U.S. Department of Labor

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

BRB No. 20-0347 BLA

LARRY E. OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STERLING SMOKELESS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 9/13/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH, 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-05064) on a claim filed on May 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Sterling Smokeless Coal Company (Sterling Smokeless), self-insured through its parent company, Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. She credited Claimant with thirteen years and two months of underground coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established legal and clinical pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). She also found Claimant established a totally disabling respiratory or pulmonary impairment due to pneumoconiosis, 20 C.F.R. §718.204(b), (c), and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. Alternatively, Employer asserts the ALJ erred in finding Claimant established clinical and legal pneumoconiosis, and that his total disability was caused by pneumoconiosis.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a response, contending the ALJ properly determined Employer is responsible for payment of benefits.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirteen years and two months of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 30.

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.[3] 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, 362 (1965).

Responsible Insurance Carrier

Sterling Smokeless employed Claimant in coal mine employment from May 1970 until December 1981, and it was the last potentially liable operator to do so.[4] Director's Brief at 3; Director's Exhibit 3; Hearing Tr. at 43, 44. By the end of Claimant's employment, Sterling Smokeless was a subsidiary of, and self-insured for black lung benefits liabilities through, Peabody Energy. Director's Brief at 3.

In 2007, twenty-six years after Claimant's coal mine employment ended, Peabody Energy sold Sterling Smokeless[5] to Patriot Coal Corporation (Patriot). Director's Exhibit 63 at 14-68 (Separation Agreement). On March 4, 2011, the Department of Labor (DOL) authorized Patriot to self-insure "retro-active to July 1, 1973" for black lung benefits liabilities, including for claims filed before Patriot purchased the Peabody Energy subsidiaries. Director's Exhibit 63 at 12-13 (Steven Breeskin's March 4, 2011 Letter to Patriot and Decision Granting Authority to Act as a Self-Insurer).[6] This authorization determined the amount of potential liability to insure the obligation, acknowledged Patriot's deposit of U.S. Treasury funds with the Federal Reserve Bank on behalf of the DOL in satisfaction of the liability obligation, and released a letter of credit Patriot financed

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 44.

[4] Claimant worked for Cannelton at Maple Meadow Mining for one month, F & B Electrical for four months, and Copper Valley Mining for four or five months until it shut down on August 10, 1984. Director's Exhibit 3; Hearing Tr. at 43-44; Decision and Order at 3-4.

[5] Sterling Smokeless Coal Company (Sterling Smokeless) merged into Eastern Associated Coal Company (Eastern), another former subsidiary of Peabody Energy Corporation (Peabody Energy), after Claimant stopped working for it. Director's Brief at 2 n.1.

[6] Steven Breeskin is the former Director of the Division of Coal Mine Workers' Compensation (DCMWC).

under Peabody Energy's self-insurance program.[7] *Id*. (Steven Breeskin's March 4, 2011 Letter to Patriot). In 2015, Patriot went bankrupt. Director's Brief at 2; Director's Exhibit 43 at 1.

Employer does not directly challenge Sterling Smokeless's designation as the responsible operator.[8] Rather, it asserts the Black Lung Disability Trust Fund (Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 20-31. It argues the ALJ erred in finding it liable for benefits because: (1) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (2) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security Patriot gave to secure its self-insurance status; (3) the DOL released Peabody Energy from liability and transferred liability to Patriot; (4) the Director did not establish Peabody Energy's self-insurance authorization covers this claim as self-insurance liability is triggered by the date a claim is filed while commercial insurance liability is triggered by the date of a miner's last coal mine employment; and (5) the Director is equitably estopped from imposing liability on Peabody Energy. *Id*. In addition, it maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

Before the ALJ, Employer relied on a Separation Agreement between Peabody Energy and Patriot; DOL's authorization of Patriot to self-insure; a March 4, 2011 letter from Mr. Breeskin to Patriot; a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; an undated letter from Michael Chance, the Director of the Division of Coal Mine Workers' Compensation (DCMWC), regarding Patriot's self-insurance reauthorization audit requiring coverage for all claims retroactive to July 1, 1973; a March 4, 2011 indemnity agreement releasing Bank of America from

[7] The monetary values are redacted. Director's Exhibit 63 at 12.

[8] Sterling Smokeless qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Sterling Smokeless; (2) Sterling Smokeless operated a mine after June 30, 1973; (3) Sterling Smokeless employed Claimant as a miner for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Sterling Smokeless is capable of assuming liability for the payment of benefits through Peabody Energy's self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Sterling Smokeless was the last potentially liable operator to employ Claimant, the ALJ designated Sterling Smokeless as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 10 n.10, 11.

liability arising from the loss of an original letter of credit for $13 million issued for Peabody Energy's self-insurance, because the DOL had either lost or destroyed it; documentation dated November 17, 2015, showing a transfer of $15 million from Patriot to the Trust Fund; and Peabody Energy's indemnity bond. Director's Exhibit 63. It also relied on deposition testimony from Mr. Breeskin and another DOL employee, David Benedict.[9] Employer's Exhibits 7, 8. The ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Sterling Smokeless and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 6-11.

Letter of Credit and Indemnity Agreement

Employer first maintains Mr. Breeskin's March 4, 2011 letter to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program and authorizing Patriot to self-insure "retroactive to July 1, 1973" for black lung benefits liabilities absolves Peabody Energy from potential liability under the Act. Employer's Brief at 22-23. It argues the release of the letter of credit establishes "the DOL made Patriot the self-insurer" for Sterling Smokeless and "released the prior [letter of credit] which was financed . . . under the Peabody Energy self-insurance program." *Id*. at 23.

The ALJ properly rejected this argument. Decision and Order at 7-8. She concluded "[i]t is the Act that creates Employer's liability for claims - not the Department's authorization of self-insurance or subsequent acceptance of security." Decision and Order at 7 (*quoting* ALJ Scott R. Morris's liability analysis in *Griffith v. Eastern Associated Coal Corp.*, 2018-BLA-05046, slip op. at 8 (June 19, 2019) (unpub.)). Operators are authorized to self-insure if, among other requirements, they obtain security approved by the DOL. 20 C.F.R. §726.101(a), (b)(4). In addition to obtaining "adequate security," a self-insurance applicant "shall [also] as a condition precedent to receiving such authorization, execute and file . . . an agreement . . . in which the applicant shall agree" to "pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners." 20 C.F.R. §726.110(a)(1). Further, Employer's liability is created by statute, which requires that during any period after December 31, 1973, coal mine operators "shall be liable for and shall secure the payment of benefits."[10] 30 U.S.C. §932(a), (b).

Thus, we agree with the Director's argument that "the security deposit is an additional obligation separate from the responsibility to pay benefits." Director's Response

[9] David Benedict is a former DCMWC employee.

[10] For the same reasons, the ALJ correctly found the DOL's authorization for Patriot to self-insure for claims retroactive to July 1, 1973, does not release Peabody Energy from liability. 30 U.S.C. §932(a), (b); 20 C.F.R. §726.110(a)(1); Decision and Order at 7-8.

at 12-13. Before the ALJ, and now before the Board, Employer has failed to cite any authority expressly allowing the DOL to release a designated responsible operator from liability, notwithstanding whether the DOL released its posted security. Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.[11]

Peabody Energy's Self-Insurance

Employer argues the Director did not submit evidence establishing the DOL continued to "require[] Peabody Energy to be the self-insurer for [Sterling Smokeless] claims" after it authorized Patriot to self-insure for claims retroactive to 1973. Employer's Brief at 27. Employer misconstrues the burdens in this case. The Director bears the burden of establishing the named responsible operator meets the criteria for being a potentially liable operator as set forth in 20 C.F.R. §725.494(a)-(e). *See* 20 C.F.R. §725.495(b). "[I]n the absence of evidence to the contrary," the regulations presume the designated responsible operator is capable of assuming liability for the payment of benefits.[12] *Id*. The named responsible operator may be relieved of liability only if it proves either it is financially incapable of assuming liability or another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c).

[11] We also reject Employer's assertion that Mr. Chance's undated letter to Patriot establishes the DOL released Peabody Energy from its liabilities. Employer's Brief at 23-25. Employer maintains this letter omits any indication that liability would rest with Peabody Energy should Patriot's self-insurance be discontinued. *Id.* But Employer's conclusion that the absence of such a statement indicates the DOL in fact released Peabody Energy from liability is illogical and unsupported. Contrary to Employer's assertion, the letter simply outlines the conditions necessary for Patriot to be reauthorized to self-insure. Director's Exhibit 63 at 75-76.

[12] An operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was authorized to self-insure during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to 20 C.F.R. §726.104(b) is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). Insurance coverage for black lung benefits exists only if the insurance policy is in effect on the last day of the miner's exposure to coal dust while employed by the insured. 20 C.F.R. §726.203(a).

Employer does not dispute that Peabody Energy provided self-insurance coverage to Sterling Smokeless on Claimant's last date of employment with it. 20 C.F.R. §§725.494(e), 726.203(a). Nor does it contest that Peabody Energy is financially capable of paying benefits. Rather, it argues the ALJ erred in finding that self-insurance coverage applies to this claim because a "company is not [a] self-insurer for a designated period of time and is forever responsible for claims made by employees in that period." Employer's Brief at 25. It asserts self-insurance liability is triggered by the date a claim is filed, while commercial insurance liability is triggered by the date of a miner's last coal mine employment. *Id*. at 24-25. To support this argument, Employer generally cites to the regulations applicable to self-insurance authorization yet fails to cite any specific authority. *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b); Employer's Brief at 28-29.

But the regulations applicable to self-insurance authorization at 20 C.F.R. §§726.101-726.115 govern only how an operator must secure its existing liability. Having identified no regulatory authority to support its argument that self-insurance liability is triggered by the date the claim is filed rather than the last day of the miner's coal mine employment, we reject Employer's contention. Employer's Brief at 24-25.

Nor does 20 C.F.R. §725.494(e)(2) support Employer's argument that Patriot might be liable for the claim "[i]f any of the funds from the surety posted by Patriot remain." Employer's Brief at 29. That section addresses the financial ability of an "operator qualified as a self-insurer . . . *during the period in which the miner was last employed by the operator*[.]" 20 C.F.R. §725.494(e)(2) (emphasis added); *see* Director's Brief at 18 (citing 20 C.F.R. §725.494(e)(2) for the proposition that liability attaches to "the potentially-liable operator to last employ the miner . . . so long as that operator is capable of providing for benefits"). Employer does not dispute that Patriot never employed Claimant, Peabody Energy qualified as a self-insurer, its coverage included Sterling Smokeless when that operator last employed Claimant, and Peabody Energy remains financially capable of paying benefits.[13] Thus, we reject Employer's argument.

Equitable Estoppel

Next, Employer argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 25-28. To invoke equitable estoppel, Employer must show the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *Premo v. U.S.*, 599 F.3d 540, 547 (6th Cir. 2010);

[13] The Director also disputes that Patriot's security deposit has not been exhausted. Director's Brief at 18-19.

Reich v. Youghiogheny & Ohio Coal Co., 66 F.3d 111, 116 (6th Cir. 1995). Affirmative misconduct is "more than mere negligence. It is an act by the government that either intentionally or recklessly misleads. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the government and the agent's requisite intent." *See U.S. v. Mich. Express, Inc.*, 374 F.3d 424, 427 (6th Cir. 2004); *see also Reich*, 66 F.3d at 116.

Employer alleges the DOL entered into "a contractual agreement" with Peabody Energy to "release [] Peabody's letter of credit" and transfer liability to Patriot, and Peabody Energy "justifiably relied upon that agreement to their detriment . . . ." Employer's Brief at 26. It contends the DOL entered into this agreement without securing proper funding from Patriot. *Id*. at 27-28. Thus, it argues this release constitutes affirmative misconduct. *Id*. at 25. Employer, however, identifies no admissible evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release. Further, as the Director correctly asserts, Employer does not allege the DOL acted either intentionally or recklessly. Director's Brief at 16-17; *see Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. Because Employer failed to establish the necessary elements, we affirm the ALJ's rejection of Employer's equitable estoppel argument. Decision and Order at 8-9; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116; *Graham v. Eastern Associated Coal Co.*, ___ BLR ___, BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022).

20 C.F.R. § 725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[14] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody Energy of liability. Employer's Brief

[14] Under Section 725.495(a)(4):

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495(a)(3)] shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

20 C.F.R. §725.495(a)(4).

at 28-29. It also argues the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond, and the ALJ was required to find the DOL exhausted Patriot's bond before Peabody Energy could be held liable. *Id*. at 28-31. We reject these arguments for the reasons stated in *Graham*, __ BLA __, BRB No. 20-0221 BLA, slip op. at 8-10.

For the foregoing reasons, we affirm the ALJ's determination that Sterling Smokeless and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Entitlement - 20 C.F.R. Part 718

In order to obtain benefits without the aid of a statutory presumption, a 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 of these elements precludes an award. *Anderson v. Valley 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 establish he suffers from 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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held a claimant can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to a miner's respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 309, 314 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (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.").

The ALJ considered four medical opinions. Dr. Habre diagnosed legal pneumoconiosis in the form of disabling chronic bronchitis related to coal mine dust exposure and cigarette smoking. Director's Exhibit 27 at 2. Dr. Faltermayer diagnosed emphysema and pneumoconiosis that "appears" to be related to coal mine dust exposure. Director's Exhibit 33. Dr. McSharry diagnosed severe emphysema with exertional hypoxemia attributable to cigarette smoking, and unrelated to coal mine dust exposure. Director's Exhibit 35 at 3. Finally, Dr. Tuteur diagnosed chronic obstructive pulmonary

disease (COPD) attributable to cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibit 5 at 31, 34-35. The ALJ credited Dr. Habre's opinion as well-reasoned and documented, and discredited the opinions of Drs. Faltermayer,[15] McSharry, and Tuteur as inadequately reasoned. Decision and Order at 26-29. She thus found Claimant established legal pneumoconiosis based on Dr. Habre's opinion. *Id*. at 29.

Employer contends the ALJ improperly shifted the burden of proof by treating "the mere possibility of contribution" of coal mine dust exposure to an impairment as meeting "the standard requiring proof of contribution." Employer's Brief at 8, 19. It argues "she is requiring that the medical expert demonstrate that there is not even any possibility that coal mine dust contributed to the impairment." *Id*. at 19. We disagree.

Contrary to Employer's contention, the ALJ did not shift the burden of proof to Employer; rather, she examined the reasoning of each physician to determine if his opinion was adequately explained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 26-29. The ALJ correctly stated Claimant bears the burden of establishing legal pneumoconiosis and considered whether medical opinion evidence is sufficient to establish the disease. Decision and Order at 23; *see* 20 C.F.R. §718.201(b).

Next, Employer argues the ALJ erred in finding Dr. Habre's opinion reasoned because the physician "does not explain why cigarette smoking could not independently cause his respiratory disability."[16] Employer's Brief at 14. We disagree. Dr. Habre diagnosed disabling chronic bronchitis based on Claimant's pulmonary function test results showing "severe obstructive airflow," his symptoms of shortness of breath, cough, wheezing, his chronic use of bronchodilators, and his smoking and occupational coal mine dust exposure histories. Director's Exhibit 27 at 2-3. He explained that "[e]ven after

[15] Employer does not challenge the ALJ's weighing of Dr. Faltermayer's opinion; thus, we affirm it. *See Skrack*, 6 BLR at 1-711.

[16] To the extent Employer contends Dr. Habre's opinion is not reasoned because he did not specifically apportion the amount of Claimant's chronic bronchitis caused by smoking as opposed to coal mine dust exposure, we reject its contention. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622 (4th Cir. 2006); Employer's Brief at 14. A physician need not apportion a specific percentage of a miner's lung disease to cigarette smoke as opposed to coal mine dust exposure to establish the existence of legal pneumoconiosis, provided the physician has credibly diagnosed a chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000).

adjusting" for Claimant's smoking habit, "it can be concluded that his work history at least in part exacerbate and worsen both his pulmonary symptoms" and his "lung function." *Id.* at 3. So he concluded Claimant's "[c]oal mine dust plays a substantial role in [his] disabling lung disease." *Id.* The ALJ correctly determined Dr. Habre's "opinion regarding legal pneumoconiosis comports with the Act's definition of that condition." Decision and Order at 29; *see Cochran*, 718 F.3d at 322-23; *Looney*, 678 F.3d at 309, 314; 20 C.F.R. §718.201(a)(2), (b). Further, she permissibly found Dr. Habre's opinion credible because it is "based on an accurate understanding of the Claimant's smoking and occupational exposure histories" and "Dr. Habre explained that while cigarette smoking is the primary risk factor for the Claimant's chronic bronchitis, his coal mine dust exposure is also a contributory factor." Decision and Order at 29; *see Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Employer also generally asserts Dr. Habre's opinion failed to adequately account for other possible causes of Claimant's lung impairment and thus the ALJ should have rejected his opinion. Employer's Brief at 14. We consider Employer's argument with respect to Dr. Habre to be a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The ALJ specifically addressed Dr. Habre's opinion as to other possible causes of Claimant's impairment. She stated Dr. Habre "noted a medical history of heart and coronary artery disease with hospitalizations for a myocardial infarction in 1992 and coronary artery bypass grafting in 2007." Decision and Order at 15. Employer does not identify any error in her credibility determinations. Thus, as it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Habre's opinion is reasoned, documented, and sufficient to establish legal pneumoconiosis. *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 29.

We further reject Employer's argument that the ALJ erred in weighing the opinions of Drs. McSharry and Tuteur. Employer's Brief at 16-17. Dr. McSharry stated Claimant has severe emphysema and exertional hypoxemia "without compelling evidence of radiographic [coal workers' pneumoconiosis (CWP)]." Director's Exhibit 35 at 3. He also stated "CWP can cause an obstructive disease, but if [pulmonary function study] abnormalities are seen with CWP, there is a component of restriction seen as well." *Id.* Further, he stated "[p]urely obstructive and hyperinflated lung disease is uncommon as a manifestation of CWP" and "[i]t is even more uncommon to have that [pulmonary function study] abnormality with no evidence of pneumoconiosis radiographically." *Id.*

The ALJ found Dr. McSharry excluded a diagnosis of legal pneumoconiosis, in part, because there was no radiographic evidence of clinical pneumoconiosis. Decision and Order at 27; Director's Exhibit 35 at 3. She permissibly found Dr. McSharry's opinion inconsistent with the regulations, which do not require a positive x-ray in order to diagnose

legal pneumoconiosis. *See Looney*, 678 F.3d at 313; 20 C.F.R. §718.202(a)(4), (b); *see also* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); Decision and Order at 27. Further, the ALJ permissibly rejected Dr. McSharry's explanation that "Claimant's 'purely obstructive' impairment could not constitute legal pneumoconiosis," as scientific studies that the DOL found credible in the preamble to the 2001 revised regulations show that coal dust-induced obstructive impairments can be clinically significant. Decision and Order at 27; *see Looney*, 678 F.3d at 313-14; 65 Fed. Reg. at 79,938-940, 70,943; Director's Exhibit 35 at 3.

Dr. Tuteur opined Claimant has "advanced [COPD]" and stated this "COPD phenotype" could be attributable to "either the inhalation of coal mine dust or cigarette smoke." Employer's Exhibit 1 at 4. He excluded legal pneumoconiosis because twenty percent of "never mining cigarette smokers . . . develop the COPD phenotype" while only one percent or fewer of "never smoking coal miners develop the [disease]." *Id*. at 5. Thus, he concluded Claimant's "COPD is due to the chronic inhalation of tobacco smoke, and not coal mine dust." *Id*. at 4-5. The ALJ observed correctly that Dr. Tuteur eliminated coal mine dust exposure as a cause of Claimant's COPD, in part, because he believes smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 27; Employer's Exhibits 1 at 4-5, 7, 5 at 28-31. She permissibly found his opinion unpersuasive to the extent he relied on statistical generalities drawn from medical literature, rather than the specifics of Claimant's case. *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 35-36. Further, we see no error in the ALJ's finding that Dr. Tuteur failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating Claimant's COPD. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14; 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; Decision and Order at 28.

Because the ALJ permissibly credited Dr. Habre's opinion over those of Drs. McSharry and Tuteur, we affirm her finding that Claimant established legal pneumoconiosis.[17] 20 C.F.R. §718.202.

[17] Because we affirm the ALJ's determination that Claimant established legal pneumoconiosis, we need not address Employer's challenges to her determination that Claimant established clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Disability Causation

Employer has not challenged the ALJ's finding that Claimant established pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); Decision and Order at 32-33. Thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718 and affirm the award of benefits. Decision and Order at 33.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge