U.S. Department of Labor

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

BRB No. 23-0056 BLA

ANNA J. HOSKINS (o/b/o of GEORGE HOSKINS) Claimant-Respondent v. BIG ELK CREEK COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/16/2023 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2019-BLA-06368) 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 subsequent claim filed on August 18, 2017.[1]

The ALJ found the Miner had 18.45 years of underground and substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant[2] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[3] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] This is the Miner's second claim for benefits. The record indicates the Miner's first claim, filed on June 22, 1989, was administratively closed on December 4, 1989. Director's Exhibit 1. The ALJ stated "[t]he basis for the denial of that claim is . . . unclear" because the records "were transferred to the Federal Records Center where they were lost or destroyed, and are not in evidence." Decision and Order at 2. She proceeded as if Claimant had to establish any element of entitlement before receiving a de novo review on the merits. *Id*. at 3 n.8, 4, 34.

[2] Claimant is the widow of the Miner, who died on March 21, 2019, while this claim was pending before the district director. Director's Exhibits 10, 18. She is pursuing the miner's claim on her husband's behalf. Director's Exhibit 89.

[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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to ALJs rendered her appointment unconstitutional. Further, it contends the Department of Labor's (DOL) destruction of the Miner's prior claim file and the ALJ's refusal to allow it to obtain discovery from the DOL regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case, deprived it of due process. In addition, it asserts the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's Appointments Clause challenges, contentions of due process violations, and argument that the ALJ erred in relying on the preamble to assess the evidence in this case. In a reply brief, Employer reiterates its contentions.

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

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§725.309(c)(3). Because the ALJ proceeded as if Claimant had to establish all the elements of entitlement, *see supra* note 1, she required Claimant to submit new evidence establishing any element of entitlement to warrant a review of this subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[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.

with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's 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).[7] Employer's Brief at 48-49; Employer's Reply Brief at 13. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 49-51; Employer's Reply Brief at 12. In addition, it challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 46-48; Employer's Reply Brief at 12. It generally argues the removal provisions for ALJs contained 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 46-48.

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

[7] *Lucia* involved an Appointments Clause 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)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

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

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's Dec. 21, 2017 Letter to ALJ Markley.

Moreover, it 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 opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Employer's Discovery Request

While the case was pending before the ALJ, Employer sought discovery from the DOL related to the deliberative process underlying the development of the preamble to the 2001 revised regulations. *See* April 15, 2021 Order; March 24, 2021 Director's Motion for Protective Order. In response, the Director moved for a Protective Order barring the requested discovery. *Id.* Employer opposed the Director's request. *See* March 31, 2021 Employer's Opposition to Motion for a Protective Order. The ALJ granted the Director's motion, finding Employer's discovery request would not lead to relevant information regarding the DOL's deliberative process or the science underlying the revised regulations that was not already set forth in the preamble or to evidence relevant to adjudication of the present claim. *See* April 15, 2021 Order.

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting the opinions of its physicians as being inconsistent with the science the DOL relied on in the preamble. Employer's Brief at 23-46; Employer's Reply Brief at 3-7. For the reasons set forth in *Johnson*, BLR , BRB No. 22-0022 BLA, slip op. at 8-9, we reject Employer's arguments.

Due Process – Destruction of the Prior Claim Record

Employer urges the Board to vacate the ALJ's Decision and Order and transfer liability for benefits to the Black Lung Disability Trust Fund (Trust Fund) because evidence in the prior claim was not made a part of the record in this claim as required by regulation. Employer's Brief at 27-30; *see* 20 C.F.R. §718.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim."). It alleges a general due process violation pertaining to its ability to mount a meaningful defense against the claim. Employer's Brief at 17-18. In response, the Director asserts Employer failed to establish any violation of its due process rights. Director's Brief at 8-11. We agree with the Director's argument.

To sustain its allegation of a procedural due process violation, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (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 coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim).

Although Employer speculates that the record and prior testimony from the Miner's prior claim might have been helpful to its defense,[9] it neither alleges that such evidence was made unavailable due to deliberate misconduct nor explains how it was deprived of a fair opportunity to mount a meaningful defense in this claim. *See Holdman*, 202 F.3d at 883-84; *Borda*, 171 F.3d at 184; *see also Oliver*, 555 F.3d at 1219. Employer therefore has not shown a due process violation.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or "substantially similar" surface coal mine employment and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

Length and Nature of Coal Mine Employment

Claimant bears the burden to establish the number of years the Miner worked 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

[9] Employer contends that, in destroying the prior claim record, the DOL deprived it of the opportunity to establish whether the Miner's work "on the surface exposed him to conditions comparable to those experienced underground." Employer's Brief at 17-18. We agree with the Director's argument that Employer's speculative comments provide no basis for remand. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *see also Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009); Director's Brief at 8-11.

determination if it is based on a reasonable method of calculation that is supported by substantial evidence. The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [the Miner] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015).

The ALJ found Claimant established 18.45 years of coal mine employment. Decision and Order at 7. Employer does not challenge the ALJ's length of coal mine employment finding. Thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Instead, Employer argues the ALJ erred in finding Claimant established the Miner was regularly exposed to coal mine dust in the years he worked aboveground at a preparation plant from 1980 to 1987. Employer's Brief at 9-17.

The ALJ considered the Miner's employment history form, description of coal mine work form, Social Security Administration earnings records, coal mine certifications, and comments he provided to physicians during examinations. Decision and Order at 6-9, 20-22; Director's Exhibits 4-8. She determined the evidence demonstrated the Miner was "regularly exposed to coal mine dust" in his aboveground work.[10] Decision and Order at 22. Thus, she found Claimant established the Miner's 18.45 years of coal mine employment is qualifying for purposes of invoking the Section 411(c)(4) presumption. *Id.*

[10] In considering the exertional requirements of the Miner's usual coal mine employment, the ALJ acknowledged that Dr. Rosenberg reported the Miner's earlier coal mine employment involved being "a mechanic," being "in charge" of a surface mine, and being "involved with tipple operations." Decision and Order at 8; Director's Exhibit 22 at 2; Employer's Exhibit 1 at 2. The ALJ stated the Miner "was regularly exposed to coal mine dust in his work at the tipple." Decision and Order at 22. As Employer notes, the "documents the ALJ cited showed that [the Miner's] entire tenure from 1980-1987 was at a '[preparation plant]' as 'foreman-coal washer.'" Employer's Brief at 10 (citing Director's Exhibits 4, 5). Immediately before the sentence in which she referred to the Miner's work at the tipple, the ALJ explained that his last employment was at a preparation plant. Decision and Order at 22. She also noted in the prior paragraph of her decision that "the Miner's work on the surface [between 1980 and 1986] was at a preparation plant that cleaned the coal." *Id.* at 21. Therefore, the context of the ALJ's analysis makes clear that the discrepancy regarding her reference to a tipple was a "scrivener's error." *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer argues Claimant failed to establish the Miner's surface mine work was performed in conditions where "coal dust exposure was as severe and regular as what miners experience underground." Employer's Brief at 9-17. The Director argues the proper standard requires regular exposure rather than severe exposure. Director's Brief at 6-8. We agree with the Director's position.

Contrary to Employer's assertion, a claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Kennard*, 790 F.3d at 664-65; 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Employer's Brief at 12-14; Director's Brief at 7. Instead, a claimant need only establish a miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).[11] Here, the ALJ reviewed the Miner's employment history form that noted he worked underground from 1967 to 1977 for Harlan Walling Coal Corp., Clover Darby Coal Co. Inc., Eastover Mining Co., and Peabody Coal Co., and on the surface from 1980 to 1987 at Bledsoe Coal Processing Co. (Bledsoe Coal).[12] Decision and Order at 6, 21-22; Director's Exhibits 4, 7, 8. She also reviewed the Miner's description of coal mine work form and noted his "last employment was [as] a coal washer and foreman at a preparation plant, where the raw coal was washed." Decision and Order at 22 (citing Director's Exhibit 5). Further, she noted the Miner indicated on his employment history form that he "was exposed to dust, gas and fumes during all of his employment." Decision and Order at 22; Director's Exhibit 4. She thus found the Miner was "regularly exposed to coal mine dust" during his "seven years" of working "on the surface" for Bledsoe Coal. Decision and Order at 22.

The ALJ permissibly found the Miner's uncontradicted employment history form credible and established he was regularly exposed to coal mine dust during his entire

[11] We reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid. Employer's Brief at 14-16. The Sixth Circuit and the United States Court of Appeals for the Tenth Circuit have rejected similar arguments and upheld the validity of 20 C.F.R. §718.305(b)(2). *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

[12] The ALJ stated that because the record is "unclear" whether the Miner's work in the preparation plant for Bledsoe Coal was at an underground mine, she had to determine "whether the surface work conditions were substantially similar to employment in an underground mine." Decision and Order at 21-22.

aboveground coal mine employment.[13] *See Kennard*, 790 F.3d at 664; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 1344 n.17 (10th Cir. 2014); *Bonner v. Apex Coal Corp.*, 25 BLR 1-279, 1-282-84 (2022); Decision and Order at 7; Employer's Brief at 36-39. As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work or comparable gainful work. *See* 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) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

[13] We reject Employer's argument that the ALJ erred in finding the Miner was regularly exposed to coal mine dust exposure as it "requires offering proof that 'exposure to coal dust was the rule rather than the exception during his aboveground work.'" Employer's Brief at 13 (citing *Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018)). Workers at a preparation plant and tipple are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment; they need not show "continuous" exposure. 20 C.F.R. §725.202(a). Rather, the presumption is rebutted with evidence that the Miner was not "regularly exposed" to coal mine dust when he worked at those sites. 20 C.F.R. §725.202(a)(1), (2). Moreover, as noted, the ALJ permissibly credited the Miner's uncontradicted employment history form as affirmative proof that he worked as a coal washer and foreman at a preparation plant and was regularly exposed to coal dust in that job.

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and her weighing of the evidence as a whole.[14] Decision and Order at 24-26.

Employer does not challenge the ALJ's finding that the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 24. Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Tuteur, and Rosenberg. Decision and Order at 12-18, 25. She stated "all three physicians agree that the Miner was totally disabled from a pulmonary or respiratory standpoint during his lifetime." Decision and Order at 25; *see* Director's Exhibits 12, 19, 20, 22; Employer's Exhibits 1, 2. She thus found the medical opinion evidence supports a finding of total disability. Decision and Order at 25.

As Employer does not challenge the ALJ's crediting of Drs. Tuteur's and Rosenberg's opinions, we affirm her crediting of their opinions. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25.

Employer argues the ALJ erred in crediting Dr. Forehand's disability opinion because it is based on the doctor's "misinformed belief" that the Miner "spent thirty-seven years mining underground 'at the face.'" Employer's Brief at 17. We disagree.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Even if credited, Employer's argument would concern whether the Miner's disability was caused by dust exposure in coal mine employment, not whether he suffered a totally disabling respiratory impairment at all.

Employer's argument on appeal thus amounts to a request to reweigh the evidence, which we are not empowered to do. *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 352-53 (6th 2007); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 17. Having correctly found all the physicians opined the Miner was

[14] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 24.

totally disabled,[15] we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; *see also Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (non-qualifying pulmonary function tests do not undermine qualifying blood gas evidence because the studies measure different types of impairment); Decision and Order at 26. Thus, we affirm her findings that Claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305, and established a change in an applicable condition of entitlement.[16] 20 C.F.R. §725.309(c); Decision and Order at 26.

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,[17] or that

[15] Moreover, as Dr. Forehand diagnosed total disability, his opinion is not contrary to the qualifying pulmonary function study evidence. Even if the ALJ were to accord Dr. Forehand's opinion no weight, the medical opinion evidence would not weigh against a finding of total disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). Thus Employer has not explained how the "error to which [it] points could have made any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni*, 6 BLR at 1-1278.

[16] The ALJ reasonably found that because Claimant established every element of entitlement, she is entitled to benefits and thus established a change in an applicable condition of entitlement since the denial of the Miner's prior claim. *See* 20 C.F.R. §725.309(c); *see also Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White* 23 BLR at 1-3; Decision and Order at 34.

[17] "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).

"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 establish rebuttal by either method.[18]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, whose law applies to this claim, requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "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)).

The ALJ considered the medical opinions of Drs. Rosenberg and Tuteur.[19] Decision and Order at 30-33. They opined the Miner did not have legal pneumoconiosis but had chronic obstructive pulmonary disease (COPD) and emphysema related to smoking and unrelated to coal mine dust exposure. Director's Exhibit 22 at 4-11; Employer's Exhibits 1 at 6-11; 2 at 7-12. The ALJ found their opinions neither reasoned nor unpersuasive and

[18] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 29.

[19] The ALJ also considered Dr. Forehand's opinion. Decision and Order at 12-14, 29-30. In his initial and supplemental reports, Dr. Forehand opined the Miner had legal pneumoconiosis. Director's Exhibits 12, 20. The ALJ found Dr. Forehand's opinion well-reasoned and documented. Decision and Order at 30. For the reasons set forth in *Smith v. Kelly's Creek Resources*, BLR , BRB No. 21-0329 BLA, slip op. at 7-12 (June 27, 2023), we reject Employer's arguments that the DOL has no legal authority to request supplemental opinions under the pilot program, the pilot program reflects the district director's attempt to advocate for claimants, and the issuance of the pilot program, without notice and comment, violates the Administrative Procedure Act. Employer's Brief at 18-23; Employer's Reply Brief at 8-12. As Employer raises no other challenges to the ALJ's weighing of Dr. Forehand's opinion on rebuttal, we affirm her weighing of it. *Skrack*, 6 BLR at 1-711.

thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 30-32.

We initially reject Employer's assertion that the ALJ erred in relying on the preamble to the revised 2001 regulations as a basis for discrediting the opinions of Drs. Rosenberg and Tuteur, and that she improperly treated it as a binding rule that created an "impossible" burden of proof.[20] Employer's Brief at 23-46; Employer's Reply at 3-7.

Federal circuit courts have consistently held that 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 Sterling*, 762 F.3d 483, 491; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Additionally, contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment. *Adams*, 694 F.3d at 801-02; Employer's Brief at 43-46.

Here, the ALJ permissibly evaluated the opinions of Drs. Rosenberg and Tuteur in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; Decision and Order at 14-18, 30-32. Moreover, her references to the preamble did not, as Employer suggests, result in substituting her own opinion for that of the physicians; rather, as discussed below, she properly evaluated whether the physicians satisfied Employer's burden by credibly explaining their opinions that the Miner did not have legal pneumoconiosis. *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); Employer's Brief at 27-37.

Drs. Rosenberg and Tuteur excluded coal mine dust exposure as a cause or contributing factor to the Miner's COPD and emphysema. Director's Exhibit 22 at 4-11; Employer's Exhibits 1 at 6-11; 2 at 7-12. They opined the Miner's smoking history was

[20] Employer asserts the ALJ improperly relied on training materials developed and provided to adjudicators that prejudiced these proceedings and encouraged an incorrect analysis. Employer's Brief at 30-34. Employer has not shown the ALJ saw or relied on the training materials. Director's Response Brief at 21. Consequently, to the extent Employer argues the ALJ was biased because of the training materials, it has not laid the necessary foundation for consideration of its allegation. Therefore, Employer's claim of bias is rejected. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

the sole cause of his obstructive lung disease. *Id*. The ALJ noted they concluded the Miner'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 31; Director's Exhibit 22 at 4, 6-8; Employer's Exhibits 2 at 7-11. Specifically, they acknowledged the Miner was exposed to sufficient amounts of coal mine dust to produce a coal mine dust-related disease. Director's Exhibit 22 at 4; Employer's Exhibit 2 at 3. However, they opined the sole cause of the Miner's COPD was cigarette smoking as "cigarette[] smokers who never mined coal developed clinically meaningful airflow obstruction about 20% of the time, while miners who never smoke develop it only about 1% of the time" and "smoking is dramatically more destructive than coal dust." Director's Exhibit 22 at 6-8; Employer's Exhibit 2 at 8. In light of the DOL's recognition that the effects of smoking and coal mine dust can be additive, the ALJ permissibly found the physicians failed to adequately explain why the Miner's history of coal mine dust exposure did not significantly contribute, along with cigarette smoking, to his obstructive lung disease. *See Barrett*, 478 F.3d at 356; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *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"); 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. 79,920, 79,939-79,941 (Dec. 20, 2000); Decision and Order at 31-32; Employer's Brief at 32-33, 35-37.

Dr. Rosenberg also excluded coal mine dust exposure as a causative factor of the Miner's COPD based on studies indicating smoking causes greater reductions per year in the FEV_1 on pulmonary function testing than coal mine dust exposure. Director's Exhibit 22 at 5-8. The ALJ permissibly found Dr. Rosenberg's rationale inadequately explained in light of the DOL's recognition set forth in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease as measured by a reduction in FEV_1. *See Sterling*, 762 F.3d at 491; 65 Fed. Reg. at 79,943; Decision and Order at 30-31.

Dr. Rosenberg further excluded coal mine dust exposure as a causative factor of the Miner's COPD because latent and progressive pneumoconiosis is "rare" and "unlikely" in this case. Director's Exhibit 22 at 10-11. He explained that "when coal mine dust exposure is below $2mg/m^3$ . . . , it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." *Id.* at 10. The ALJ permissibly discredited Dr. Rosenberg's reasoning as inconsistent with the regulations' recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Young*, 947 F.3d at 407; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); *Beeler*,

521 F.3d at 726; 20 C.F.R. §718.201(c); Decision and Order at 31; Employer's Brief at 33-35.

Additionally, Dr. Rosenberg concluded the Miner's diffuse emphysematous COPD was consistent with cigarette smoking and not characteristic of coal mine dust exposure. Director's Exhibit 22 at 8-10; Employer's Exhibit 1 at 9-10. The ALJ acted within her discretion in finding Dr. Rosenberg's opinion inadequately explained given the DOL's recognition in the preamble that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See Adams*, 694 F.3d at 801-02; 65 Fed. Reg. at 79,943; Decision and Order at 31; Employer's Brief at 30-32.

We consider Employer's general arguments that the ALJ should have found the opinions of Drs. Tuteur and Rosenberg well-documented and reasoned to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 27-37. Because the ALJ acted within her discretion in rejecting both opinions, we affirm her finding that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [the Miner'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); Decision and Order at 33-34. She discredited Drs. Tuteur's and Rosenberg's opinions on disability causation because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer did not disprove the existence of the disease. *See Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 33. As the ALJ's finding that Employer failed to prove no part of the Miner's total respiratory disability was due to legal pneumoconiosis is unchallenged, we affirm it. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge