U.S. Department of Labor

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

BRB No. 21-0367 BLA

JAMES W. PETRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE S MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 9/27/2022
	)	
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 on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Jeffery R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, 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: BOGGS, Chief Administrative Appeals Judge, and ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits on Remand (2018-BLA-05090) rendered on a claim filed on January 29, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a Decision and Order Awarding Benefits issued on June 27, 2019, the ALJ found Claimant established 15.84 years of coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] Further, she found Employer did not rebut the presumption and therefore awarded benefits.

In consideration of Employer's appeal, the Benefits Review Board vacated the ALJ's length of coal mine employment determination because she failed to render a threshold finding as to whether Claimant established a calendar year of coal mine employment prior to applying the formula for calculating a year of coal mine employment at 20 C.F.R. §725.101(a)(32)(iii). *Petry v. Double S Mining, Inc.*, BRB No. 19-0468 BLA, slip op. at 5-7 (Sep. 18, 2020) (unpub.). Thus, the Board vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits.[2] *Id.* at 6.

In her Decision and Order on Remand, that is the subject of this appeal, the ALJ found Claimant established 15.34 years of qualifying coal mine employment and reinstated

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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] The Board declined to address as premature Employer's arguments regarding rebuttal of the Section 411(c)(4) presumption. *Petry*, BRB No. 19-0468 BLA, slip op. at 6.

her prior determinations that Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it. Accordingly, the ALJ awarded benefits.

On appeal, Employer challenges the constitutionality of the amendments to the Act contained in the Affordable Care Act (ACA), and the ACA itself. Further, Employer argues the ALJ again erred in calculating Claimant's length of coal mine employment and finding it did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, filed a response urging the Board to reject Employer's constitutional argument.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[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).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the ACA, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 22-25. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. The Board previously rejected this argument. *Petry*, BRB No. 19-0468 BLA, slip op. at 3. As Employer has not shown that the Board's holding was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball Greenfield*, 22 BRBS 234, 237 (1989). Moreover, Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last 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 Transcript at 20.

based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Hunt*, 7 BLR at 1-710-711.

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which a miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark*, 22 BLR at 1-280. If the miner's employment "lasted for a calendar year or partial periods totaling a 365-day period amounting to one year," the regulations presume, in the absence of contrary evidence, "that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). The regulations further provide that an ALJ may rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year . . . ." 20 C.F.R. §725.101(a)(32)(iii).

Based on Claimant's Social Security Earnings Record (SSER), testimony, and employment history provided on his claim for benefits, the ALJ found Claimant established fourteen calendar years of employment in 1971, 1975-1984, 1986-1988.[4] Decision and Order on Remand at 8-9. Using the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ divided Claimant's annual earnings in coal mine employment by the 125-day industry average to find Claimant worked a regulatory year of coal mine employment in each of the fourteen years except 1986. *Id.* at 9. With regard to 1986, the ALJ found application of the formula demonstrated Claimant worked 0.34 of a regulatory year.[5] *Id.* at 9-10. Further finding the record demonstrates two full quarters of coal mine employment in each of the years of 1970, 1972, 1974, and 1989, the ALJ found Claimant established partial periods totaling two calendar years and presumed he worked at least 125-days in both years. *Id.* at 9. She also found Employer did not rebut the presumption of regular work because application of the formula at 20 C.F.R. §725.101(a)(32)(iii) demonstrated Claimant worked

[4] The ALJ used the term "regulatory year" to denote a "calendar year" in which Claimant worked at least 125 days. Decision and Order on Remand at 4 n.4.

[5] Dividing Claimant's 1986 earnings by the mining industry's daily average earnings for that year, the ALJ found Claimant worked for 42 days in 1986. Decision and Order on Remand at 9-10. She divided 42 days by the standard 125-working-days per year, which yielded a total of 0.34 of a year of coal mine employment. *Id.*

more than 125 days in the eight quarters totaling two calendar years of coal mine employment.[6] *Id.* at 11 n.13. Thus, the ALJ concluded Claimant established 15.34 regulatory years of coal mine employment. *Id.*

Employer challenges the ALJ's finding that Clamant established a calendar year of coal mine employment in both 1986 and 1987. Employer's Brief at 7. Because dividing Claimant's annual coal mine employment earnings by the industry's daily average earnings yields less than 250 days, Employer contends Claimant's SSER establishes he had less than a calendar-year employment in 1986, when he earned only $5,262.00 for Buttons Coal Company (Buttons Coal), and in 1987 when Claimant earned $24,411.00 with Buttons Coal and $132.00 with Double S Mining Company (Double S).[7] *Id.* at 7-8. We reject Employer's assertion as a request to reweigh the evidence. *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280-81.

Contrary to Employer's assertion, the ALJ was not required to find Claimant did not have a calendar year employment relationship in 1986 or 1987 because his SSER demonstrates he had less than 250 working days with a coal mine operator in both years. The ALJ correctly observed the regulations do not require a minimum number of working days to establish a calendar year of coal mine employment; rather, they require a showing of an "employment relationship totaling 365 days." *See* 65 Fed. Reg. 79,920, 79,959 (Dec. 20, 2000); Decision and Order on Remand at 10 n.12 (citing 62 Fed. Reg. 3338, 3349 (Jan. 22, 1997)).[8]

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[6] Specifically, the ALJ found Claimant worked for 98.45 days in 1970, 104.17 days in 1972, 74.66 days in 1974, and 162.23 days in 1989. Decision and Order on Remand at 11 n.13.

[7] Employer asserts a 250-day divisor "is a facially reasonable approximation" of a year of coal mine employment because it "represents 5 days worked per week with 2 weeks off for the year." Employer's Brief at 8 n.2. It contends a 250-day divisor yields 0.171 regulatory year in 1986 and 0.779 regulatory year in 1987, for a total of 12.95 regulatory years in 1971, 1975-1984, and 1986-1988, rather than the 13.34 regulatory years the ALJ found. *Id.* at 8-9.

[8] Nor was the ALJ required to use a 250-day divisor to determine the amount of regulatory time to credit Claimant for 1986, in which she determined Claimant worked less than 125 days during the calendar year relationship. As the ALJ noted, neither the Act nor the regulations establish a 250-day standard, and Employer has provided no other authority either below or on appeal that demonstrates the ALJ's use of a 125-day divisor to credit Claimant with .34 regulatory years of employment was improper instead of the .17

She concluded the preponderance of the evidence establishes a 365-day employment relationship in both years because Claimant's SSER evidences "substantial income" with Buttons Coal Company in 1986 and 1987, Claimant identified Buttons Coal as his employer in "1986-1987" on his certified employment history form, and "Claimant[] credibl[y] testi[fied] that his coal mining career spanned from 1970-1989, and underwent two layoff periods [in 1973 and 1985]." Decision and Order on Remand at 6-10; Director's Exhibits 3 at 1, 6 at 4; Hearing Transcript at 15.

It is the role of the ALJ, as the trier-of-fact, to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). The Board cannot disturb factual findings that are supported by substantial evidence even if it might reach a different conclusion if it were reviewing the evidence *de novo*. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 (4th Cir. 2002); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). While Claimant's SSER provides important information regarding his work history as a miner, further evidence of additional employment contained in his testimony and certified employment history form are also relevant and probative. *See Hutnick v. Director, OWCP*, 7 BLR1-326, 1-329 (1984); *see* 20 C.F.R. §725.101(a)(32)(ii) ("dates and length of employment may be established by any credible evidence including . . . sworn testimony"). Thus, while the ALJ found Claimant's SSER to be "the most accurate source of evidence concerning the length of Claimant's coal mine employment," she also permissibly credited Claimant's testimony to the extent it did not conflict with his SSER. *See* 20 C.F.R. § 725.101(a)(32)(ii); *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting miner's uncorroborated testimony that employer characterized as "hazy and contradictory"); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-45 (1984) (ALJ "may rely on lay testimony regarding a miner's coal mine employment, especially if, as here, the testimony is not contradicted by any documentation of record"); Decision and Order on Remand at 8-10. As substantial evidence supports the ALJ's finding of 13.34 regulatory years of coal mine employment in 1971, 1975-1984, 1986-1988, we affirm it.[9] *See Held*, 314 F.3d 187; *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280-81.

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regulatory years Employer urges. Decision and Order on Remand at 10 n.12 (citing 62 Fed. Reg. 3338, 3349 (Jan. 22, 1997)).

[9] Although Employer correctly notes Claimant had earnings with both Buttons Coal Company and Double S Mining Company in 1987, it fails to explain why Claimant's contemporaneous earnings with Double S would necessarily preclude the ALJ from crediting his testimony as demonstrating he had a full calendar-year employment

Next, Employer argues the ALJ erred in finding Claimant performed a total of two calendar years of coal mine employment during the years of 1970, 1972, 1974, and 1989. Employer's Brief at 9. Specifically, Employer contends the ALJ erred in "cobbl[ing] together [eight] quarters of employment from these disparate years to collectively yield two full calendar years." *Id.* at 10. It asserts the "obvious" intent behind 20 C.F.R. §725.101(a)(32)(ii)'s clause, that a calendar "year" means "partial periods totaling one year," is to credit a claimant "for a year's worth of coal mine employment where he works for the same employer for partial periods over successive years." *Id.*. Thus, it argues "there is no justification to combine partial years' employment *from different employers*" as is the case here, where Claimant worked two quarters of a year with Cannelton Industries in 1970, 1972, and 1974, and two quarters of a year with Double S Mining Company in 1989. *Id.* at 11 (emphasis in original). So had the ALJ properly assessed each partial employment period individually by applying the formula at 20 C.F.R. §725.101(a)(32)(iii) and using a 250-work-day divisor, Employer asserts Claimant could establish only an additional 1.762 years of coal mine employment during this four-year period. *Id.*

We reject Employer's assertion that the Act precludes non-consecutive partial employment periods from amounting to full calendar years of employment under 20 C.F.R. §725.101(a)(32)(ii). The plain text of the regulation places no restrictions on the accounting of employment periods and applicable case law provides that an ALJ may use any reasonable method to calculate a miner's length of coal mine employment. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280-81. Moreover, as we have affirmed the ALJ's finding of 13.34 regulatory years of coal mine employment in 1971, 1975-1984, 1986-1988 and Employer concedes Claimant's partial periods of coal mine employment in 1970, 1972, 1974, and 1989 reasonably amount to an additional 1.762 regulatory years of coal mine employment, Employer's assertion of error is moot. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We therefore affirm the ALJ's findings that Claimant established at least fifteen years of coal mine employment and therefore invoked the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305; Decision and Order at 11.

relationship with Buttons that year, particularly since the amount Claimant earned with Double S is quite small. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 109 (1983).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[10] 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.[11]

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).

Employer relies on the opinions of Drs. Zaldivar and Spagnolo that Claimant does not have legal pneumoconiosis. Director's Exhibit 18; Employer's Exhibits 11, 15, 16. The ALJ found their opinions not well-reasoned and insufficient to satisfy Employer's burden of proof. Decision and Order at 39-41. Employer argues the ALJ did not give permissible reasons for discrediting their opinions. We disagree.

Dr. Zaldivar examined Claimant on December 7, 2016, and diagnosed a disabling reversible restriction due to severe obstruction. Director's Exhibit 18 at 3-5. He attributed Claimant's condition entirely to asthma-chronic obstructive pulmonary disease (COPD) overlap syndrome, which he believed was unrelated to coal dust exposure because coal-dust-related lung disease is irreversible and Claimant's pulmonary function studies improved over time and with the administration of a bronchodilator. *Id.* at 5; Employer's

[10] "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).

[11] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 43.

Exhibit 16 at 15-18, 21-24, 34.[12] Specifically, he eliminated coal dust exposure as a cause of the irreversible component of Claimant's impairment,[13] explaining that inadequately treated asthma always results in permanent residual obstruction,[14] COPD due to coal dust does not occur in the absence of clinical pneumoconiosis, and Claimant "does not have radiographic pneumoconiosis." Director's Exhibit 18 at 4-5; Employer's Exhibit 16 at 24.

Employer correctly notes the ALJ misspoke in stating Dr. Zaldivar did not address coal dust exposure as a potential cause of Claimant's irreversible obstruction. Employer's Brief at 18 (citing 2019 Decision and Order at 40 n.83; Director's Exhibit 18 at 3-4; Employer's Exhibit 16 at 21-22, 25-29). We see no reversible error in the ALJ's misstatement, however, as the ALJ considered Dr. Zaldivar's opinion that Claimant's residual obstruction is unrelated to coal dust exposure. *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"). Further, contrary to Employer's assertion, the ALJ permissibly rejected this aspect of Dr. Zaldivar's opinion as predicated on the absence of clinical pneumoconiosis in Claimant. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (ALJ may discredit physician whose opinion regarding legal pneumoconiosis conflicts with the Department of Labor's (DOL) recognition that coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis)); *see* 20 C.F.R. §§718.201(a), 718.202(a)(4), (b); 65 Fed Reg. at 79,943; 2019 Decision and Order at 40. Thus, we affirm the ALJ's finding that Dr. Zaldivar's opinion is insufficient to disprove Claimant has legal pneumoconiosis.[15] *See Looney*, 678

[12] Dr. Zaldivar explained Claimant's FEV1 value significantly improved following the administration of a bronchodilator on Dr. Zaldivar's 2016 pulmonary function study, and the moderate restriction of total lung capacity and moderate diffusion impairment seen on the study reverted to normal on the May and June 2018 pulmonary function tests that Dr. Green administered. Employer's Exhibit 16 at 15-18, 21-24, 34.

[13] All of Claimant's pulmonary function tests produced qualifying values before and after the administration of bronchodilators. Director's Exhibits 14, 18; Claimant's Exhibits 1, 2. A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[14] Dr. Zaldivar explained Claimant has a lifelong history of asthmatic symptoms and has had asthma for years, despite never having been diagnosed with asthma. Director's Exhibit 18 at 4; Employer's Exhibit 16 at 34.

[15] We reject Employer's additional argument that the ALJ erred in failing to recognize Dr. Zaldivar's citation to new medical literature that post-dates the preamble to

F.3d at 313; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 2019 Decision and Order at 40.

Dr. Spagnolo reviewed Claimant's medical records and issued a report on March 10, 2018. Employer's Exhibit 11. Although each pulmonary function study he reviewed produced qualifying values before and after the administration of bronchodilators, Dr. Spagnolo interpreted each study as "normal" and did not diagnose a chronic lung disease or impairment.[16] *Id.* at 10; Employer's Exhibit 15 at 26-27, 30. He opined Claimant's obesity and disabling heart failure, without contribution from any chronic lung disease due to coal dust exposure, account for Claimant's shortness of breath, cough, and wheezing.[17] Employer's Exhibits 11 at 10; 15 at 29-30, 38-39, 42. Contrary to Employer's assertion, the ALJ permissibly found Dr. Spagnolo's opinion as to an absence of a coal-dust-related lung disease unpersuasive in light of his failure to diagnose any respiratory or pulmonary impairment. *See Akers*, 131 F.3d at 441 (ALJ may discount opinion that contradicts his

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the 2001 revised regulations and supports his opinion concerning the relationship between the amount of dust retention in the lungs and the development of an obstructive impairment. Employer's Brief at 19. Contrary to Employer's assertion, the ALJ was not required to find the studies that Dr. Zaldivar cited invalidate the science that the DOL credited in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (observing that neither of employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble"); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (quoting *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490 (7th Cir. 2004)) (Argument that the science in the preamble has been misinterpreted or superseded by subsequent studies requires courts "to engage the substance of that scientific dispute," thus requiring a party to submit "'the type and quality of medical evidence that would invalidate' the DOL's position in that scientific dispute.").

[16] Dr. Spagnolo summarized the four qualifying pulmonary function studies of record as showing that overall "[t]here's no obstruction, no restriction, and a normal DLCO [diffusing capacity for carbon monoxide]." Employer's Exhibit 15 at 30. He similarly opined Claimant's four arterial blood gas studies are within normal limits. *Id.* at 30-31.

[17] Although Dr. Spagnolo could not "rule out an asthmatic component to [Claimant's] symptoms given his medical history of multiple allergies" and the reversibility demonstrated on his 2016 post-bronchodilator pulmonary function test, he stated asthma did not "seem to be playing any role currently in his lung function." Employers Exhibit 11 at 10; Employer's Exhibit 15 at 29-30.

findings); 2019 Decision and Order at 41. Further, although Dr. Spagnolo attributed Claimant's respiratory symptoms to obesity, disabling heart failure, and possible asthma, the ALJ permissibly found his opinion insufficient to rebut the presumption of legal pneumoconiosis because he did not explain how he eliminated any contribution or aggravation by coal dust. *See Looney*, 678 F.3d at 313-314 (ALJ may accord less weight to a physician who fails to adequately explain why a miner's impairment "was not due at least in part to his coal dust exposure"); 2019 Decision and Order at 41.

Employer's arguments on legal pneumoconiosis are a request to re-weigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis.[18] 20 C.F.R. §718.305(a); 2019 Decision and Order at 31.

Disability Causation

The ALJ also considered whether Employer could rebut the presumption by establishing that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). She discredited the opinions of Drs. Zaldivar and Spagnolo because they failed to diagnose pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); 2019 Decision and Order at 44-46. Employer does not challenge that finding. *See Skrack*, 6 BLR at 1-711. We therefore affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

[18] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts, we need not address Employer's arguments concerning the ALJ's weighing of Drs. Green's and Gaziano's opinions that Claimant has legal pneumoconiosis. *See Shinseki*, 556 U.S. at 413; 2019 Decision and Order at 41-42; Employer's Brief at 13-17.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge