U.S. Department of Labor

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

BRB Nos. 20-0407 BLA
& 20-0408 BLA

GARNET TRACY (o/b/o and Widow of GERALD TRACY) Claimant-Respondent v. CONSOLIDATION COAL and CONSOL ENERGY, INCORPORATED c/o HEALTHSMART, CCS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/27/2021 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.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Cheryl L. Intravaia and Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer and its Carrier.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal 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 (2016-BLA-05711, 2019-BLA-06223) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 28, 2014,[1] and a survivor's claim filed on March 11, 2019.[2]

The ALJ credited the Miner with thirty-three years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, Claimant established a change in an applicable condition of entitlement[3] and invoked the

[1] The Miner filed one prior claim. Miner's Claim (MC) Director's Exhibit 8 at 249-253. The district director denied it on August 25, 1995, because the Miner failed to establish any element of entitlement. Director's Exhibit 1.

[2] Claimant, the Miner's widow, is pursuing the miner's claim on his behalf as well as her own survivor's claim. The Board consolidated Employer's appeals in the miner's and survivor's claims for purposes of decision only.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless "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. §725.309(c)(3). Because the Miner's most recent prior claim was denied for failure to establish any element of entitlement, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of the Miner's current claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was determined to be entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

On appeal, Employer argues the ALJ erred in finding the Miner's above-ground coal mine employment was performed in conditions substantially similar to underground coal mines and the Miner was totally disabled, and thus erred in finding Claimant invoked the Section 411(c)(4) presumption. It also argues he erred in finding it did not rebut the presumption.[6] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, arguing the ALJ applied the appropriate legal standard in assessing whether the miner's above-ground coal mine employment was qualifying for the presumption. Employer filed a consolidated reply brief, reiterating its arguments.

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

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[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was 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); 20 C.F.R. §718.305.

[5] 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 that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15.

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

Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had at least fifteen years of employment in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

We first reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2), which defines substantial similarity, is invalid because it is contrary to the Act. Employer's Brief at 4-6. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, as well as 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).

Employer further argues the ALJ erred in finding the Miner's testimony sufficient to establish his surface coal mine employment occurred in conditions substantially similar to underground mines. Employer's Brief at 6, 19. We disagree. The Miner testified that: he was regularly exposed to dust at the strip mine where he worked; he would cough and suffer from a dry throat at work from inhaling the dust; his clothes were covered in dust; and he would cough and spit dust after leaving work for the day. Hearing Transcript at 17-18. The ALJ permissibly found the Miner's uncontradicted testimony credible and establishes he was regularly exposed to coal mine dust. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions throughout his employment were "very dusty" met burden to establish he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17 (10th Cir. 2014) (claimant's testimony that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); Decision and Order at 4. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(2).

Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function studies, qualifying

arterial blood gas studies,[8] 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 the relevant evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas testing, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 5-7. However, he found Claimant established total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7-10.

Employer argues the ALJ erred. Employer's Brief at 15-19. Again, we disagree.

The ALJ considered the opinions of Drs. Feicht, Goggin, Go, and Zaldivar that the Miner was totally disabled, and Dr. Fino's opinion that he was not. Decision and Order at 7-10; Miner's Claim (MC) Director's Exhibits 6 at 195-96, 219; 7 at 233-41; 8 at 30-31, 37-46, 71-75, 173-79; Claimant's Exhibit 1; Employer's Exhibits 3, 4, 6-8. He discredited Dr. Fino's opinion as unsupported by the record, and found the opinions of Drs. Goggin, Go, and Zaldivar credible and sufficient to establish total disability.[9] Decision and Order at 10.

Employer argues the ALJ did not adequately set forth his bases for crediting the opinions of Drs. Goggin, Go, and Zaldivar and thus did not satisfy the explanatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[10] Employer's Brief at 15-16, 19-20.

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[8] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The ALJ did not render any credibility findings with respect to Dr. Feicht's opinion.

[10] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Contrary to Employer's argument, the ALJ accurately set forth the doctors' respective bases for diagnosing total disability and explained his reasons for crediting them. Decision and Order at 7-10. He found Dr. Goggin was the Miner's treating physician for over ten years. Decision and Order at 7-8, *citing* MC Claimant's Exhibit 1. He noted the doctor diagnosed chronic obstructive pulmonary disease (COPD) in the form of chronic bronchitis, based on what the doctor stated was the Miner's "long history of severe lung disease, [documented] countless clinical encounters over the years, previous [x-rays] and pulmonary function tests, as well as data from multiple hospitalizations." *Id*. Finally, the ALJ noted Dr. Goggin testified at a deposition that the Miner's COPD prevented him from performing his usual coal mine employment as a heavy equipment operator due to "chronic cough, chronic wheezing, frequent exacerbations requiring steroids and antibiotics, and shortness of breath when walking even short distances." Decision and Order at 7-8, *citing* Employer's Exhibit 19 at 10.

With respect to Dr. Go, the ALJ observed the doctor opined the Miner was totally disabled based on his history of frequent exacerbations of obstructive lung disease and shortness of breath when walking, which rendered him unable to perform the exertional work required of a heavy equipment operator. Decision and Order at 8, *citing* MC Director's Exhibit 7 at 240. Finally, the ALJ found Dr. Zaldivar similarly opined that, from a pulmonary standpoint, the Miner was unable to do his usual coal mining work as an equipment operator due to frequent exacerbations of his asthma-COPD overlap syndrome which were severe enough at times to cause him to be hospitalized. Decision and Order at 9-10, *citing* Employer's Exhibits 6 at 12-13; 8 at 25.

The ALJ permissibly found these opinions well-reasoned and entitled to great weight because the doctors accurately considered the Miner's symptoms and history of asthma and chronic bronchitis, and explained why his respiratory condition rendered him incapable of performing his previous coal mine work. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 7-10. As the ALJ set forth his findings and conclusions regarding their opinions, and we are able to discern his bases for crediting them, we reject Employer's argument that his credibility findings do not satisfy the APA.[11] *Big Branch*

[11] Employer argues that Dr. Fino's opinion establishes that all the objective testing of record is invalid, and thus the opinions of Dr. Goggin, Go, and Zaldivar are not credible to the extent that their respective conclusions were based on invalid testing. Employer's Brief at 16-18. It asserts the ALJ erred in failing to weigh Dr. Fino's opinion on the validity of the objective testing before weighing the medical opinions. *Id*. Employer, however, did not argue to the ALJ that any of the objective testing was invalid. We will not consider such challenges for the first time on appeal. *See Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (party

Res., Inc. v. Ogle, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002) (APA satisfied where ALJ properly addressed the relevant evidence and provided a sufficient rationale for his findings); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied); Employer's Brief at 15-16, 19-20.

Employer also argues the opinions of Drs. Goggin, Go, and Zaldivar are insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv) because they opined the Miner was totally disabled based on chronic bronchitis and its resultant respiratory symptoms. Employer's Brief at 15-18. To the contrary, a physician may base his total disability opinion on a miner's lung disease-induced respiratory symptoms. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physician's identification of the miner's symptoms of "shortness of breath," "acute shortness of breath," and "mild shortness of breath" with various activities constitutes a "reasoned medical opinion"); *Jordan v. Benefits Review Bd. of the U.S. Dep't of Labor,* 876 F.2d 1455, 1460 (11th Cir. 1989) (physician's "recitation of [the miner's] symptoms" constituted relevant evidence that the ALJ must consider absent a specific "basis for a finding that the listed limitations are the patient's rather than the doctor's conclusions"). As all three physicians opined Claimant's frequent exacerbations of asthma and/or COPD render him incapable of performing his previous coal mine work from a respiratory standpoint, Employer's argument that their opinions cannot establish total disability is without merit.

Employer next asserts the ALJ erred in crediting the opinions of Drs. Goggin, Go, and Zaldivar because their conclusions are contrary to his findings that the objective testing is non-qualifying for total disability.[12] Employer's Brief 16-20. This argument has no

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alleging objective study is invalid has a "two-part obligation at the hearing": "specify in what way the study fails to conform to the quality standards" and "demonstrate how this defect or omission renders the study unreliable"). Further, although the ALJ found an August 5, 2015 pulmonary function study unreliable, Employer did not argue before the ALJ that any of the doctors relied on this study in rendering their opinions and thus their opinions are not credible on this basis. Because Employer makes this argument for the first time to the Board, we decline to address it. *Mabe*, 987 F.3d at 588.

[12] Employer argues that, as part of rendering their opinions, Drs. Go and Zaldivar considered pulmonary function testing Claimant performed in 2016 that the ALJ found was not contained in the record. Employer's Brief at 16. It contends the ALJ failed to address the weight entitled to their opinions in light of their consideration of evidence outside of the record. *Id*. Because Employer also makes this argument for the first time to the Board and did not raise it to the ALJ, we decline to consider it. *Mabe*, 987 F.3d at 588.

merit. The fact that the ALJ found the weight of the pulmonary function study and blood gas study evidence to be non-qualifying does not preclude a finding of total disability based on a reasoned medical opinion. The regulations specifically provide that total disability may be established based on a physician's reasoned opinion that a miner could not perform his usual coal mine employment, even when the pulmonary function and arterial blood gas studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

Employer further argues the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 16-20. Dr. Fino noted the Miner had worsening shortness of breath over twenty-five years and became dyspneic "when walking at his own pace on the level ground or ascending one flight of steps," when walking up hills or grades, and when "lifting and carrying, performing manual labor, and walking briskly on the level ground." Employer's Exhibit 3 at 2. He also noted the Miner wheezed and had a daily cough with mucous production which began when he was working in the mines. *Id.* He opined, however, that the Miner had "no respiratory impairment present" and was not totally disabled based on his pulmonary function and arterial blood gas studies. *Id.* at 9. In three supplemental opinions and a deposition, he disagreed that the Miner had asthma or COPD and reiterated that the Miner did not have a pulmonary impairment and was not disabled based on his objective testing. MC Director's Exhibit 6 at 195-96; Employer's Exhibits 4 at 6; 7 at 20-21; MC Employer's Exhibit 16 at 3.

Contrary to Employer's contention, the ALJ permissibly discredited Dr. Fino's opinion that the Miner had "no pulmonary impairment" because it was inconsistent with the Miner's treatment records that reflect consistent diagnoses of and treatment for asthma and chronic bronchitis. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 10; Employer's Brief at 16-19. Moreover, the ALJ observed that Dr. Fino opined Claimant has no respiratory or pulmonary impairment and thus is not disabled because all the pulmonary function studies of record are invalid and "[o]ne must only rely on valid lung function studies to determine impairment and disability." MC Employer's Exhibit 16 at 3; Employer's Exhibit 3. However, as discussed above and as the administrative law judge found, a claimant can establish total disability based on lung disease-induced respiratory symptoms that prevent the miner from performing his last coal mine employment, notwithstanding whether the objective testing supports total disability. *See Scott*, 60 F.3d at 1141; *Jordan*, 876 F.2d at 1460. Thus, the ALJ permissibly found Dr. Fino's exclusion of total disability based on an alleged lack of valid pulmonary function testing unpersuasive, particularly in light of the Miner's frequent, documented exacerbations of asthma/COPD. *See Scott*, 60 F.3d at 1141; *Jordan*, 876 F.2d at 1460; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 9.

Thus we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his finding that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §§718.305, 725.309.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[13] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[14]

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 Sixth Circuit holds this standard requires Employer to show 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."[15] *Id.* at 407, *citing Arch on the Green, Inc. v.*

[13] "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). "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[14] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 13.

[15] Employer argues the Sixth Circuit's decisions in *Groves* and *Young* conflict with the holding of the Tenth Circuit in *Consol. Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d

Groves, 761 F.3d 594, 600 (6th Cir. 2014). The ALJ considered the opinions of Drs. Fino and Zaldivar that the Miner did not have legal pneumoconiosis, and found them inadequately reasoned. Decision and Order at 13-15.

Employer argues the ALJ erred in discrediting Dr. Fino's opinion. Employer's Brief at 21-23. Dr. Fino excluded legal pneumoconiosis because he opined the Miner did not have a respiratory disease or impairment. MC Director's Exhibit 6 at 196; Employer's Exhibits 3, 4. He opined the Miner's objective testing was either invalid or non-qualifying. *Id*. Thus he concluded there was no basis to diagnose a lung disease or impairment. *Id*.

The ALJ found Dr. Fino's opinion that the Miner had no respiratory disease or impairment inconsistent with the "overwhelming evidence of record [which] reveals the Miner suffered from at least asthma and chronic bronchitis," and the Miner's treatment records that document numerous incidences of exacerbation throughout "the last few years" of his life. Decision and Order at 14. Given the Miner's history of asthma and chronic bronchitis, the ALJ permissibly found Dr. Fino's opinion inadequately reasoned. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 14.

Employer next argues the ALJ erred in weighing Dr. Zaldivar's opinion. Employer's Brief at 23-27. Dr. Zaldivar opined the Miner had long-standing asthma unrelated to his coal mine dust exposure. Employer's Exhibit 6 at 9-13. He opined that frequent exacerbations of the asthma led to remodeling of the Miner's lungs and asthma-COPD overlap syndrome. *Id*. He further opined that the Miner's asthma was "due to hereditary factors because his brother had asthma, as well as allergic factors, as documented by his allergist," and it caused the variable results on his pulmonary function studies. *Id*. at 12. He excluded coal mine dust exposure as a cause of the asthma because the Miner did not experience symptoms until well after leaving the coal mines and, "therefore, coal dust particles could not be causing stimulation of mucus production in the airway." MC Director's Exhibit 6 at 190-91.

The ALJ permissibly found this reasoning inconsistent with the regulations, which state that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987);

1142 (10th Cir. 2017)," and thus asserts the Board should clarify the appropriate burden to ensure consistent standards. Employer's Brief at 21. Contrary to Employer's argument, we discern no conflict in law between the two circuits as to the appropriate standard for rebutting the presumption of legal pneumoconiosis. In any event, we apply the law of the Sixth Circuit in this case because the Miner performed his last coal mine employment in Ohio. *See Shupe*, 12 BLR at 1-202.

Sunny Ridge Mining Co. v. Keathley, 773 F.3d 734, 737-40 (6th Cir. 2014); *see also* 65 Fed. Reg. 79.920, 79,971 (Dec 20, 2000) ("it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period"); Decision and Order at 15. The ALJ also permissibly found Dr. Zaldivar did not adequately explain why the Miner's thirty-three years of coal mine dust exposure did not contribute, at least in part, to his asthma. *See* 20 C.F.R. §718.201(a)(2); *Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order 15.

Thus we affirm the ALJ's finding that Employer failed to disprove the Miner had legal pneumoconiosis.[16] 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); Decision and Order at 16. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

In order to disprove disability causation, Employer must establish "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). Because Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, we affirm his determination that Employer failed to establish no part of the Miner's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits in the miner's claim.

The 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, 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).

[16] Because the ALJ provided valid reasons for discrediting Dr. Zaldivar's opinion, any error in discrediting his opinion for other reasons is harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. Employer's Brief at 25-26.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge