U.S. Department of Labor

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

BRB Nos. 21-0535 BLA
and 21-0536 BLA

PEGGY L. SHOOK (o/b/o and Widow of BILLIE H. SHOOK)	)	
Claimant-Respondent	)	
v.	)	
JEWELL SMOKELESS COAL CORPORATION	)	
and	)	DATE ISSUED: 9/13/2022
SUNCOKE ENERGY, INCORPORATED	)	
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 Miner and Survivor Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer and its Carrier.

Steven Winkelman (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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Miner and Survivor Benefits (2013-BLA-05398, 2014-BLA-05624) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on March 2, 2012,[1] and a survivor's claim filed on April 7, 2014.[2]

The ALJ credited the Miner with 39.25 years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the

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[1] Claimant is the widow of the Miner, who died on March 14, 2014. Survivor's Claim (SC) Director's Exhibit 5. She is pursuing both his claim and her survivor's claim. SC Director's Exhibits 1b; 2.

[2] ALJ Paul R. Almanza previously awarded benefits in both the miner's and survivor's claims after holding a formal hearing. In response to Employer's appeal in that case, the Benefits Review Board remanded the matter to the Office of Administrative Law Judges (OALJ) for reassignment to a new ALJ in light of the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *See Shook v. Jewell Smokeless Coal Co.*, BRB Nos. 18-0457 BLA, 18-0458 BLA (May 23, 2019) (unpub.). The OALJ reassigned the case to ALJ Jonathan C. Calianos (the ALJ). The parties waived their right to a formal hearing and agreed to a decision on the record.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

time of his death, the ALJ also determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act,[4] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to the ALJ rendered his appointment unconstitutional. On the merits, it argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Finally, Employer argues the ALJ erred in finding it did not rebut the presumption.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and removal protections. Employer filed a reply brief, reiterating its constitutional appointment contentions.[6]

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

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[4] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2).

with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 8-13; Employer's Reply Brief at 2. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 11-13; Employer's Reply Brief at 2.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 3-6. He also maintains Employer failed to rebut the

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

[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler,* 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an Associate Chief [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Calianos.

presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* at 4-6. We agree with the Director's arguments.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Calianos and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Calianos. The Secretary further acted in his "capacity as head of the [DOL]" when ratifying the appointment of ALJ Calianos "as an [ALJ]." *Id.* In doing so, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment.[10]

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates he did not make a detached and considered affirmation when he

[10] Employer's assertion that the Secretary, in his December 21, 2017 letter to ALJ Calianos, did not "[approve] the appointment of [the ALJ] as his own appointment going forward or retroactively" ignores that the Secretary explicitly approved the ALJ's prior appointment "in [his] capacity as head of the [DOL]." Employer's Brief at 12; Secretary's December 21, 2017 Letter to ALJ Calianos.

ratified ALJ Calianos's appointment. Employer's Brief at 13. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[11] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 9-12. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Calianos's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 13-16; Employer's Reply Brief at 2-4. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.*

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[11] While Employer notes the Secretary's ratification letter was "signed in autopen," Employer's Brief at 12, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopen signing of Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

We reject Employer's arguments, as the only circuit court to squarely address this precise issue with regard to DOL ALJs has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in rejecting a similar argument raised with respect to the removal provisions applicable to Federal Deposit Insurance Corporation (FDIC) ALJs, the United States Court of Appeals for the Sixth Circuit noted that in *Free Enterprise*[12] the Supreme Court "took care to omit ALJs from the scope of its holding." *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (citing *Free Enter. Fund*, 561 U.S. at 507 n.10). The Sixth Circuit further explained that a party challenging the constitutionality of removal provisions must set forth how the protections in question "specifically caused an agency action in order to be entitled to judicial invalidation of that action." *Calcutt*, 37 F.4th at 315. Vague, generalized allegations of harm, including the "possibility" that the agency "would have taken different actions" had the ALJ not been "unconstitutionally shielded from removal," are insufficient to establish necessary harm. *Calcutt*, 37 F.4th at 315-16. Employer in this case has not alleged it suffered any harm due to the ALJ's removal protections.

Nor does *Arthrex* support Employer's argument. In *Arthrex*, the Supreme Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." 141 S. Ct. 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court

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[12] In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1.

has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established the removal provisions at 5 U.S.C. §7521 are unconstitutional as applied to DOL ALJs. *Pehringer*, 8 F.4th at 1137-1138.

The Miner's Claim

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner 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 based on a reasonable method of calculation that is supported by substantial evidence. The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [the Miner] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Length and Nature of Coal Mine Employment

The ALJ found Claimant established 39.25 years of coal mine employment. Decision and Order at 6. Employer does not challenge the ALJ's length of coal mine employment finding. Thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Instead, Employer argues the ALJ erred in finding Claimant established the Miner was regularly exposed to coal mine dust during his employment. Employer's Brief at 17-20. We disagree.

The ALJ considered Claimant's testimony[13] and the Miner's employment history form. Decision and Order at 5-6. He also considered the accounts of working conditions the Miner shared with Drs. Habre, Tuteur, and Rosenberg, physicians who examined him. *Id*. Claimant testified the Miner's work clothes were dirty and black with coal dust before

[13] The parties agreed to admit the transcript of the hearing before ALJ Almanza into the record as Joint Exhibit 2. Decision and Order at 2.

she washed them. Hearing Tr. at 29. On his employment history form, the Miner stated he worked as a prep plant operator from 1953 to 1994 and as a general worker at a prep plant from 1977 to 1994. Miner's Claim (MC) Director's Exhibits 3, 4. He also stated he was exposed to dust, gas, and fumes during this time. MC Director's Exhibit 3. He further stated he operated the tipple, fire coal plant, and "shake out" on loaded rail cars, and worked in maintenance and as a mechanic, welder, and greaser. MC Director's Exhibit 4.

Drs. Habre, Tuteur, and Rosenberg stated the Miner worked underground for three years and the rest of his employment was on the surface as a plant operator at a general preparation plant. MC Director's Exhibit 9 at 6-7; Employer's Exhibits 1, 3. Dr. Rosenberg also stated the Miner's job at the preparation plant required him to "shovel and clean up coal." Employer's Exhibit 1 at 3. Further, he noted the Miner reported "a lot of dust was created generally, particularly by the shake out." Employer's Exhibit 1 at 3.

Contrary to Employer's contentions, the ALJ permissibly relied on Claimant's credible, uncontested testimony, the Miner's employment history form detailing his working conditions, and his accounts to Drs. Habre, Tuteur and Rosenberg to find he was regularly exposed to coal mine dust for at least fifteen years.[14] *See Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 764 (4th Cir. 1999); *see also Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014); *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1343-44 n.17 (10th Cir. 2014); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Decision and Order at 5-6.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b). Thus, we affirm his finding that Claimant invoked the presumption. *Id.*

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[14] Employer implies the ALJ erred in finding the Miner was regularly exposed to coal mine dust because "there is no mention as to [the] length of time the miner worked at each job, such as the shake out, separated coal, etc." Employer's Brief at 19. However, Employer does not argue, and the ALJ did not find, that certain job duties exposed the Miner to coal mine dust and others did not. Decision and Order at 5-6. Because Employer has not explained the relevance of how much time the Miner spent on each of his job duties, we need not address its argument. *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").

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis[15] 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.[16]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered Drs. Tuteur's and Rosenberg's opinions that the Miner did not have legal pneumoconiosis.[17] Decision and Order at 14-15; Employer's Exhibits 1, 3. Dr. Tuteur opined the Miner had chronic obstructive pulmonary disease (COPD) related to cigarette smoking, and not coal mine dust exposure. Employer's Exhibit 3. Dr. Rosenberg opined the Miner had a severe airflow obstruction related to cigarette smoking, and not

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[15] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition 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).

[16] The ALJ did not address whether Employer disproved clinical pneumoconiosis because he found it could not rebut the presumed facts of legal pneumoconiosis and total disability due to pneumoconiosis. Decision and Order at 16.

[17] The ALJ also considered Dr. Habre's opinion that the Miner had chronic obstructive pulmonary disease related to cigarette smoking and coal mine dust exposure. Decision and Order at 10-11; MC Director's Exhibit 9 at 3. He determined Dr. Habre's opinion supports a finding of legal pneumoconiosis, and therefore does not aid Employer in rebutting the presumed fact that the Miner had the disease. *Id.* at 15 n.10.

coal mine dust exposure. Employer's Exhibit 1. The ALJ discredited Dr. Tuteur's opinion as unpersuasive and Dr. Rosenberg's opinion as inconsistent with the regulations and not well-reasoned. Decision and Order at 14-15.

Employer argues the ALJ erred in discrediting Dr. Tuteur's opinion.[18] Employer's Brief at 20-21. We disagree.

Dr. Tuteur opined "[n]o symptom, physical examination abnormality, impairment of pulmonary function, or radiographic change can reliably differentiate" between COPD caused by coal mine dust exposure or cigarette smoking. Employer's Exhibit 3 at 8. Instead, he concluded the Miner's COPD was not caused by coal mine dust exposure using "relative risk" and referencing medical studies purporting to show that the inhalation of coal mine dust causes COPD much less frequently than cigarette smoking causes it. *Id.* at 8-9.

Contrary to Employer's argument, the ALJ permissibly found Dr. Tuteur's opinion unpersuasive because it is based "solely on a weighing of relative risks" and "general statistics, without reference to the particularized facts about the Miner." Decision and Order at 14; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312-13 (4th Cir. 2012) (substantial evidence supported ALJ's discrediting of medical opinion where doctor relied "heavily on general statistics rather than particularized facts about" the miner); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 408-08 (6th Cir. 2020); *Goodin,* 743 F.3d at 1345-46; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

We thus affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. Decision and Order at 15. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. Therefore, 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); Decision and Order at 16-17. He permissibly discredited the opinions of Drs. Tuteur and Rosenberg on disability causation because they failed to diagnose legal pneumoconiosis, contrary to his finding that

[18] Because Employer does not challenge the ALJ's discrediting of Dr. Rosenberg's opinion, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order 14.

Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling,* 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 16. Having affirmed the ALJ's findings on legal pneumoconiosis, and because Employer raises no other arguments, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Skrack*, 6 BLR at 1-711. We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 17-18.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge