U.S. Department of Labor

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

BRB Nos. 18-0136 BLA
and 18-0137 BLA

LELA J. CLARK, o/b/o and Widow of RALPH L. CLARK	)	
Claimant-Respondent	)	
v.	)	
CENTRAL OHIO COAL COMPANY	)	DATE ISSUED: 03/27/2019
Employer-Petitioner	)	
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 in Living Miner's and Survivor's Claims of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims (2016-BLA-5099 and 2016-BLA-5100), rendered by Administrative Law Judge Steven D. Bell on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on June 23, 2011, and a survivor's claim filed on July 29, 2015.[1]

Adjudicating the miner's claim, the administrative law judge found he had thirty-six years of coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. Claimant therefore invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits. In the survivor's claim, the administrative law judge found that because the miner was

[1] Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim. Survivor's Claim (SC) Director's Exhibit 2. The miner's most recent prior claim, filed on August 10, 2000, was denied by the district director on March 15, 2013, because he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Living Miner (LM) Director's Exhibits 2, 34. The miner took no further action until filing the present subsequent claim. The miner died on July 6, 2015. LM Director's Exhibit 40.

[2] 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 coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because he did not establish total disability. LM Director's Exhibit 2. Consequently, to obtain review on the merits of the miner's current claim, claimant had to submit new evidence establishing total disability. *See* 20 C.F.R. §725.309(c).

entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

On appeal, employer challenges the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2), and thus his finding that claimant invoked the Section 411(c)(4) presumption. Employer also asserts the administrative law judge erred in finding the presumption unrebutted and awarding benefits in the survivor's claim. Claimant responds, urging affirmance of the awards. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

We affirm, as uncontested by employer, the administrative law judge's finding that the miner had thirty-six years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-8. Thus, to invoke the Section 411(c)(4) presumption, claimant must establish that the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones*

[4] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); LM Director's Exhibit 5.

& Laughlin Steel Corp., 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Because all of the new pulmonary function studies are qualifying,[6] the administrative law judge found that they support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 26. He further found all of the new blood gas studies are non-qualifying, and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 26.

He next considered the new medical opinions of Drs. Holt, Knight, Bermudez, Zaldivar, and Spagnolo, together with the miner's medical treatment records. Drs. Holt, Knight, Bermudez, and Zaldivar opined that the miner was totally disabled from a respiratory standpoint from performing his usual coal mine work. Decision and Order at 26. The administrative law judge found that Dr. Spagnolo "did not directly address the issue of whether [the miner's] 'chronic respiratory impairment' would prevent him from returning to his previous coal mine employment." Decision and Order at 26. Therefore, "rely[ing] on the unanimous opinions of the physicians who actually addressed this issue," the administrative law judge concluded that the medical opinion evidence establishes total disability. Decision and Order at 27; *see* 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the administrative law judge erred in his evaluation of the medical opinions. Employer's Brief at 8-19. We disagree.

Dr. Zaldivar, employer's expert witness, examined the miner and reviewed medical records. He opined that the miner's pulmonary function studies reflect a "severe respiratory impairment" that rendered him "totally and permanently disabled" from performing his last coal mine job as an electrician foreman.[7] Living Miner (LM) Director's

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

[7] Employer's suggestion that the miner was transferred to a lighter duty job after working as electrician foreman is without merit. Employer's Brief at 14 n.5. Contrary to employer's argument, the electrician foreman position *is* the lighter duty job to which the miner said he was transferred. LM Director's Exhibit 4. The miner explained that electrician foreman is a lighter duty position than electrician, and he was moved to the electrician foreman position "for career advancement and because [he] was aging." *Id*. The miner and the physicians of record thus correctly identified his most recent job as being

Exhibit 22. With respect to the exertional requirements of that job, Dr. Zaldivar stated that the miner had to "take radio calls for electrical work as needed," "go and check the progress of the work and order parts," "climb on equipment to make sure they were working properly," "climb a ladder up to the cab" of machines that were five or six stories high, and "walk as much as a mile a day." *Id*.

Employer concedes that Dr. Zaldivar's understanding of these work requirements is "much the same" as the miner's description, and thus, he had "a better understanding [than the other physicians] of the job the [m]iner last performed." Employer's Brief at 14. Employer further concedes that his opinion "might be construed as helpful to the [c]laimant" in establishing total disability. *Id*. Employer's sole argument – that Dr. Zaldivar's diagnosis is "negated" by his attribution of that impairment to asthma, smoking, and use of Amiodarone – is without merit. *Id*. The issue at 20 C.F.R. §718.204(b), and for invocation of the Section 411(c)(4) presumption, is whether the miner had a totally disabling respiratory impairment, not the cause of that impairment. We therefore affirm the administrative law judge's finding that Dr. Zaldivar's opinion that the miner could not perform his usual coal mine job as an electrician foreman supports a finding of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 25-26.

We further reject employer's argument that the administrative law judge erred in declining to find that the opinion of employer's other expert, Dr. Spagnolo, constitutes a credible diagnosis that the miner was not totally disabled. Dr. Spagnolo stated the miner's last work as an electrician foreman required him to climb a five- to six-story ladder. LM Employer's Exhibit 5. He further noted the miner described the most difficult part of his job as "getting on and off the machines." *Id.* He stated the miner suffered from numerous medical conditions, including severe cardiac disease, arthritis with a knee replacement, and asthma, and had an obstructive impairment. *Id.* He opined that the miner's asthma and smoking history "led to his chronic respiratory impairment," but such impairment or condition "has [not] been aggravated in any way" by the inhalation of coal dust. ***Id.*** He then stated that while "[the miner's] other medical conditions . . . may prevent him from

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that of an electrician foreman, and consistently identified this job as requiring, among other things, walking up to a mile a day; climbing five- to six-story ladders to get into machines; and climbing on and off equipment to make sure it was working properly and to make any necessary repairs. LM Director's Exhibits 4-6, 11, 22, 24; LM Employer's Exhibits 5, 12 at 36-37.

climbing tall ladders that may have been required during his last coal[]mine job . . . this limitation is not caused in whole or in part by pneumoconiosis."[8] *Id*.

At his deposition, when asked whether the miner was disabled from a pulmonary standpoint, Dr. Spagnolo replied: "[G]iven [the miner's] FEV1 of a liter, I think he would have trouble climbing up – what was that, how many stories? Ten-story ladder? A six-story ladder. That's a pretty long way. He may have some trouble climbing that." LM Employer's Exhibit 12 at 36-37. When asked whether the miner could perform other job duties such as "getting up and down off of machinery," Dr. Spagnolo replied, "… I think he could probably do [it]. It's the ladder that bothers me a little bit." *Id*.

Based on this evidence, the administrative law judge rejected employer's contention that Dr. Spagnolo opined the miner was not disabled, labeling it "disingenuous and misleading." Decision and Order at 26, *citing* Employer's Post-Hearing Brief at 7. He stated: "Clearly, Dr. Spagnolo did NOT say that [the miner's] respiratory impairment was not sufficiently severe to prevent him from performing the requirements of his previous coal mine job. Nor did he state, as argued by the Employer, that [the miner's] serious asthmatic condition was not disabling from a pulmonary standpoint."[9] Decision and Order at 27 (internal citation omitted).

As the administrative law judge's finding is rational and supported by substantial evidence, we affirm his determination that Dr. Spagnolo "sidestepped the question of whether [the miner] was able, from a pulmonary standpoint, to perform the duties required

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[8] Dr. Spagnolo's statement that any limitation in the miner's ability to perform his coal mine job is not due to pneumoconiosis addresses the cause of the miner's disabling respiratory or pulmonary impairment, not its existence. LM Employer's Exhibits 5, 12 at 36-37. Existence of a totally disabling impairment is relevant at 20 C.F.R. §718.204(b)(2), while the issue of whether pneumoconiosis played any part in that impairment is properly addressed on rebuttal at 20 C.F.R. §718.305(d)(1)(ii).

[9] The administrative law judge also observed:

> In fact, Dr. Spagnolo did not indicate in any way whether [the miner's] chronic respiratory impairment, whether due to coal mine dust exposure or otherwise, would affect his ability to perform those job duties. All he said was that this impairment was not related to his exposure to coal mine dust, and that his other health conditions may have prevented him from performing his previous job duties.

Decision and Order at 27.

by his previous job." *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 27.[10] We therefore affirm his finding that Dr. Spagnolo's opinion is not probative on the issue of total disability because he did not express a definitive conclusion as to the miner's ability to perform his usual coal mine work from a respiratory perspective. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 27.

We further reject employer's assertion that the administrative law judge erred in crediting Dr. Holt's opinion because he had an inaccurate understanding of the miner's job duties. Employer's Brief at 13. To the contrary, Dr. Holt accurately stated the miner's last coal mine job was that of an electrician foreman and identified job duties consistent with those identified by the miner and Drs. Zaldivar and Spagnolo. LM Director's Exhibits 4-6, 11, 22, 25; LM Employer's Exhibits 5, 11, 12 at 36-37. Specifically, Dr. Holt stated that the miner's job required "a fair amount of physical activity," including "walking distances" and "climbing in and out of equipment."[11] LM Director's Exhibit 11. We also reject

[10] Indeed, Dr. Spagnolo's testimony that it would be difficult for the miner to climb a six-story ladder due to his low FEV1 value is best construed as a statement that the miner cannot perform his previous coal mine job from a respiratory standpoint. *See Budash v. Bethlehem Mines Corp.*, 13 BLR 1-44, 1-50 (1985) (en banc) ("A medical report only needs to describe either the severity of the impairment or the physical effects imposed by [the miner's] respiratory impairment sufficiently so that the administrative law judge can infer that [the miner] is totally disabled."); LM Employer's Exhibit 12 at 36. Employer's suggestion that this portion of Dr. Spagnolo's opinion should be ignored because he overstated claimant's actual job duties is unavailing. Employer's Brief at 17. The miner's application for benefits, dated June 21, 2011, lists the job duty of "climbing up on big machines to operate [and] work on them;" both Dr. Zaldivar and Dr. Spagnolo identified climbing five- or six-story ladders to get into machines as a requirement of his most recent coal mining job; and the miner's son similarly testified at the hearing that climbing five- or six-story ladders into machines was one of the miner's job duties. LM Director's Exhibits 4-6, 11, 22, 24; LM Employer's Exhibits 5, 12 at 36-37; Hearing Transcript at 23-25.

[11] Contrary to employer's argument, Dr. Holt's statement that the miner "walk[ed] distances" is consistent with the miner's statement that he had to "walk a reasonable amount" or "at least a mile a day," and Dr. Zaldivar's statement that he had to walk "as much as a mile a day." LM Director's Exhibits 4-6, 11, 22. We are also not persuaded that Dr. Holt's statement that the miner "would also have had a tool belt that he would have worn" undermines his opinion, particularly in light of the fact that one of the miner's job

employer's argument that Dr. Holt did not identify "what particular aspect of the [m]iner's test results" rendered the miner totally disabled. Employer's Brief at 13. Dr. Holt explicitly concluded that the miner was totally disabled from performing his work as an electrician foreman based on the "severe obstructive lung defect" reflected by the miner's FEV1 value of 33 percent predicted. LM Director's Exhibit 11. Accordingly, we affirm the administrative law judge's determination that Dr. Holt's opinion supports a finding of total disability.

We also reject employer's argument that remand is required because Drs. Knight and Bermudez were not sufficiently aware of the exertional requirements of the miner's usual coal mine job. Employer's Brief at 12-14. Dr. Knight was aware that the miner's last coal mine job was that of an electrician foreman, having incorporated the miner's Employment History Form, CM-911, into his medical report. LM Director's Exhibit 10, *citing* LM Director's Exhibit 5. Based on the "severe obstruction" reflected on the January 25, 2011 pulmonary function study and the April 5, 2011 "diffusion studies show[ing] a moderate impairment," Dr. Knight concluded that the miner "would be unable with these types of pulmonary functions to perform his prior coal mining-type work." LM Director's Exhibit 10. Dr. Bermudez was also aware that the miner last worked as an electrician foreman[12] and concluded that the miner's "severe chronic obstructive pulmonary process and the severity of this impairment precludes [him] from performing his coal mining activities." *Id.*

Even if there were merit to employer's argument that these physicians did not adequately discuss the exertional requirements of being an electrician foreman, their opinions that the miner is totally disabled, if discredited, would neither support a finding of total disability nor weigh against such a finding. *See Rafferty*, 9 BLR at 1-232. Thus, to the extent we have affirmed the administrative law judge's finding that Drs. Zaldivar and Holt credibly diagnosed total disability, while Dr. Spagnolo did not offer a probative opinion on the issue, any alleged error in crediting the opinions of Drs. Knight and Bermudez is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any

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duties was walking to machinery and climbing into it for the purpose of repairing it. LM Director's Exhibit 25 at 41-42.

[12] Dr. Bermudez, the miner's treating pulmonologist, diagnosed a severe obstructive impairment, which precluded the miner "from performing his coal mining activities." LM Claimant's Exhibit 1. He reported that he reviewed the miner's employment history as set forth in the district director's proposed Decision and Order and in the Schedule for Submission of Additional Evidence. *Id.*; *see* LM Director's Exhibits 16, 37.

difference"). We therefore affirm the administrative law judge's finding that the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We also reject employer's argument that the administrative law judge improperly shifted the burden of proof by requiring employer to rebut a presumption that the miner was totally disabled. Employer's Brief at 19. As referenced by the administrative law judge, the regulation at 20 C.F.R. §718.204(b)(2) provides, "[i]n the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) . . . shall establish a miner's total disability." Decision and Order at 25. Having found that all three pulmonary function studies are qualifying for total disability, the administrative law judge considered whether "there is [any] contrary probative evidence to rebut" the finding of total disability based on the pulmonary function studies. Decision and Order at 27. As discussed above, he permissibly found that the medical opinion evidence supports a finding of total disability and is not contrary probative evidence that would undermine the qualifying pulmonary function studies. He also considered the non-qualifying blood gas studies but permissibly found they do not undermine the qualifying pulmonary function studies. *See Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying pulmonary function study are not called into question by a contemporaneous normal blood gas study); Decision and Order at 26-27.

We thus reject employer's contention that the administrative law judge failed to adequately weigh all of the relevant evidence, Employer's Brief at 9-10, 19-20, and see no error in his finding that, "weighing all of the medical evidence as a whole . . . [c]laimant has established that [the miner] had a totally disabling respiratory impairment." Decision and Order at 27. We therefore affirm his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) overall, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[13] and invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither

[13] In determining whether claimant established total disability, the administrative law judge reasonably accorded greater weight to the evidence submitted in the current claim as being more indicative of the miner's condition as of the October 27, 2016 hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 35-36.

legal nor clinical pneumoconiosis,[14] or that "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 administrative law judge found employer failed to rebut under either prong.[15] Decision and Order at 30-34.

Employer alleges that the administrative law judge applied an incorrect standard in finding it did not disprove legal pneumoconiosis.[16] We disagree. The administrative law judge did not discredit the physicians' rebuttal opinions based on the application of an incorrect standard,[17] but instead provided valid reasons for finding their diagnoses inadequately reasoned.

Both Dr. Zaldivar and Dr. Spagnolo stated that the miner's severe obstructive impairment was not related in any way to coal dust inhalation. LM Director's Exhibit 22 at 3-4; LM Employer's Exhibits 5, 11 at 24-26, 33; 12 at 9, 36. As the administrative law judge noted, however, both physicians also opined that to identify coal dust as a causal

[14] "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). "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).

[15] The administrative law judge found employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 28-29.

[16] Employer also alleges the administrative law judge erred in crediting the diagnoses of legal pneumoconiosis made by Drs. Knight, Holt, and Bermudez. Contrary to employer's contention, the administrative law judge properly found that because they all diagnosed legal pneumoconiosis their opinions do not assist employer in meeting its burden on rebuttal. 20 C.F.R. §718.305(d)(1)(i)(A).

[17] The administrative law judge initially stated correctly that employer is required to establish that the miner did not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Decision and Order at 29. He subsequently characterized the standard as follows: "It is the Employer's burden to establish that [the miner's] respiratory impairment was not related to his 36 years of exposure to coal mine dust;" the Employer must make an affirmative showing that . . . the disease is not related to coal mine work;" and employer must demonstrate that the miner's "disabling pulmonary impairment is not due, at least in part, to his history of coal mine dust exposure[.]" *Id*. at 30 (citations omitted).

factor to the severe obstructive impairment requires radiological evidence of a significant dust burden or a significant degree of clinical pneumoconiosis.[18] Decision and Order at 30, 33. The administrative law judge permissibly discredited this reasoning as inconsistent with the Department of Labor's recognition that a physician can credibly diagnose pneumoconiosis "notwithstanding a negative x-ray" and that legal pneumoconiosis, in the form of a clinically significant obstructive impairment, can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 21, 2000); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 31, 33.

Further, Drs. Zaldivar and Spagnolo each opined that other factors and conditions, such as asthma and cigarette smoke exposure, could fully account for the miner's pulmonary impairment.[19] Decision and Order at 32-33; LM Employer's Exhibit 11 at 40-

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[18] Dr. Zaldivar stated:

> Well, the only way that coal and silica can cause damage to the lungs is by the mineral content of the lungs, which is causing an ongoing damage within the lungs we cannot see radiographically. So the underpinning of legal pneumoconiosis, I trust, is that there is enough mineral dust within the lungs to produce an ongoing damage which eventually will cause some degree of airway impairment.
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> Well, we don't have any evidence of mineral dust within the lungs even by CT scan, which is as close as we can get to a histological evaluation, so by the best non-invasive testing we have, there is not any visible mineral dust.
> …
>
> [N]o one has said this person's lungs have dust that I can see in the form of macules in the lungs or linear densities or whatever.

LM Employer's Exhibit 11 at 33, 50. Dr. Spagnolo stated: "[I]f you don't see it on the [x]-ray and you don't see it on the CT, and if you have other evidence, it would be very unlikely that they would be disabled. I'm not saying it's impossible but it would be unlikely." LM Employer's Exhibit 12 at 9. He also indicated, "I don't see any evidence of coal mine related dust disease. I didn't see it on the [x]-rays and the pulmonary functions are easily explainable by his asthma." *Id*. at 36.

[19] Dr. Zaldivar stated, "there is no need to invoke a hypothetical damage to the lungs from legal pneumoconiosis when we have a real diagnosis here that fully explains the situation" and "considering the totality of the case here, [the miner's impairment] is entirely due to longstanding asthma and smoking." LM Employer's Exhibit 11 at 40. Thus he

41; 12 at 35-36. In light of the additive nature of smoking and coal dust exposure, the administrative law judge permissibly found that neither physician adequately explained why the miner's thirty-six years of coal dust exposure did not significantly contribute, along with these other factors, to his impairment. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Rowe*, 710 F.2d at 255; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. at 79,940; Decision and Order at 32-33. Because the administrative law judge provided valid rationales for finding the opinions of Drs. Zaldivar and Spagnolo inadequately reasoned on the existence of legal pneumoconiosis, we affirm his finding that employer did not rebut the presumption at 20 C.F.R. §718.305(d)(1)(i)(A).

The administrative law judge next addressed whether employer satisfied the second method of rebuttal by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 34-35. He permissibly discredited the opinions of Drs. Zaldivar and Spagnolo on disability causation, as neither physician diagnosed legal pneumoconiosis, contrary to his finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); Decision and Order at 34-35. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established the miner's entitlement to benefits.

The Survivor's Claim

The administrative law judge found that claimant established each fact necessary for derivative entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 36. Because we have affirmed the award of benefits in the miner's claim, claimant is derivatively entitled to survivor's benefits

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concluded that the miner "did not have any impairment at all" caused by coal mine dust exposure. *Id.* at 41. Dr. Spagnolo similarly opined that he excluded coal mine dust exposure as a cause of the miner's impairment, in part, because he "could explain virtually everything based on the asthma" and, in particular, the miner's "pulmonary functions are easily explainable by his asthma." LM Employer's Exhibit 12 at 35-36.

pursuant to Section 422(*l*).[20] 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[20] We, therefore, need not address employer's arguments that claimant failed to establish that pneumoconiosis was a "substantially contributing cause" of, or "hastened" the miner's death pursuant to 20 C.F.R. §718.205. Employer's Brief at 39-42.