U.S. Department of Labor

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

BRB No. 20-0485 BLA

CLARENCE B. WADE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 9/30/2022
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for Claimant.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05635) on a claim filed on June 20, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal Company (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He found Claimant has 23.44 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4). Furthermore, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Benefits Review Board to affirm the ALJ's determination that Eastern is the responsible operator and Peabody Energy is liable for the payment of benefits.

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

[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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of underground coal mine employment and total disability, and therefore invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Claimant last worked in coal mine employment from January 19, 1976 to July 2, 1999 for Eastern, a subsidiary of Peabody Energy. Director's Exhibits 7, 8. On November 1, 2007, Peabody Energy sold Eastern to Patriot Coal Corporation (Patriot). Director's Exhibit 8. In 2011, the Department of Labor (DOL) authorized Patriot to self-insure for black lung liabilities relating to the Peabody Energy subsidiaries it purchased, including Eastern, retroactive to July 1, 1973. Director's Response Brief at 2. This authorization required Patriot to make an initial deposit of negotiable securities. *Id.* In 2015, Patriot went bankrupt. *Id.*

Employer does not directly challenge its designation as the responsible operator.[4] However, it contests Peabody Energy's liability as the responsible carrier. Employer's Brief at 24-33. Employer maintains Patriot is the responsible carrier because Patriot last insured Eastern's black lung liabilities and the DOL acknowledged Patriot was the insurer. *Id.* The Director counters that neither Patriot's self-insurance authorization nor any other agreement relieved Peabody Energy of liability for benefits of miners whose last day of employment with Eastern was covered by Peabody Energy's self-insurance. Director's Brief at 6-18.

[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.

[4] Eastern qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of employment with Eastern; (2) Eastern operated a mine after June 30, 1973; (3) Eastern employed Claimant 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) Eastern 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 Eastern was the last potentially liable operator to employ Claimant, the ALJ designated Eastern as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 11.

District Director Proceedings

After Claimant filed his claim on June 20, 2017, the district director identified Eastern, self-insured through Peabody Energy, as the "potentially liable operator" in a September 7, 2017 Notice of Claim. Director's Exhibit 29. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id*. In response, Employer denied liability, asserting Patriot is the responsible carrier and requesting that the district director dismiss Peabody Energy as the liable carrier. Director's Exhibit 31.

On January 12, 2018, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern as the responsible operator and Peabody Energy as its insurer. Director's Exhibit 32. The district director informed Eastern and Peabody Energy that they had until March 13, 2018 to submit additional documentary evidence relevant to liability in support of its position. *Id*. They also had until April 12, 2018 to submit evidence responsive to evidence submitted by another party. *Id*. Finally, they had to identify any liability witnesses they intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ) within these deadlines. *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on January 19, 2018 and contested liability. Director's Exhibit 33. Thereafter, Employer requested an extension of time to submit medical evidence. Director's Exhibit 34. The district director gave Employer until May 12, 2018, to submit medical evidence. Director's Exhibit 35. Employer did not submit additional evidence to the district director to support its controversion of liability or identify any liability witnesses by that deadline.

The district director issued a Proposed Decision and Order (PDO) on January 24, 2019, awarding benefits and designating Eastern as the responsible operator and Peabody Energy as the responsible carrier. Director's Exhibit 36.

On January 30, 2019, Employer requested reconsideration or in the alternative a hearing regarding Peabody Energy's liability and Claimant's entitlement to benefits. For the first time Employer submitted liability evidence and designated liability witnesses, including DOL employees Stephen Breeskin and David Benedict. Director's Exhibit 41;

Employer's Exhibit 12.[5] Thereafter the case was referred to OALJ and assigned to the ALJ.

ALJ Proceedings

The ALJ held a hearing on December 2, 2019. During the hearing, Employer submitted documentary liability evidence and the deposition transcripts and Ex Parte In Camera testimony of Mr. Breeskin and Mr. Benedict, along with deposition exhibits. Hearing Tr. at 16-19; Employer's Exhibits 5-9. Although the ALJ admitted this evidence, he declined to consider it in his Decision and Order, explaining Employer failed to submit it in accordance with the district director's SSAE deadlines and did not establish extraordinary circumstances for its failure. 20 C.F.R. §§725.456(b)(1), 725.457(c)(1); Decision and Order at 5-8. Further, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Eastern and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 4-11.

Issues on Appeal

Exclusion of Employer's Liability Evidence

Employer contends the ALJ erred in excluding its liability evidence contained in Director's Exhibit 41 and the deposition transcripts of Messrs. Benedict and Breeskin and the additional documents attached thereto. Employer's Brief at 22-23. We disagree.

It is Employer's responsibility to submit evidence relevant to its disputed liability by the deadlines set forth in the SSAE. 20 C.F.R. §§725.410, 725.412(a), 725.456(b)(1).

[5] Employer submitted the following documents to the district director as Director's Exhibit 41: (1) a 2007 Separation Agreement between Peabody Energy and Patriot; (2) a November 23, 2010 letter from the Division of Coal Mine Workers' Compensation (DCMWC) to Patriot requiring $22.5 million for authorization to self-insure; (3) a March 4, 2011 letter from the DCMWC granting Patriot authorization to self-insure retroactive to July 1, 1973, and releasing Peabody Energy's $13 million letter of credit; (4) a March 4, 2011 indemnity agreement between the Department of Labor (DOL) and Bank of America; (5) an undated letter from Michael Chance, the Director of the DCMWC, regarding Patriot's self-insurance reauthorization audit; (6) documentation dated November 16 to 19, 2015, showing authorization to transfer, and the transfer of, $15 million from Patriot to the Black Lung Disability Trust Fund (Trust Fund); and (7) Peabody Energy's indemnity bond. Director's Exhibit 41. The district director inadvertently left out Director's Exhibit 41 when he transferred the record to OALJ, and the ALJ admitted it at the hearing as Employer's Exhibit 12. Hearing Tr. at 9-11.

Absent extraordinary circumstances, liability evidence pertaining to the responsible operator or carrier must be timely submitted to the district director. 20 C.F.R. §§725.414(d), 725.456(b)(1) ("Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances."). An employer must also designate to the district director potential liability witnesses "[i]n accordance with the schedule issued by the district director" and such testimony may not be admitted at the ALJ hearing unless "the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c).

The district director's SSAE informed Employer that it had until April 12, 2018, to submit its liability evidence and designate any potential liability witnesses. Director's Exhibit 32. Employer waited until December 2, 2019, nineteen months after the SSAE deadline, and after the district director issued his Proposed Decision and Order, to submit liability evidence contained in Director's Exhibit 41 and designate Messrs. Benedict and Breeskin as potential liability witnesses. Director's Exhibit 41; Employer's Exhibit 12. Thus the ALJ found Employer did not timely submit its liability evidence or designate these witnesses. Decision and Order at 6-7.

Employer argues that it need only designate its liability witnesses at any time the claim is before the district director. Employer's Brief at 22-23. Because the January 24, 2019 Proposed Decision and Order had not become final when it submitted its evidence and designated Messrs. Benedict and Breeskin, Employer argues it complied with the regulations. To the contrary, 20 C.F.R. §725.457(c) specifically provides, "No person shall be permitted to testify as a witness at the hearing, or pursuant to deposition or interrogatory . . . unless that person meets the requirements of [20 C.F.R.] §725.414(c)." 20 C.F.R. §725.457(c). 20 C.F.R. §725.414(c), in turn, provides, in "*accordance with the schedule issued by the district director*, all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c) (emphasis added). "Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances." *Id*. Employer does not dispute that it failed to designate Messrs. Benedict and Breeskin before the deadline set by the district director in the SSAE. Thus we affirm the ALJ's finding that Employer did not timely designate its liability witnesses. Decision and Order at 6-7.

Moreover, in declining to consider the depositions of these witnesses, the ALJ correctly found Employer did not argue extraordinary circumstances exist for failing to identify Messrs. Benedict and Breeskin as liability witnesses within the deadline set by the

district director. Decision and Order at 6-7. Nor did it argue extraordinary circumstances excuse its failure to timely submit to the district director the documentary liability evidence contained in Director's Exhibit 41. Decision and Order at 6-7. As Employer does not challenge these findings, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus, a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009). Apart from its bare assertion that the ALJ erred, Employer does not raise any further arguments as to why the excluded evidence is admissible. Employer's Brief at 22-23. Because the ALJ acted within his discretion in rendering his evidentiary rulings, we affirm them.[6] 20 C.F.R. §725.414(b)-(d); *see Clark*, 12 BLR at 1-153; Decision and Order at 6-7. Consequently, we affirm the ALJ's decision not to consider Employer's liability evidence and the depositions of Messrs. Benedict and Breeskin. *Blake*, 24 BLR at 1-113; Decision and Order at 6-7.

Liability under 20 C.F.R. §725.495(a)(4)

Employer asserts that Patriot, not Peabody Energy, is liable for payment of benefits. Employer's Brief at 23-33. It contends the evidence establishes the DOL "made Patriot [] the insurer for claims of past employees of Eastern retroactive to 1973," including Claimant. *Id*. at 24-25. Further, it asserts the "regulations provide that the DOL can set which company is the self-insurer for liability" of an operator and "that is what the DOL did" in transferring liability from Peabody to Patriot on March 4, 2011. *Id*. at 28. In support of its argument, Employer alleges "hundreds of federal black lung claims made by former employees of Eastern for which the DOL did in fact name Patriot [] as the insurer." *Id*. at 25. It also points to the DOL's actions with respect to Patriot's self-insurance authorization in which the Department imposed, set the amount, and collected a surety that "made Patriot

[6] Employer generally argues the ALJ should have considered its untimely documentary liability exhibits and the depositions of Messrs. Benedict and Breeskin in his Decision and Order as impeachment evidence. Employer's Brief at 25-27. It asserts it need not comply with the deadlines set by the district director in the SSAE when submitting liability evidence for impeachment purposes. *Id*. It cites no regulatory authority to support this argument. Moreover, the district director's SSAE set a deadline of April 12, 2018 for Employer to submit liability evidence responsive to another party's evidence. Director's Exhibit 32. Employer missed that deadline.

[] the insurer for all claims of Eastern employees retroactive to 1973." *Id*. at 28. Based on the foregoing, Employer argues the regulations place liability on the Black Lung Disability Trust Fund, rather than Employer, because both Eastern and Patriot are bankrupt and the Director failed to present evidence showing Peabody Energy self-insured Eastern's liabilities after the DOL released Peabody Energy's surety and authorized Patriot to self-insure. *Id*. at 23-33. We reject these arguments for the reasons stated in *Graham v. E. Assoc. Coal Co.*, __ BLA __, BRB No. 20-0221 BLA, slip op. at 8-10 (June 23, 2022).[7]

Equitable Estoppel

Employer also argues it should be relieved of liability under the doctrine of equitable estoppel. Employer's Brief at 29. 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); *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 argues the DOL "should be equitably estopped from placing liability on Peabody when it made Patriot [] the insurer for prior employees of Eastern which would cover this Claimant, set the surety for doing so, collected the surety for doing so, spent the surety for doing so, imposed millions of dollars of liability on Patriot for former employees of Eastern and other subsidiaries, and released Peabody Energy's letter of credit under which it had been an insurer." Employer's Brief at 29. It asserts "if the DOL [or any agent] did not have authority . . . to do so but did so anyway, and now Peabody Energy is harmed," then the DOL's "affirmative misconduct has caused such harm that rises to the level required for equitable estoppel." *Id*.

Employer, however, identifies no admissible evidence establishing the DOL released Peabody Energy from liability, or made a representation of such a release. Further, Employer does not allege the DOL acted either intentionally or recklessly. *See Mich. Express, Inc.*, 374 F.3d at 427; *Reich*, 66 F.3d at 116. Because Employer has failed to

[7] We also reject Employer's argument that Black Lung Benefits Act Bulletin (BLBA Bulletin) Nos. 12-07 and 14-02 place liability on the Trust Fund for the reasons stated in *Graham v. E. Assoc. Coal Co.*, __ BLA __, BRB No. 20-0221 BLA, slip op. at 10 (June 23, 2022).

establish the necessary elements, we affirm the ALJ's rejection of Employer's equitable estoppel argument. Decision and Order at 16; *see Premo*, 599 F.3d at 547; *Reich*, 66 F.3d at 116; *Graham*, ___ BLR ___, BRB No. 20-0221 BLA, slip op. at 7-8.

For the above reasons, we conclude the ALJ properly found Eastern is the responsible operator, 20 C.F.R. §§725.494(e), 725.495(a)(1), and properly determined that Peabody Energy is the responsible carrier.[8] Thus, we affirm the ALJ's finding that Eastern as self-insured by Peabody Energy is liable for benefits.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[9] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20

[8] We affirm, as unchallenged, the ALJ's findings that Eastern satisfies the definition of a responsible operator under the Act and that Eastern has not shown its carrier, Peabody Energy, is financially incapable of assuming liability. 20 C.F.R. §§725.494(e), 725.495(a)(3); *see* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986). Although Peabody Energy disputes it was authorized to self-insure Eastern's obligations on Claimant's last date of coal mine employment in July 1999, that contention is based solely on its theory that it was absolved of liability when DOL authorized Patriot to self-insure claims of Eastern miners retroactively. Peabody Energy neither disputes it was Eastern's self-insurer on Claimant's last day of employment nor denies it is financially capable of paying benefits; instead, it only contends it should not be required to self-insure claims of Eastern miners.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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. §§718.305(d)(1)(i)(B), 718.201(a)(1).

Employer argues the ALJ erred in finding the x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. Employer's Brief at 5-7. We disagree.

The ALJ considered seven interpretations of two x-rays dated September 12, 2017 and September 14, 2018. Decision and Order at 27-30. He noted that all of the interpreting physicians are dually-qualified as Board-certified radiologists and B-readers. *Id*. Drs. Smith, DePonte, and Alexander interpreted the September 12, 2017 x-ray as positive for pneumoconiosis, while Drs. Seaman and Tarver interpreted it as negative for the disease. Director's Exhibits 14, 20, 21; Employer's Exhibit 2; Claimant's Exhibit 6. Dr. Smith interpreted the September 14, 2018 x-ray as positive for pneumoconiosis, while Dr. Godwin interpreted it as negative. Employer's Exhibit 5; Claimant's Exhibit 5.

The ALJ found the September 12, 2017 x-ray supports a finding of pneumoconiosis because three of the five dually-qualified radiologists read it as positive for the disease. Decision and Order at 29-30. He found the readings of the September 14, 2018 x-ray are in equipoise because an equal number of physicians read this x-ray as positive and negative for pneumoconiosis. *Id*. Because the ALJ found one x-ray is positive for pneumoconiosis and one is in equipoise, he found Employer failed to rebut the presumption of clinical pneumoconiosis through x-ray evidence. *Id*.

We first reject Employer's argument that the ALJ should have discounted Dr. Smith's x-ray readings because he is associated with Lungs at Work, the organization that represents Claimant. Employer's Brief at 5-6. In the absence of specific evidence of bias, party affiliation is not a dispositive factor in determining the weight to be assigned to the medical evidence of record. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 637 n.6 (6th Cir. 2009) (bias cannot be presumed merely because an expert is compensated for his opinion); *Urgolites v. BethEnergy Mines, Inc*., 17 BLR 1-20, 1-23 n.4 (1992); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-35-36 (1991) (en banc) (it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable). Employer identifies no evidence in the record regarding the specific relationship of Dr. Smith and Lungs at Work. Thus, as Employer

has not supported its contention that Dr. Smith's readings should be discredited as biased, nor has it cited legal authority for its position, we are not persuaded by this argument.

Employer next contends the ALJ erred in weighing these conflicting readings without considering the doctors' academic credentials. Employer's Brief at 6-7. We disagree. An ALJ is not required to assign greater weight to the x-ray interpretation of one physician over another based on their academic appointments but, rather, may permissibly accord them equal weight based on their status as dually-qualified radiologists. *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). The ALJ properly conducted both a qualitative and quantitative analysis of the conflicting x-ray readings, taking into consideration the physicians' radiological qualifications and the number of readings by dually-qualified radiologists, and permissibly found the September 12, 2017 x-ray positive for pneumoconiosis and the readings of the September 14, 2018 x-ray in equipoise. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 29-30. Because the record contains one positive x-ray and readings of one other x-ray that are in equipoise, the ALJ rationally found the x-ray evidence insufficient to rebut the presumption of clinical pneumoconiosis. *Id*.

As Employer raises no additional argument, we affirm the ALJ's finding that Employer did not disprove clinical pneumoconiosis based on all the relevant evidence. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 30-37.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does 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 ALJ weighed the opinions of Drs. Tuteur and Zaldivar. Employer's Exhibits 3, 4, 10, 11. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking and unrelated to coal mine dust exposure. Employer's Exhibits 4, 11. Dr. Zaldivar diagnosed an obstructive respiratory impairment due to asthma and unrelated to coal mine dust exposure. Employer's Exhibits 3; 10 at 16-18, 35-38, 40. The ALJ discredited their opinions because he found their rationales for excluding legal pneumoconiosis unpersuasive. Decision and Order at 33-36.

Employer argues the ALJ erred in discrediting the opinions of Drs. Tuteur and Zaldivar.[10] Employer's Brief at 11-21. We disagree.

Initially we reject Employer's argument that the ALJ applied the wrong standard when addressing rebuttal. Employer's Brief at 11-12. The ALJ properly required Employer to establish Claimant does not have a chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 33-34, *citing* 20 C.F.R. §718.201(b). The ALJ did not require Employer to rule out coal mine dust exposure as a cause of Claimant's chronic lung disease, Employer's Brief at 11, but, as discussed below, permissibly found neither Dr. Tuteur nor Dr. Zaldivar adequately explained why they concluded coal mine dust exposure did not contribute to, or aggravate, his chronic lung disease. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark*, 12 BLR at 1-155; 20 C.F.R. §718.201(b); Decision and Order at 35-37.

Dr. Tuteur opined Claimant's "COPD may be due to either [the] inhalation of coal mine dust or cigarette smoke." Employer's Exhibit 4 at 4. He stated the clinical picture of either exposure causing COPD is "generally similar." *Id.* Thus he explained that in "an individual person, one cannot use available characteristics to differentiate between these two etiologies." *Id.* Nonetheless, he opined Claimant's COPD is due to cigarette smoking because scientific studies indicate "never smoking coal miners develop [the] COPD phenotype about [one percent] of the time or less," but "never mining cigarette smokers [] develop the COPD phenotype about [twenty percent] of the time." *Id.* at 4-5. He therefore excluded legal pneumoconiosis based on this "relative" risk assessment. *Id.*

The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied on "general statistics rather than particularized facts about" Claimant, and the doctor did not adequately explain why, in this "individual case," Claimant's "coal mine dust exposure did not . . . contribute to [his] COPD." Decision and Order at 35; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-313 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013). Further, even if cigarette smoking more likely caused the COPD, the ALJ permissibly found Dr. Tuteur did not "adequately explain how he is able to determine that [Claimant's] substantial coal mine dust exposure is not also a significant contributor" to the smoking-related COPD. Decision

[10] The ALJ also considered the opinions of Drs. Celko, Sood, and Go diagnosing legal pneumoconiosis. Decision and Order at 34-35. He found their opinions reasoned and documented. *Id.* Because none of their opinions aid Employer in rebutting the presumption of legal pneumoconiosis, we need not address Employer's arguments regarding the ALJ's weighing of their opinions. Employer's Brief at 7-11.

and Order at 35; *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017).

Dr. Zaldivar attributed Claimant's obstructive respiratory impairment to asthma because the impairment improved after the administration of bronchodilators. Employer's Exhibits 3 at 3-4; 10 at 16-18. He also opined Claimant's asthma is not the type of asthma caused by coal mine dust exposure. Employer's Exhibit 10 at 35-38, 40. As the ALJ correctly found, however, the obstructive impairment on pulmonary function testing did not "reverse to normal after the administration of bronchodilators . . . ." Decision and Order at 36. According to Dr. Zaldivar, the FEV1 value on the September 12, 2017 pulmonary function study improved by twenty-three percent after bronchodilators. Employer's Exhibit 3 at 2. Further, the post-bronchodilator values were still qualifying for total disability. Decision and Order at 16; Director's Exhibit 17. Dr. Zaldivar also stated there was a fourteen percent improvement in the FEV1 value after bronchodilators on the April 12, 2018 pulmonary function study. Employer's Exhibit 3 at 3. While Dr. Zaldivar characterized both studies as exhibiting "positive response to bronchodilators" in order to diagnose asthma and exclude legal pneumoconiosis, Employer's Exhibit 3 at 2-3, the ALJ permissibly found he did not "adequately explain the basis for determining coal mine dust exposure did not contribute to the fixed portion of [Claimant's] obstructive impairment." Decision and Order at 36; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007).

Employer also argues the ALJ should have discounted the opinion of Dr. Celko, the doctor who examined Claimant as part of the DOL-sponsored pulmonary evaluation, because his "letterhead" is proof that he is an employee of Lungs at Work. Employer's Brief at 3-4. In response, Claimant asserts "Dr. Celko is not now and has never been an employee of Lungs at Work." Claimant's Brief at 2. Employer has not explained how its allegation of bias with respect to Dr. Celko changes the outcome of this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). All the doctors who rendered a medical opinion agreed Claimant has a totally disabling respiratory or pulmonary impairment. Director's Exhibit 14; Claimant's Exhibits 1, 3; Employer's Exhibits 4, 10 at 15. Additionally, Dr. Celko diagnosed clinical and legal pneumoconiosis and therefore his opinion does not assist Employer in rebutting the Section 411(c)(4) presumption.

Because the ALJ acted within his discretion in discrediting the opinions of Drs. Tuteur and Zaldivar, we affirm his determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 33-36. Based on the foregoing, we affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the disability causation opinions of Drs. Tuteur and Zaldivar because neither diagnosed pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 37-39. 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.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge