U.S. Department of Labor

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

BRB Nos. 22-0031 BLA
and 23-0075 BLA

CLAUDINE M. HARGIS (o/b/o and Widow of CARL R. HARGIS)	)	
Claimant-Respondent	)	
v.	)	
WEEBRO, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 8/11/2023
OLD REPUBLIC INSURANCE COMPANY	)	
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 Jerry R. DeMaio and Decision and Order Awarding Continuing Benefits of Willow Eden Fort, Administrative Law Judges, United States Department of Labor.

Daniel Sherman (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Steven Winkelman (miner's claim), and Jennifer Stockman (survivor's claim) (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jerry R. DeMaio's Decision and Order Awarding Benefits (2019-BLA-05109) and ALJ Willow Eden Fort's Decision and Order Awarding Continuing Benefits (2021-BLA-05728) 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 subsequent claim[1] filed on May 3, 2017, and a survivor's claim filed on March 15, 2021.[2]

ALJ DeMaio credited the Miner with at least ten years of coal mine employment. He therefore found Claimant[3] could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4)

[1] The Miner filed seven prior claims, all of which were either denied or withdrawn. Director's Exhibits 1-4, 49 at 7. The Miner withdrew his most recent prior claim. Director's Exhibit 49 at 7. It is therefore considered not to have been filed. 20 C.F.R §725.306(b). The district director denied the Miner's next most recent prior claim for failure to establish any element of entitlement. Director's Exhibit 3.

[2] The Board consolidates Employer's appeals in the miner's and survivor's claims for purposes of decision only.

[3] Claimant is the widow of the Miner, who died on December 27, 2020. Survivor's Claim Director's Exhibit 13. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was 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.

(2018); 20 C.F.R. §718.305. Considering entitlement under 20 C.F.R. Part 718, ALJ DeMaio found Claimant established legal pneumoconiosis substantially contributed to the Miner's respiratory disability. 20 C.F.R §§718.202(a), 718.203(b), 718.204(b)(2), (c). Because Claimant established all elements of entitlement ALJ DeMaio found she demonstrated a change in an applicable condition of entitlement,[5] 20 C.F.R §725.309(c), and awarded benefits. Subsequently, ALJ Fort awarded Claimant derivative survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[6]

On appeal, Employer argues ALJ DeMaio lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2,[7] and because the removal provisions applicable to ALJ DeMaio render his appointment unconstitutional. Employer also challenges ALJ DeMaio's findings that Claimant established pneumoconiosis (disease), total disability

[5] Where a claimant files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ 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(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because the Miner's prior claim was denied for failure to establish any element of entitlement, Claimant had to establish an element of entitlement to obtain review of the merits of the miner's claim. *Id*. Contrary to Employer's argument, ALJ DeMaio identified the Miner's last denied claim and determined Claimant established a change in an applicable condition of entitlement. Decision and Order at 6-7; Employer's Brief at 1-2, 24-25.

[6] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his 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).

[7] 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.

(disability), and total disability due to pneumoconiosis (disability causation).[8] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's constitutional challenges. Employer replied to Claimant's and the Director's briefs, reiterating its contentions.

With respect to the survivor's claim, Employer argues ALJ Fort erred in awarding survivor's benefits under Section 422(*l*) because the award in the miner's claim was pending on appeal before the Board and thus was not final. Claimant has not filed a response in the survivor's claim. The Director responds and argues Claimant is derivatively entitled to survivor's benefits.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJs' Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[9] 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 and Removal Protections

Employer urges the Board to vacate ALJ DeMaio's Decision and Order and remand this case[10] to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v.*

[8] We affirm, as unchallenged on appeal, ALJ DeMaio's findings that the Miner had at least ten years of coal mine employment and a forty-nine pack-year smoking history. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-5.

[9] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6; 8.

[10] Employer argues the United States Supreme Court's decision in *Carr v. Saul*, 593 U.S. , 141 S. Ct. 1352 (2021) "suggests that the Board is unable to decide matters of constitutional dimension . . . ." Employer's Brief at 13. Contrary to Employer's contention, the constitutionality of an ALJ's appointment raises a substantial question of law and is therefore within the Board's scope of review. 33 U.S.C. §921(b)(3); *see Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 676 (6th Cir. 2018) (Appointments Clause argument is to be first considered by the administrative agency); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984) (the Board is vested with "same judicial power to rule on substantive legal questions as was possessed by the district courts") (citation

SEC, 585 U.S. , 138 S. Ct. 2044 (2018).[11] Employer's Brief at 13-17. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[12] but maintains the ratification was insufficient to cure the constitutional defect in ALJ DeMaio's prior appointment. *Id.* at 14-18. It also challenges the constitutionality of the removal protections afforded DOL ALJs. *Id.* at 19-23. It generally argues the removal provisions for ALJs contained in the APA, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* at 20-23. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id.* at 13-14, 19-24. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

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omitted); *see also Energy W. Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (the Board has authority to remedy an Appointments Clause violation).

[11] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (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.

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

> In my capacity as head of the Department of Labor [(DOL)], and after due consideration, I hereby ratify the Department's prior appointment of you as an [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 DeMaio.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director*, OWCP, 9 BLR 1-1 (1986) (en banc).

To establish legal pneumoconiosis, Claimant must prove the Miner had 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(b). The United States Court of Appeals for the Sixth Circuit has held a claimant can satisfy this burden by showing that the disease was caused in part by coal mine employment. *Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

ALJ DeMaio considered the medical opinions of Drs. Chavda, Sood, Tuteur, and Rosenberg.[13] Decision and Order at 9-12. Drs. Chavda and Sood diagnosed the Miner with emphysema and chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Director's Exhibit 12; Claimant's Exhibit 4. Drs. Tuteur and Rosenberg opined the Miner's COPD was due to smoking, and that congestive heart failure and lung cancer unrelated to coal mine dust exposure also contributed to his respiratory impairment. Director's Exhibit 22; Employer's Exhibits 1, 3, 8.

ALJ DeMaio found the opinions of Drs. Chavda and Sood well-reasoned because they were based on the Miner's physical examinations, symptoms, histories, and objective test results. Decision and Order at 10, 12-14. Although he accorded "slightly less weight" to Dr. Chavda's opinion for overestimating the Miner's coal mine employment history at twenty years, he found it an otherwise reasoned opinion that coal mine dust exposure worsened the Miner's smoking-related COPD and emphysema. *Id.* at 12, 14. Conversely,

[13] ALJ DeMaio also considered but discredited Dr. Baker's opinion diagnosing legal pneumoconiosis because Dr. Baker "significantly misstated" the Miner's smoking and coal mine employment histories. Decision and Order at 13; Claimant's Exhibit 3. Since ALJ DeMaio did not rely on Dr. Baker's pneumoconiosis opinion we do not summarize it here.

ALJ DeMaio found Drs. Tuteur's and Rosenberg's opinions not as well-reasoned as those of Drs. Sood and Chavda and accorded them less weight. He therefore found the medical opinions "point[] toward a finding of legal pneumoconiosis," and that when all the evidence was considered, they establish legal pneumoconiosis. Decision and Order at 14.

Employer contends ALJ DeMaio erred in relying on Dr. Chavda's opinion when the doctor relied on a twenty-year coal mine employment history. Employer's Brief at 36. We disagree.

The ALJ determines the effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion. *See Huscoal, Inc., v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. 2022); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994). Contrary to Employer's argument, ALJ DeMaio considered the discrepancy in Dr. Chavda's statement of the Miner's coal mine employment history and accorded his opinion "slightly less weight" for that reason. Decision and Order at 12. ALJ DeMaio acted within his discretion in finding Dr. Chavda still rendered a well-reasoned opinion that although the Miner's smoking history caused COPD and emphysema, his coal mine coal dust exposure worsened those conditions.[14] Decision and Order at 14 (citing Director's Exhibit 12 at 14); *see Clemons*, 48 F.4th at 491; *Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-99; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012).

Employer also contends Dr. Chavda's opinion does not satisfy Claimant's burden of persuasion because he said, "exposure to coal dust cannot be completely ruled out that it has not caused any COPD or emphysema." Director's Exhibit 12 at 14.[15] However, Dr. Chavda also stated, "[the Miner's] COPD, emphysema, legal and clinical pneumoconiosis is substantially caused by 20 years of coal dust exposure" and, immediately after the comment in which he used the terminology "ruled out," he further explained "[i]t [exposure to coal mine dust] . . . has definitely caused worsening of COPD and emphysema which was originally caused by smoking . . . ." *Id.* Since the regulatory definition of legal pneumoconiosis encompasses "any chronic pulmonary disease or respiratory or pulmonary

[14] Moreover, even if ALJ DeMaio had discredited Dr. Chavda because of the inaccurate coal mine employment history, he fully credited Dr. Sood's diagnosis of legal pneumoconiosis over the contrary opinions of Drs. Rosenberg and Tuteur, a finding that we affirm. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the alleged "error to which [it] points could have made any difference").

[15] This statement occurs in the portion of Dr. Chavda's opinion discussing Claimant's history of smoking as a factor in his development of COPD, emphysema, and symptoms of coughing. Director's Exhibit 12 at 14.

impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R §718.201(b), considering Dr. Chavda's statements in their entirety, the ALJ permissibly considered Dr. Chavda to have concluded that, more likely than not, coal mine dust exposure had the requisite effect. *See Groves*, 761 F.3d at 598-99. Because we reject Employer's arguments, we affirm ALJ DeMaio's determination that Dr. Chavda's opinion may be credited to establish legal pneumoconiosis.

Employer next contends ALJ DeMaio did not explain why he credited Dr. Sood's opinion. Employer's Brief at 37. Again, we disagree. ALJ DeMaio specifically found Dr. Sood's opinion well-reasoned and well-documented when viewed in context of the record, and he cited Dr. Sood's documentation of "consistent chronic progressive respiratory symptoms, self-reported progressive activity intolerance, diagnoses of black lung by the treating providers, use of supplemental oxygen, abnormally reduced diffusing capacity, abnormally elevated alveolar arterial gradient at rest, desaturation on ambulation and the majority of chest x-rays." Decision and Order at 12-14. He therefore afforded "significant weight" to Dr. Sood's opinion that while the Miner's smoking affected his respiratory condition, his exposure to coal mine dust also substantially contributed to his COPD. Decision and Order at 12-14; Claimant's Exhibit 4 at 11-12; *see Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-99; *Banks*, 690 F.3d at 489. We thus reject Employer's contention and affirm ALJ DeMaio's decision to accord significant weight to Dr. Sood's opinion.

We also reject Employer's assertion ALJ DeMaio failed to provide a valid reason for discrediting Dr. Tuteur's opinion and impermissibly shifted the burden to it by requiring Dr. Tuteur to "rule out" any contribution of coal mine dust to the Miner's COPD. Employer's Brief at 39-40. Contrary to Employer's argument, ALJ DeMaio permissibly found that, although Dr. Tuteur recognized coal mine dust exposure can cause COPD and stated it is not possible to distinguish between the effects of smoking and coal mine dust, the physician did not adequately explain why the Miner's history of coal mine dust exposure did not contribute to or aggravate his COPD.[16] *See Clemons*, 48 F.4th at 489-90; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 20 C.F.R §718.201(b); Decision and Order at 13. Although Employer states Dr. Tuteur adequately explained his opinion, Employer's Brief at 39, its assertion amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Further,

[16] Dr. Tuteur opined that "when one compares the 20% risk of COPD among smokers who never mined to the l% to 2% risk of nonsmoking miners . . . it is with reasonable medical certainty that [the Miner's] . . . mild COPD is uniquely due to the chronic inhalation of tobacco smoke, not coal mine dust." Director's Exhibit 22 at 5.

ALJ DeMaio maintained the burden of proof on Claimant to establish legal pneumoconiosis. Decision and Order at 6, 14.

Employer also argues ALJ DeMaio erred in finding Dr. Rosenberg's opinion undermined. Employer's Brief at 37-38. We disagree.

As ALJ DeMaio noted, Dr. Rosenberg opined the Miner did not have legal pneumoconiosis based, in part, on his belief that coal dust-related lung disease would not be expected to develop and progress after exposure to coal mine dust ceases. Employer's Exhibit 8 at 10-11. Dr. Rosenberg reasoned that the Miner had normal lung function in 1996 when he left coal mine employment and his lung function did not deteriorate until years later, as he continued to smoke and developed other diseases. *Id.* at 11. ALJ DeMaio permissibly found Dr. Rosenberg's opinion, unequivocally rejecting coal dust exposure as a possible factor in Claimant's case, inconsistent with the regulatory recognition that pneumoconiosis is a "latent and progressive disease, which may first become detectable only after cessation of coal mine dust exposure."[17] 20 C.F.R. §718.201(c)(1); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014).

Consequently, we affirm, as supported by substantial evidence, ALJ DeMaio's determination that Claimant established legal pneumoconiosis based on the medical opinion evidence.[18] Decision and Order at 14; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on 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 ALJ must weigh the relevant evidence supporting a finding of

[17] Employer asserts ALJ DeMaio treated the preamble to the 2001 regulations as a finding that COPD is always related to coal mine dust exposure, Employer's Brief at 37 n.10, but he did not refer to or rely on the preamble. Decision and Order at 12-14.

[18] Because we affirm ALJ DeMaio's determination that Claimant established legal pneumoconiosis, we need not address Employer's challenges to his determination that she also established the Miner had clinical pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

total disability against the contrary evidence. *See Rafferty v. Jones & 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). ALJ DeMaio found Claimant established total disability based on the medical opinion evidence and the evidence as a whole.[19] Decision and Order at 21-22.

ALJ DeMaio considered the medical opinions of Drs. Chavda, Baker, Sood, Tuteur, and Rosenberg and found that, since all the physicians opined the Miner was totally disabled, the medical opinions established total disability. Decision and Order at 22.

Employer contends ALJ DeMaio erred in crediting Dr. Chavda's disability opinion without addressing the fact he found the August 30, 2017 pulmonary function study Dr. Chavda administered and relied upon to be invalid for lack of effort. Employer's Brief at 3-4, 25. But Employer identifies at worst a harmless error given the other evidence of total disability ALJ DeMaio credited. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the alleged "error to which [it] points could have made any difference"). Contrary to Employer's additional arguments, Dr. Baker gave no indication he relied on Dr. Chavda's invalid pulmonary function study to find the Miner totally disabled,[20] nor is there evidence that the diffusion capacity study Dr. Sood relied upon to diagnose "a class IV impairment," Claimant's Exhibit 4 at 14, was also invalidated.[21]

Additionally, we reject Employer's contention that ALJ DeMaio erred in finding Drs. Rosenberg's and Tuteur's opinions supportive of total disability. Employer's Brief at

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[19] ALJ DeMaio determined that the pulmonary function studies and arterial blood gas studies do not establish total disability and although Dr. Sood diagnosed cor pulmonale, he did not diagnose right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 18-21.

[20] While Dr. Baker summarized Dr. Chavda's medical report, when diagnosing total disability he referenced the qualifying values from the March 15, 2019 pulmonary function study he administered and interpreted as demonstrating a moderately severe restrictive ventilatory defect. Claimant's Exhibit 3 at 2. He also specifically referenced the Miner's need to be "on supplementary oxygen most of the time." *Id.* at 3.

[21] Dr. Vuskovich's report invalidating Dr. Chavda's August 30, 2017 pulmonary function study does not address the diffusing capacity study administered on the same date. Director's Exhibit 20 at 1-2. Moreover, the record indicates that Dr. Sood also relied on the Miner's pre-bronchodilator pulmonary function study values obtained from 2016 to 2019, and the presence of a gas exchange abnormality detected by ambulatory oximetry on March 9, 2018. Claimant's Exhibit 4 at 14.

26-27. It contends neither physician found a pulmonary disability, but rather attributed the Miner's impairment to nonpulmonary conditions. *Id.* Employer's argument conflates the issues of total disability and causation. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; in a claim being considered without the benefit of a presumption, the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4) or 718.204(c). *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). The pertinent regulation provides that "[i]f . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

Dr. Rosenberg noted that the Miner's lung function deteriorated after he developed heart failure and two simultaneous lung cancers in his left lung, and opined that the Miner became disabled as he developed "multiple whole-person disorders," including lung cancer and chronic congestive heart failure with chronic pleural effusion.[22] Employer's Exhibit 8 at 9. Dr. Tuteur opined that the Miner "is totally and permanently disabled from returning to work in the coal mining industry or work requiring similar effort," and that his moderate obstructive ventilatory impairment, lung cancer, coronary artery disease, and other nonpulmonary conditions "fully account for his impairment and disability." Director's Exhibit 22 at 4. We conclude that substantial evidence supports ALJ DeMaio's determination that Drs. Rosenberg and Tuteur diagnosed a respiratory or pulmonary disability, albeit one they opined was caused in part by nonpulmonary conditions or diseases. Decision and Order at 22; *see* 20 C.F.R §718.204(a).

We therefore affirm ALJ DeMaio's determination that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). As Employer raises no additional arguments, we affirm ALJ De Maio's finding that Claimant established total disability based on his consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty,* 9 BLR at 1-232.

[22] Employer focuses on Dr. Rosenberg's statement that the Miner "is not disabled from a pulmonary perspective," but it omits his reasoning that the Miner's lung function deteriorated and he "ha[d] become disabled" as he developed various pulmonary and nonpulmonary diseases. Employer's Exhibit 8 at 9; *see* 20 C.F.R §718.204(a). Dr. Rosenberg's conclusion was, "[t]aking this into account, [the Miner] is not disabled from a pulmonary perspective, and any reduction of lung function is not primarily related to a coal mine dust related etiology, even assuming he is disabled from a pulmonary perspective." Employer's Exhibit 8 at 11.

Disability Causation

To establish the Miner was totally disabled due to pneumoconiosis, Claimant must prove pneumoconiosis was "a substantially contributing cause of [the Miner's] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Groves*, 761 F.3d at 599-600. Pneumoconiosis is a "substantially contributing cause" if it has a "material adverse effect" on the Miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i),(ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

ALJ DeMaio found Dr. Sood's opinion that the Miner's disabling COPD was legal pneumoconiosis also established that pneumoconiosis was a substantially contributing cause of the Miner's total disability. Decision and Order at 22-23; 20 C.F.R §718.204(c). He discredited the opinions of Drs. Tuteur and Rosenberg that the Miner's totally disabling impairment was not caused by pneumoconiosis because neither physician diagnosed legal pneumoconiosis, contrary to his finding the Miner had the disease. Decision and Order at 23 (citing *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015)).

Employer contends ALJ DeMaio erred by relying on out-of-circuit authority to discredit the opinions of Drs. Tuteur and Rosenberg. Employer's Brief at 2-3, 6, 27-31. It asserts "the doctors' failure to find pneumoconiosis does not discredit the reasons they provided for ruling out coal dust as a contributor." *Id.* at 28-31.

We find no error in ALJ DeMaio's citation to *Epling* for the proposition that an ALJ may discredit a physician's disability causation opinion where the physician fails to diagnose pneumoconiosis. ALJ DeMaio's analysis is consistent with Sixth Circuit law. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993) ("The better way for the ALJ to proceed is to treat as less significant those physicians' conclusions about causation when they find no pneumoconiosis."), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (ALJ may discount a physician's opinion as to disability causation because he erroneously failed to diagnose pneumoconiosis). As Employer does not otherwise challenge the disability causation finding, we affirm ALJ DeMaio's finding that Claimant established the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c). We therefore affirm the award of benefits in the Miner's claim.

The Survivor's Claim

Based on the award of benefits in the Miner's claim, ALJ Fort found Claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under

Section 422(*l*) of the Act: 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*); Survivor's Claim Decision and Order at 2-3.

Employer argues ALJ Fort erred in determining that Claimant is derivatively entitled to survivor's benefits under Section 422(*l*) because the Miner's award of benefits was not final. Survivor's Claim Employer's Brief at 4-7. The Board has previously rejected this argument, holding an award of benefits in a miner's claim need not be final or effective for a claimant to receive benefits under Section 422(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014).[23] For the reasons set forth in *Rothwell,* we reject Employer's argument. Because we have affirmed the award of benefits in the Miner's claim, we affirm ALJ Fort's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013).

[23] Employer contends *Rothwell v. Heritage Coal Co*., 25 BLR 1-141 (2014) is inapplicable because it involved modification proceedings that left intact an ALJ's "final and effective" order, rather than involving an appeal. Survivor's Claim Employer's Reply at 1. But *Rothwell* specifically states benefits under the Act are due "after the issuance of an effective order requiring the payment of benefits . . . notwithstanding the *pendency of a motion for reconsideration before an* [*ALJ*] *or an appeal to the Board or court* . . . ." 25 BLR at 1-146 (quoting 20 C.F.R. §725.502(a)(l)) (emphasis added). Additionally, "[a]n effective order shall remain in effect *unless it is vacated* by an [ALJ] on reconsideration, or, upon review . . . by the [Board] or an appropriate court . . . ." 20 C.F.R. §725.502(a)(l) (emphasis added).

Accordingly, ALJ DeMaio's Decision and Order Awarding Benefits and ALJ Fort's Decision and Order Awarding Continuing Benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge