**U.S. Department of Labor**

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

BRB Nos. 20-0311 BLA
and 20-0312 BLA

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| LENA BROWN<br>(o/b/o and Widow of GARY BROWN)<br><br>Claimant-Respondent<br><br>v.<br><br>SHURROCK COAL CORPORATION<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-<br>Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 09/16/2021<br><br>DECISION and ORDER |

Appeal of the Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

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

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim (2015-BLA-05410 and 2017-BLA-05847) rendered on claims filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found the Miner had 11.75 years of coal mine employment and, therefore, Claimant could not invoke the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ accepted the parties' stipulation that the Miner had a totally disabling respiratory or pulmonary impairment, and further found Claimant established the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a)(4), 718.204(b),(c). Accordingly, he awarded benefits in the Miner's claim and found Claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[3] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ lacked the authority to decide the claims because he was not appointed in a manner consistent with the Appointments Clause of the

[1] The Miner filed a claim on March 25, 2014, but died on November 6, 2016, while his claim was pending. Claimant, the Miner's widow, is pursuing this claim on his behalf and her own survivor's claim. Director's Exhibits 2, 52.

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

[3] Section 422(*l*) provides that the survivor of a miner who was determined to be 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).

Constitution.[4] It also argues that the removal provisions applicable to ALJs violate the separation of powers doctrine and render his appointment unconstitutional. Additionally, Employer contests its designation as the responsible operator. On the merits of entitlement, Employer asserts the ALJ improperly shifted the burden of proof to Employer to disprove legal pneumoconiosis and erred in finding Claimant established the Miner was totally disabled due to pneumoconiosis. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's arguments regarding the ALJ's appointment and its designation as the responsible operator. Employer filed a reply brief reiterating its arguments.[5]

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.[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**

Employer urges the Board to vacate the awards and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.

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[4] 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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established total respiratory or pulmonary disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

[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 work in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 29.

Ct. 2044 (2018).[7] Employer's Brief at 10-19; Employer's Reply Brief at 1-7. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] Employer's Brief at 12-15; Employer's Reply Brief at 2-4.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification of his appointment is valid and the ALJ took no significant action on this case before that time. Director's Brief at 5-6. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and

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[7] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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)).

[8] The 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, [ALJ]s 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 Kane.

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

considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *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 that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show 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 Kane and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Kane. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Kane "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" and generally speculates he did not make a "detached and considered affirmation of an earlier decision" when he ratified Judge Kane's appointment. Employer's Reply Brief at 2-3. Employer therefore 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 thus properly ratified the ALJ's appointment.[10] *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 were valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relation 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).

We also reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its assertion of an Appointments Clause violation because incumbent ALJs remain in the competitive service. Employer's Brief at

[10] That the Secretary signed the ratification letter with "an autopen," 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"); Employer's Brief at 14 n.2; Employer's Reply Brief at 2-3.

19. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Kane's appointment, which we have held constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

As the Director asserts, moreover, the only action Judge Kane took in this case prior to the Secretary's ratification of his appointment was issuing a Notice of Hearing on November 29, 2017. Director's Brief at 2, 5. The Notice of Hearing alone does not involve any consideration of the merits, nor would it be expected to influence the ALJ's consideration of the case. It simply reiterates the statutory and regulatory requirements governing the hearing procedures. *See Noble v. B & W Res., Inc.*, 25 BLR 1-267, 1-271-72 (2020). Thus, unlike *Lucia*, in which the judge presided over a hearing and issued a decision while not properly appointed, the issuance of the Notice of Hearing in this case would not be expected to affect this ALJ's ability "to consider the matter as though he had not adjudicated it before." *Lucia*, 138 S. Ct. at 2055. It therefore did not taint the adjudication with an Appointments Clause violation requiring remand. *See Noble*, 25 BLR at 1-272.

Thus, we reject Employer's arguments that this case should be remanded to the Office of Administrative Law Judges (OALJ) for a new hearing before a different ALJ.

**Removal Provisions**

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 15-18; Employer's Reply Brief at 4-7. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 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 17-19. Employer 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), and 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). Employer's Brief at 15-19; Employer's Reply Brief at 6-9.

Employer's arguments are without merit, as the only circuit to squarely address the issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787, at *10 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is

constitutional as applied to DOL ALJs). Moreover, 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. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[11] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id*. (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 [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[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)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound 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 that the removal provisions at 5

[11] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

U.S.C. §7521 are unconstitutional. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787, at *10.

**Responsible Operator**

As the entity identified as the responsible operator, Employer has the burden of proving it is not the "potentially liable operator" that most recently employed the Miner.[12] 20 C.F.R. §725.495(c)(2). Employer does not dispute it meets the criteria for a potentially liable operator. Rather, Employer challenges its responsible operator designation based on its assertions that Chube Leasing Corporation (Chube) is a successor operator to Employer that most recently employed the Miner, and that the Miner's combined employment with Employer and Chube lasted at least one year.[13] *See* 20 C.F.R. §§725.492, 725.494.

The regulations define a "successor operator" as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). The regulation at 20 C.F.R. §725.492(b) further provides that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). In any case in which an operator is a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. 20 C.F.R. §725.493(b)(1).

Employer argues the ALJ erred in finding the Miner's June 27, 2016 deposition testimony insufficient to establish that Chube is a successor operator, Decision and Order at 9; it also asserts Claimant's August 6, 2018 hearing testimony shows Employer and Chube were under common ownership and "operated the same mine one after the other." Employer's Brief at 19 (citing *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555 (6th Cir. 2002), and *C&K Coal Co. v. Taylor*, 165 F.3d 254 (3d Cir. 1999)); *see also* Employer's

[12] 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).

[13] The ALJ credited the Miner with a full year of employment with Employer in 1989, and 0.2 years of employment with Chube in 1990. Decision and Order at 9.

Reply Brief at 8-9; Employer's Post-Hearing Brief at 23. Employer's contention lacks merit.

Initially, we note Employer did not designate either the Miner or Claimant as a liability witness as the regulations require. 20 C.F.R. §§725.414(c), 456(b)(1), (2). On March 27, 2014, the district director issued a Notice of Claim to Shurrock Coal Corp. (Shurrock) advising that it had been named as a potentially liable operator. Director's Exhibit 20. Employer controverted the claim but did not submit any evidence pertaining to the responsible operator issue. Director's Exhibit 21. On August 19, 2014, the district director issued a Schedule for the Submission of Additional Evidence naming Shurrock as the designated responsible operator. Director's Exhibit 26. The district director advised Employer that it could no longer submit evidence regarding its status as a potentially liable operator because it did not submit such evidence within ninety days of receiving the Notice of Claim. *Id.* at 3 (citing 20 C.F.R. §725.408(b)(2)). The district director further advised Employer that it must identify liability witnesses relating to its status as the designated responsible operator by October 18, 2014, but this date could be extended for good cause. *Id.*at 2 (citing 20 C.F.R. §725.414(b), (c)). The district director also noted that, absent a showing of extraordinary circumstances, Employer's failure to identify a liability witness before the case was transferred to the OALJ for a hearing would preclude it from using the testimony of a witness on the responsible operator issue in further proceedings. *Id.* at 2-3 (citing 20 C.F.R. §725.456(b)(1)).

At no point did Employer inform the district director that it was designating the Miner or Claimant as liability witnesses. Where no party provides notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not argue extraordinary circumstances before the ALJ, nor does it do so before the Board.

Moreover, even if the Miner or Claimant were considered as timely-identified liability witnesses, we see no error in the ALJ's finding that the Miner's testimony was insufficient to establish that Chube is a successor operator and liable for benefits. The Miner testified to the following: Ray and Kelly Sloan owned Chube and Shurrock; Chube was "part of Shurrock" but "they paid us [Shurrock's employees]" on "one or two paydays" for work installing a new mine site "around the hill from where I was at [when Shurrock paid us]." Employer's Exhibit 2 at 8-10.

The ALJ found the Miner's "limited testimony," by itself, insufficient to establish that Chube was a successor company to Shurrock. He noted:

> The Miner did not work in management, he was not in a position to make financial decisions at the company, and he did not testify to any knowledge of the internal workings of the structure of the companies. He simply stated that the same individuals owned [Chube and Shurrock].

Decision and Order at 9.

We agree with the ALJ that the Miner's testimony does not establish a successor operator relationship because it does not address whether Employer sold or transferred substantially all of its mine or mining operation assets to Chube, nor does it suggest Employer ceased to exist. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011). We therefore affirm the ALJ's finding that the Miner's testimony is insufficient to carry Employer's burden of proving the same.[14] 20 C.F.R. §725.492(b)(1)-(3); *see* Employer's Exhibit 2 at 8-10; Hearing Transcript at 25-28; *c.f. Hall*, 287 F.3d at 565 (miner's testimony that all equipment and employees moved from one mine to another mine operating under a different name or corporate structure establishes the requisite "transfer of assets"). Consequently, we affirm the ALJ's determination that Employer is the properly designated responsible operator. Decision and Order at 9.

**Entitlement - 20 C.F.R. Part 718**

Without the Section 411(c)(3) and (c)(4) presumptions, in order to be entitled to benefits Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley*

[14] Employer generally cites Claimant's testimony as confirming a successor relationship between it and Chube. Employer's Brief at 19; Employer's Reply Brief at 8-9. However, similar to the Miner's statements that the ALJ found insufficient to establish a successor relationship, Claimant testified only that both companies were owned by Ray and Kelly Sloan; Chube was a "subcontractor" of Shurrock and "part of [Shurrock]" but "just had a different name;" and the Miner went to work in the "same place" and worked with and for the same people. Hearing Transcript at 25-28. Further, when Employer's counsel asked Claimant if the Miner, a scoop driver, drove the same scoop for both companies, she responded the Miner did not mention any change of equipment but "[she is] sure they [Shurrock Coal and Chube] had several [scoop vehicles]." *Id.* at 27-28.

*Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

**Legal Pneumoconiosis**

To establish legal pneumoconiosis, Claimant must prove the Miner had a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[15] 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the Miner's treatment records and five medical opinions. Decision and Order at 5, 14-22. He credited Dr. Cordasco's opinion that the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure over the contrary opinions of Drs. Zaldivar and Vuskovich.[16] Decision and Order at 18-22.

Employer generally asserts the ALJ improperly relied on the preamble to the 2001 amended regulations to assess the credibility of its physicians' opinions. We disagree. The preamble sets forth the DOL's resolution of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits.[17] *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining*

[15] The ALJ found Claimant did not establish the Miner had clinical pneumoconiosis or complicated pneumoconiosis. Decision and Order at 11, 14, 20.

[16] The ALJ found Claimant's treatment records support a finding of COPD, but are not probative of its etiology. Claimant's Exhibits 1-4; Decision and Order at 22. The ALJ gave little weight to Dr. Green's opinion that the Miner had legal pneumoconiosis and found Dr. Shamma-Othman did not directly address whether the Miner had the disease. Decision ad Order at 18-19.

[17] Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment. Employer's Brief at 30 n.5; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990).

*Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000). The ALJ therefore permissibly considered the medical opinions in conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-03.

Further, the ALJ did not "overread" the preamble to presume that all COPD is legal pneumoconiosis or shift the burden of proof to Employer. Employer's Brief at 29-30. Rather, the ALJ properly observed "the regulations require that the issue of whether a miner's disability is due to coal mine employment or smoking must be resolved on a claim-by-claim basis" and "each [claimant] bear[s] the burden of proving that [the miner's] obstructive lung disease did in fact arise out of his coal mine employment." Decision and Order at 15-16 (citing 65 Fed. Reg. at 79,938, 79,941).

Employer contends the ALJ improperly shifted the burden of proof in crediting Dr. Cordasco's "equivocal" opinion on legal pneumoconiosis. The ALJ, however, acted within his discretion in finding Dr. Cordasco's opinion sufficiently reasoned and documented to support Claimant's burden of proof, as it is based on Dr. Cordasco's physical examination, objective testing, and an accurate understanding of the Miner's smoking and work histories. Decision and Order at 17-18. The ALJ observed correctly that while Dr. Cordasco opined the Miner's COPD was caused by both smoking and coal mine dust exposure, he stated smoking "probably" played a greater role than coal dust exposure in the development of the Miner's COPD. *Id.* at 17; Director's Exhibit 11 at 39. Contrary to Employer's contention, the ALJ permissibly found "any equivocality in Dr. Cordasco's opinion relates to the extent to which [the Miner's] occupational exposure to coal mine dust contributed to his COPD (relative to his smoking history), rather than *if* it contributed to his COPD." Decision and Order at 17-18 (emphasis added) (referencing Director's Exhibit 11 at 39); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Tenn. 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). Because Dr. Cordasco clearly identified both smoking and coal mine dust exposure as causative factors for the Miner's COPD, and he did not suggest coal mine dust played only a de minimus role, the ALJ permissibly concluded Dr. Cordasco's opinion supports a finding that the Miner had legal pneumoconiosis.[18] *See* 65 Fed. Reg. at 79,940-43; *Groves*, 761 F.3d at 597-98; *Cornett*,

[18] Although Employer correctly notes Dr. Cordasco opined the Miner had clinical pneumoconiosis, which is contrary to the ALJ's finding, Employer fails to explain the significance of this assertion given that legal pneumoconiosis may be present independent of clinical pneumoconiosis. 20 C.F.R. §§718.201(a), 718.202(a)(4), (b); 65 Fed Reg. 79,920, 79,943 (Dec. 20, 2000); *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009)

227 F.3d at 576-77 (because coal dust need not be the sole cause of a miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them).

We also reject Employer's assertion that the ALJ erred in discrediting the opinions of Drs. Zaldivar and Vuskovich that Claimant does not have legal pneumoconiosis. Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis because the Miner had asthma, which Dr. Zaldivar stated "is not a disease of coal miners."[19] Director's Exhibit 14 at 3-4. He stated the Miner's "history of responding to prednisone while hospitalized and to having more trouble breathing when he is near nonspecific irritants such as strong chemical smells, means that he is an asthmatic." *Id.* at 3. He further explained that individuals who smoke and have asthma "eventually develop irreversible airway obstruction." *Id.* The ALJ permissibly found Dr. Zaldivar's opinion less persuasive because it does not account for DOL's recognition in the preamble that asthma may constitute legal pneumoconiosis if it is significantly related to or substantially aggravated by coal mine dust exposure.[20] As the ALJ found, Dr. Zaldivar did not address whether coal mine dust exposure was a contributing or aggravating cause of Claimant's asthma even if it was not the direct cause. Decision and Order at 20-21; *see Sterling*, 762 F.3d at 491; *Groves*, 761 F.3d at 601. Further, we see no error in the ALJ's permissible conclusion that Dr. Zaldivar's opinion is based on generalities and not the specifics of the Miner's condition. *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 19.

The ALJ also permissibly found Dr. Vuskovich offered conflicting statements regarding whether or not the Miner had legal pneumoconiosis and accordingly afforded his opinions less weight. *See Rowe*, 710 F.2d at 255; Decision and Order at 22; Employer's Exhibits 1 at 7 (Miner likely had legal pneumoconiosis and alpha$_1$-antitrypsin deficiency disease); 10 at 6 (not possible to determine whether Miner had legal pneumoconiosis); 13

(appellant must explain how the "error to which [it] points could have made any difference").

[19] Dr. Zaldivar summarily stated "bullous emphysema is not a manifestation of coal workers' pneumoconiosis. It is a manifestation of smokers' emphysema." Employer's Exhibit 20 at 6.

[20] We note that the regulation itself implies as much by defining pneumoconiosis as arising from coal dust exposure when the respiratory or pulmonary impairment is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 CFR 718.201(a)(2), (b).

at 9, 13 (Miner did not have legal pneumoconiosis; emphysema due to alpha$_1$-antitrypsin deficiency disease); 22 at 2 (emphysema due to alpha$_1$-antitrypsin deficiency disease; pulmonary function studies consistent with alpha$_1$-antitrypsin deficiency disease).

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 22; *see Martin*, 400 F.3d at 305; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.[21]

**Total Disability Causation**

To establish disability causation, Claimant must prove the Miner's legal pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis was a substantially contributing cause if it had "a material adverse effect on the [M]iner's respiratory or pulmonary condition," or if it "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Because Claimant established the Miner's disabling COPD was legal pneumoconiosis, the ALJ found she also established the Miner was totally disabled due to legal pneumoconiosis. Decision and Order at 15, 23; *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all experts agree a miner's COPD significantly contributes to his totally disabling pulmonary condition, a finding that his COPD is legal pneumoconiosis resolves the disability causation question).

In challenging the ALJ's disability causation finding, Employer's sole argument is that the ALJ failed to consider the Miner had a disabling back injury which prevented him from returning to work. Employer's Brief at 21-24; Employer's Reply Brief at 10. Citing *Peabody Coal Co. v Vigna*, 22 F.3d 1388 (7th Cir. 1994), and *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994), Employer maintains that a pre-existing disability or co-existing non-respiratory impairment precludes an award of benefits. Contrary to Employer's argument, the Sixth Circuit has held that a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See e.g., Cross Mountain*

[21] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Zaldivar and Vuskovich, we need not address Employer's challenges to the other reasons the ALJ gave for discrediting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 24-28.

*Coal Co. v. Ward*, 93 F.3d 211, 216-17 (6th Cir. 1996). Moreover, because this claim was filed after January 19, 2001, any independent disability unrelated to the Miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). As Employer raises no other challenge to the ALJ's disability causation findings, we affirm his determination that Claimant established the Miner was totally disabled due to legal pneumoconiosis, and we affirm the award of benefits in the Miner's claim. 20 C.F.R. §718.204(c); *Skrack*, 6 BLR at 1-711.

**The Survivor's Claim**

Relying on the award of benefits in the Miner's claim, the ALJ found Claimant satisfied the prerequisites for automatic entitlement under Section 422(*l*) of the Act.[22] 30 U.S.C. §932(*l*); Decision and Order at 24. Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[22] To establish entitlement under Section 422(*l*), Claimant must prove that: she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).

Accordingly, the ALJ's Decision and Order Granting Benefits in the Miner's Claim and Automatic Entitlement in the Survivor's Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge