhibits 6-8. The ALJ found their opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 27-29.

We initially reject Employer's argument that the ALJ applied the wrong standard when addressing rebuttal.[16] Employer's Brief at 22-23. The ALJ properly required Employer to establish Claimant does not have a chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 29; *see* 20 C.F.R. §718.201(b).

Moreover, the ALJ permissibly found neither Dr. Zaldivar nor Dr. Rosenberg adequately explained why they concluded coal mine dust exposure did not contribute to, or aggravate, the Miner's chronic lung disease. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); 20 C.F.R. §718.201(b); Decision and Order at 27-29. The ALJ accurately

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[15] The ALJ also considered Dr. Forehand's opinion that the Miner had legal pneumoconiosis. Decision and Order at 28; MC Director's Exhibit 15; MC Claimant's Exhibits 1, 2. Because Dr. Forehand's opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of Dr. Forehand's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 20.

[16] We reject Employer's argument that the ALJ erred in failing to apply the legal standard enunciated in *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). Employer's Brief at 22-23. In *Young*, the United States Court of Appeals for the Sixth Circuit held an employer can "disprove the existence of legal pneumoconiosis by showing that [a miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Young*, 947 F.3d at 405. "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014). As this case arises within the jurisdiction of the Fourth Circuit, the holding in *Young* is not binding on the ALJ.

stated Drs. Zaldivar and Rosenberg opined coal mine dust exposure did not cause or contribute to the Miner's emphysema because "smoking and not coal dust exposure causes a diffuse emphysema." Decision and Order at 27. He further noted Dr. Zaldivar acknowledged that "the two exposures do cause emphysema through similar mechanisms" but "explained that smoke will first damage the mitochondria of the cell, change the membrane of the cell to lipid composition, damage the stem cells, and sensitizes the lungs." *Id.* He also noted "Dr. Zaldivar then stated that once that damage is done, then coal dust will follow similar pathways." *Id.* Further, he noted Dr. Rosenberg cited "numerous studies" to show "the particles in cigarette smoke are smaller and more numerous than those in coal dust" and thus they are "the etiologic agents" that caused the Miner's diffuse emphysema. *Id.* He also noted Dr. Rosenberg acknowledged that "further investigation of the size of the particles in coal dust has been suggested." *Id.* Contrary to Employer's assertion, while both physicians attributed the Miner's emphysema to cigarette smoking, the ALJ permissibly found neither persuasively explained why coal mine dust exposure did not significantly aggravate the disease. *Id.* at 28; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Hicks*, 138 F.3d at 530; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

Additionally, the ALJ accurately noted Dr. Rosenberg stated "coal dust could be an additive cause but if it was low-grade clinical pneumoconiosis you would not have added any appreciable matter to the loss of alveolar capillary death." Decision and Order at 27. He also accurately observed "Dr. Zaldivar stated that pneumoconiosis would need to be present radiographically in category 2 or greater to damage the lungs enough to cause hypoxemia." *Id.* He determined Drs. Rosenberg's and Zaldivar's analyses "required a high profusion of clinical pneumoconiosis in order to determine that the emphysema present was related to the Miner's coal mine dust exposure." *Id.* at 27, 28. Contrary to Employer's assertion, the ALJ permissibly found their opinions inconsistent with the regulations that provide legal pneumoconiosis may be present even in the absence of clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (ALJ may discredit physician whose opinion regarding legal pneumoconiosis conflicts with the DOL's recognition that coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis); *see* 20 C.F.R. §§718.201(a), 718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 27, 28. Further, he permissibly found that to the extent Dr. Zaldivar relied on the absence of "radiographic pneumoconiosis" to conclude the Miner did not have legal pneumoconiosis, his opinion is inconsistent with the regulations that recognize legal pneumoconiosis can exist in the absence of positive x-ray evidence. *See Looney*, 678 F.3d at 313 (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a

negative chest x-ray") (internal quotations omitted); 20 C.F.R. §§718.202(a)(4), 718.202(b); Decision and Order at 28.

Finally, Employer argues the ALJ erred in weighing the opinions of Drs. Zaldivar and Rosenberg as they "provided sound opinions" explaining why the Miner's emphysema was due to smoking alone and thus, were worthy of determinative weight. Employer's Brief at 21. This argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus we affirm the ALJ's finding that Employer did not disprove the existence of legal pneumoconiosis. 20 C.F.R.§718.305(d)(1)(i)(A); Decision and Order at 29. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[17] *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 30.

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 30-31. He found the opinions of Drs. Zaldivar and Rosenberg unpersuasive on the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (physician who fails to diagnose pneumoconiosis, contrary to the ALJ's finding, cannot be credited on rebuttal of disability causation absent specific and persuasive reasons); Decision and Order at 30; MC Director's Exhibit 24; MC Employer's Exhibits 6, 7, 8 at 34-35. As Employer does not specifically identify any error in the ALJ's credibility finding, we affirm it.[18] *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); *Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we affirm the ALJ's finding that Employer failed to

[17] As we have affirmed the ALJ's determination that Employer failed to disprove legal pneumoconiosis, we need not address Employer's argument that it disproved clinical pneumoconiosis. Employer's Brief at 11-15.

[18] As discussed above, Employer's argument that the ALJ erred in failing to apply the legal standard enunciated in *Young* is relevant to its burden to rebut the presumed fact of legal pneumoconiosis, not to its burden to rebut the presumed fact of total disability due to legal pneumoconiosis. *See Young*, 947 F.3d at 405; Employer's Brief at 22-23.

establish no part of the Miner's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 154-56.

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim award, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[19] 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the 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

[19] Employer acknowledges the ALJ did not address whether the evidence established that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 but states it wants to preserve the issue. Employer's Brief at 23-24.