U.S. Department of Labor

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

BRB No. 22-0438 BLA

AVONELL ISAAC (Widow of LONZO ISAAC) Claimant-Respondent v. AGIPCOAL USA INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/20/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2015-BLA-05593) rendered on a survivor's claim filed on August 20, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act). This claim is before the Benefits Review Board for a third time.[1]

The ALJ found Claimant[2] established the Miner had more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). The ALJ therefore found she invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's finding of total disability and thus invocation of the Section 411(c)(4) presumption. It further challenges the ALJ's findings

[1] ALJ Larry A. Temin awarded benefits in a decision issued December 22, 2017. Upon Employer's appeal to the Board challenging ALJ Temin's authority to hear and decide the case, the Board remanded the case for ALJ Temin to reconsider his actions and ratify his findings, if appropriate. *Isaac v. Agipcoal USA, Inc.*, BRB No. 18-0160 BLA (May 31, 2018) (Order) (unpub.). On August 8, 2018, ALJ Temin issued a decision and order on remand, ratifying his prior decision. Employer again appealed and the Board remanded for a new hearing before a different ALJ, pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *Isaac v. Agipcoal USA, Inc.*, BRB No. 18-0556, slip op. at 3-4 (July 26, 2019) (unpub.). On remand, the case was assigned to ALJ Peter B. Silvain, Jr., who held a hearing. 2020 Notice of Hearing; 2020 Hearing Transcript. After the hearing, but prior to issuance of a decision, the case was reassigned to ALJ John P. Sellers (the ALJ). Decision and Order at 3.

[2] Claimant is the surviving spouse of the Miner, Lonzo Isaac, who died on June 28, 2013. Director's Exhibits 2, 11. The Miner did not file a lifetime claim for benefits; thus, Claimant is not entitled to derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death 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 at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

that it failed to rebut the presumption.[4] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, declined to file a response. Employer filed a reply brief, reiterating its arguments.

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

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). 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.[6] 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 all relevant supporting evidence against all relevant 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). The ALJ found Claimant established total disability based on the medical opinion evidence, as supported by the Miner's treatment records.[7] Decision and Order at 21.

---

[4] We affirm, as unchallenged, the ALJ's finding that Claimant established the Miner had more than fifteen 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.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; 2020 Hearing Transcript at 19.

[6] The ALJ found the Miner's usual coal mine work was as a roaming repairman, which "involved at least some periods of heavy to very heavy manual labor." Decision and Order at 7. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[7] We affirm, as unchallenged on appeal, the ALJ's findings that the pulmonary function studies and arterial blood gas studies do not support total disability and there is no

Treatment and Hospitalization Records

As the medical opinion evidence is based primarily on the experts' consideration of the Miner's treatment and hospitalization records, we will first address the ALJ's findings regarding this evidence.

The ALJ summarized the Miner's various treatment and hospitalization records, spanning from the 1960s through his death in 2013. Decision and Order at 11-16. The ALJ indicated that while the records do not "expressly" state the Miner was totally disabled or discuss his ability to do exertional work, they document his worsening condition from "2009 onward," with frequent hospitalizations for shortness of breath, bouts of congestive heart failure, respiratory failure, hypoxemia, and chronic obstructive pulmonary disease (COPD) exacerbations. *Id.* at 16; Director's Exhibits 13-15; Claimant's Exhibit 3. He further noted the Miner was prescribed oxygen in 2010 and relied upon it until he died. Decision and Order at 16. The ALJ concluded that "while there is nothing in the treatment records to support a finding of total disability, I find that the records are insufficient to show that the Miner was not disabled prior to his death." *Id.*

Employer argues the ALJ used an incorrect legal standard by placing the burden on Employer to disprove total disability, pointing to the ALJ's conclusion regarding the treatment records. Employer's Brief at 14. We disagree.

Rather than applying an incorrect standard, the ALJ simply found the treatment records neither support nor disprove a finding of total disability on their own. This finding is evident, particularly given the ALJ's earlier indication that the records do not "expressly" address the issue but demonstrate a decline in the Miner's condition. Decision and Order at 16; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (if a reviewing tribunal can understand what the ALJ did and why he did it, the ALJ has complied with his duty of explanation).

Medical Opinion Evidence

We next address the ALJ's consideration of the medical opinions of Drs. Perper, Tuteur, and Rosenberg. Decision and Order at 17-22; Claimant's Exhibit 1; Employer's Exhibits 4-6. Dr. Perper opined the Miner was totally disabled from a respiratory impairment while Drs. Tuteur and Rosenberg opined he was not totally disabled from a primary pulmonary or respiratory impairment but, rather, was impaired from cardiac disease. Decision and Order at 19-21. The ALJ credited Dr. Perper's opinion as well-

---

evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 7, 9-10.

documented and well-reasoned and most consistent with the overall weight of the evidence, and he accorded Drs. Tuteur's and Rosenberg's opinions little weight. *Id*. Consequently, the ALJ found the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 19-21.

Employer argues the ALJ erred in his consideration of the medical opinion evidence. Employer's Brief at 17-22. We disagree.

Employer first asserts the ALJ made impermissible inferences and substituted his opinion for that of the expert when he determined that Dr. Perper's opinion supports total disability. Decision and Order at 21; Employer's Brief at 18. Specifically, it contends that Dr. Perper's opinion cannot support total disability "as a matter of law" because he failed to demonstrate an understanding of the exertional requirements of the Miner's usual coal mine employment or opine that the Miner was unable to do such work. Employer's Brief at 21-22.

The ALJ acknowledged that while Dr. Perper identified tasks the Miner performed in his usual coal mining work, he did not specifically address the exertional requirements. Decision and Order at 20. However, noting that Dr. Perper stated the Miner's shortness of breath and insufficient blood oxygenation severely limited his abilities, the ALJ found it reasonable to infer from this opinion that the Miner was precluded from performing the very heavy exertion required of his usual coal mine work and thus that Dr. Perper's opinion supported total disability. *Id.* at 21.

Contrary to Employer's contention, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his usual coal mine work. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of the miner's usual coal mine work). As the ALJ indicated, Dr. Perper opined that the Miner's well-documented shortness of breath and insufficient blood gas exchange, necessitating the use of continuous oxygenation, "*severely* limited" his activities and are "consistent with a totally and permanently disabling respiratory impairment." Claimant's Exhibit 1 at 31-32 (emphasis added). Thus, the ALJ permissibly concluded that Dr. Perper's opinion supports a finding that the Miner was incapable of

performing very heavy labor and thus was totally disabled.[8] *McMath*, 12 BLR at 1-9; *Budash*, 9 BLR at 1-51-52; Decision and Order at 20-21.

Employer next contends the ALJ erred in rejecting Dr. Rosenberg's opinion that the Miner was not disabled from a "primary" pulmonary disease but, rather, was disabled due to cardiac disease. Employer argues that disability must be entirely respiratory in nature and cannot be secondary to cardiovascular disease. Employer's Brief at 17. We disagree.

Dr. Rosenberg indicated the treatment records demonstrated the Miner had congestive heart failure, including multiple hospitalizations over several years until his death. Employer's Exhibits 5, 6. He stated the Miner had "backup of fluid" in his lungs that caused shortness of breath and "would lead to oxygenation abnormalities and ultimately some type of respiratory impairment." Employer's Exhibit 6 at 50. He opined the Miner was totally disabled, but indicated his impairment was due to cardiac disease and not a "primary pulmonary disorder"; thus, he found the Miner was not disabled from a pulmonary or respiratory impairment. Employer's Exhibits 5 at 11; 6 at 50.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the miner had a totally disabling respiratory or pulmonary impairment. The cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 10-11 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023).

As the ALJ found, Dr. Rosenberg explained "in great detail" the impact the Miner's cardiac disease had on his lung function and that it rendered him disabled. Decision and Order at 20. Dr. Rosenberg explained that fluid accumulated in the Miner's lungs, preventing adequate gas exchange and resulting in shortness of breath. Decision and Order at 18-19; Employer's Exhibit 6 at 50-51. Further, the ALJ correctly noted that the regulations provide that "[if] . . . a nonpulmonary or nonrespiratory condition or disease

[8] Employer also argues the ALJ erred in failing to address Dr. Perper's reliance on a 2011 pulmonary function study that was not of record. Employer's Brief at 21; Claimant's Exhibit 1. While Dr. Perper referenced a February 19, 2011 pulmonary function study not in the record, this reference appears to be a typographical error as the pulmonary function study dated February 19, 2010, admitted in the record, includes the same values referenced by Dr. Perper. *See* Claimant's Exhibit 1 at 9; Director's Exhibit 14 at 10. Thus, we reject Employer's argument that the ALJ erred in failing to address Dr. Perper's consideration of evidence outside of the record.

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); Decision and Order at 20. Thus, while the ALJ credited Dr. Rosenberg's assessment that the Miner had a disabling impairment, he permissibly found Dr. Rosenberg's conclusion that the Miner could not be considered totally disabled because he did not have a "primary pulmonary problem," to be contrary to the regulations and worthy of little weight. Decision and Order at 20; *see* 20 C.F.R. §718.204(a).

Employer next argues the ALJ erred in discrediting Dr. Tuteur's opinion for relying on the February 19, 2010 pulmonary function study. Employer's Brief at 19; Decision and Order at 21. Relatedly, it contends the ALJ erred in assigning Dr. Tuteur's opinion little weight because he did not adequately address the Miner's capabilities at the time of his death, arguing it is inappropriate to address disability during a terminal hospitalization. Employer's Brief at 20; Decision and Order at 21. We find Employer's arguments unpersuasive.

As the ALJ found, Dr. Tuteur relied solely on the 2010 pulmonary function study to assess impairment and, unlike the other medical experts, did not address the decline in the Miner's condition demonstrated in the treatment and hospitalization records after that time. Decision and Order at 21; Employer's Exhibit 4 at 13; *see* 20 C.F.R. §718.204(b)(2)(iv). Thus, contrary to Employer's contentions, the ALJ did not assess total disability based on the Miner's terminal hospitalization, but permissibly found Dr. Tuteur did not adequately address the other relevant evidence that post-dates the 2010 pulmonary function study. 20 C.F.R. §718.305(b)(1)(iii) (invocation of the presumption is established if the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment"); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988) (ALJ may give greater weight to more recent evidence as more probative of the miner's current condition). Thus, the ALJ permissibly accorded Dr. Tuteur's opinion little weight. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 21.

As it is supported by substantial evidence, we affirm the ALJ's findings that the medical opinion evidence supports total disability. 20 C.F.R. §718.204(b)(2)(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order at 21.

Weighing the Evidence Together

Finally, Employer argues that when the ALJ weighed the evidence regarding total disability together, he failed to weigh the non-qualifying pulmonary function study

evidence; rather, he summarily stated it cannot be used to establish total disability. Employer's Brief at 21. We disagree.

In weighing the various types of evidence together, the ALJ considered Dr. Perper's "well-reasoned and supported opinion," the non-qualifying pulmonary function study evidence, and the invalid arterial blood gas studies conducted during the Miner's hospitalizations.[9] Decision and Order at 21. Weighing "like and unlike evidence together," he found the medical opinion evidence establishes total disability. *Id.* We affirm this finding.

The ALJ found Drs. Perper's and Rosenberg's explanations that the record demonstrates a disabling blood oxygenation impairment to be persuasive. Decision and Order at 10, 19-21. He also found that the extensive record of the Miner's cardiac, pulmonary, and respiratory issues, combined with Dr. Rosenberg's opinion as to how cardiac disease caused fluid to accumulate in the Miner's lungs and interfere with gas exchange, support a finding of "chronic pulmonary impairments" from 2009 until the Miner's death. *Id.* at 20. Further, the ALJ found Dr. Tuteur's sole reliance on the 2010 pulmonary function study did not adequately address the more recent evidence regarding the Miner's condition. *Id.* Thus, considering the ALJ's findings as a whole, it is evident that he found the single, non-qualifying pulmonary function study outweighed by the other relevant evidence.[10] *Mays*, 176 F.3d at 756.

Moreover, given the ALJ's findings, even assuming he inadequately explained his weighing of the non-qualifying pulmonary function study, Employer has not explained how that study could outweigh the evidence supporting total disability, as pulmonary function studies do not measure blood oxygenation. *See Tussey v. Island Creek Coal Co.*,

[9] Employer argues the ALJ's finding that the "objective testing militating against a total disability finding 'cannot be used to establish total disability'" demonstrates the ALJ's application of an incorrect legal standard. Employer's Brief at 14-15 (citing Decision and Order at 21). However, it is evident that the ALJ's statement quoted by Employer refers to the hospitalization arterial blood gas studies, which the ALJ found cannot be used to support total disability because they were obtained during a hospitalization for an acute respiratory or cardiac illness. *See* Decision and Order at 10 (citing Appendix C to 20 C.F.R. Part 718).

[10] The ALJ also considered Claimant's deposition testimony that the Miner was sick "all the time" from 2009 forward, with his breathing progressively worsening. Director's Exhibit 18 at 15-16. She also testified that the Miner used supplemental oxygen "24/7" during the last year of his life. *Id.* at 19.

982 F.2d 1036, 1040-41 (6th Cir. 1993) (as blood gas studies and pulmonary function studies measure different types of impairment, the two are not directly contrary or offsetting); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Consequently, we affirm the ALJ's finding that Claimant established total disability and thus invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2),718.305; Decision and Order at 21-22.

Rebuttal of 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,[11] or "no part of [his] death 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.[12]

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)(2)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds this standard requires Employer to show the Miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than *a de minimis* impact

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

[12] The ALJ found Employer rebutted the presence of clinical pneumoconiosis. Decision and Order at 24.

on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

The ALJ considered the medical opinions of Drs. Rosenberg and Tuteur that the Miner did not have legal pneumoconiosis, as well as the Miner's treatment records.[13] Decision and Order at 25-29. The ALJ found Drs. Rosenberg's and Tuteur's opinions not well-reasoned or well-documented and thus insufficient to rebut the presence of legal pneumoconiosis. *Id.* at 28-29.

Employer contends the ALJ erred in assigning greater weight to the diagnoses of COPD and obstructive disease in the Miner's treatment records over Drs. Rosenberg's and Tuteur's opinions that there is no basis for those diagnoses. Employer's Brief at 26-27. Employer further contends the ALJ misused the preamble to the 2001 revised regulations. *Id.* at 27-28. Employer's arguments are unpersuasive.

As the ALJ indicated, because Claimant invoked the Section 411(c)(4) presumption, the Miner is presumed to have legal pneumoconiosis and Employer must affirmatively disprove the disease by a preponderance of the evidence. 20 C.F.R. §§718.201(b)(2), (c), 718.305(d)(2)(i)(A); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Minich*, 25 BLR at 1-155 n.8; Decision and Order at 25. He further found there are multiple diagnoses in the record of COPD and bronchitis, as well as x-rays identifying emphysema.[14] Decision and Order at 26-27; Director's Exhibits 13-15; Claimant's Exhibit 3.

While Drs. Tuteur and Rosenberg acknowledged these diagnoses, they contended there was no objective evidence of obstruction in the record to support such diagnoses. Employer's Exhibits 4-6. Given Employer's burden to affirmatively disprove legal pneumoconiosis and the multiple diagnoses of COPD and bronchitis by different

[13] The ALJ also considered Dr. Perper's opinion that Claimant had legal pneumoconiosis; however, as the ALJ found, his opinion does not support Employer's burden on rebuttal. Decision and Order at 29; Claimant's Exhibit 1. Thus, we need not consider Employer's arguments regarding the ALJ's consideration of this opinion. Employer's Brief at 28-29.

[14] Employer contends the diagnoses of chronic obstructive pulmonary disease (COPD) relied on medical history provided by the Miner's daughter. Employer's Brief at 26. However, this notation of a history provided by his daughter was during his terminal hospitalization, Claimant's Exhibit 3 at 9, and diagnoses of COPD were made prior to that time. *See, e.g.*, Director's Exhibit 14 at 9, 21; Director's Exhibit 15 at 23, 95, 152; Claimant's Exhibit 3 at 6.

physicians, the ALJ permissibly found Drs. Rosenberg's and Tuteur's opinions – premised on a belief that the record evidence does not prove obstruction – did not convincingly disprove legal pneumoconiosis.[15] *See Kennard*, 790 F.3d at 668; Decision and Order at 25-27.

Moreover, while Dr. Tuteur contended there was no objective evidence of obstruction, he acknowledged that there was reduction in the Miner's FEV1 in the 2010 pulmonary function study, but stated it was solely due to edema from congestive heart failure. Decision and Order at 24; Employer's Exhibit 4. The ALJ permissibly found that Dr. Tuteur's opinion was undermined because he provided no explanation as to how he concluded that the Miner's coal mine dust exposure was not a significant contributing or aggravating cause. *See* 20 C.F.R. §718.201(a)(2) (legal pneumoconiosis "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment"); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013) (ALJ has discretion to assess credibility of the medical opinions based on the explanations given and assign those opinions appropriate weight); Decision and Order at 25-26.

Similarly, Dr. Rosenberg opined there was no evidence of obstruction,[16] and while the Miner had blood gas abnormalities near the end of his life, he stated they were due solely to congestive heart failure. Employer's Exhibits 5, 6. In support of his conclusion, Dr. Rosenberg pointed in part to his belief that the Miner had no symptoms until after he ceased coal mining and indicated that if the Miner had suffered from legal pneumoconiosis, his symptoms would not have been of such recent onset. Employer's Exhibit 5 at 12-13.

[15] Employer also contends the ALJ erred in finding Drs. Yonts's and Alam's status as the Miner's treating physicians entitles their opinions to more weight; it also alleges their opinions are unsupported and are not medical opinions under 20 C.F.R. §718.104(d). Employer's Brief at 26-27; Employer's Reply at 3-4. We note that the ALJ was required to consider the treatment records, as they were admitted into evidence. *See McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Further, any alleged error in the ALJ's findings would be harmless as it is Employer's burden to affirmatively disprove legal pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[16] Dr. Rosenberg contended the 2010 pulmonary function study was invalid and thus of "no diagnostic value for COPD." Employer's Exhibit 6 at 22-23. He indicated if one were to assume it was valid, it would demonstrate "mild obstruction." *Id.* The ALJ found the study to be sufficiently reliable, a finding Employer does not challenge; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8.

The ALJ found Dr. Rosenberg's opinion unreasoned and unsupported, noting the Miner's treatment records document ongoing complaints of shortness of breath and cough as far back as the 1960s, "well before" the Miner ceased coal mining work in 1984. Decision and Order at 28 (citing Director's Exhibit 12). Further, even if the ALJ had found Dr. Rosenberg's factual assumption regarding the timing of the Miner's symptoms supported, he determined the physician's contentions to be contrary to the regulations which state that pneumoconiosis is a latent and progressive disease that may first become detectable after coal mining ceases. Decision and Order at 28 (citing 20 C.F.R. §718.201(c)).

While Employer generally argues the ALJ erroneously relied on the preamble to the amended regulations in making his credibility determination (on the basis that the preamble "says nothing about cardiac conditions" like the Miner's),[17] it has not challenged these specific findings regarding Dr. Rosenberg's opinion; thus, they are affirmed.[18] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Based on the foregoing, we affirm the ALJ's finding that Employer failed to rebut the presence of legal pneumoconiosis. Decision and Order at 28-29; 20 C.F.R. §718.305(d)(i)(A).

Death Causation

The ALJ next considered whether Employer established that "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 29-30. Contrary to Employer's argument, the ALJ permissibly discredited Drs. Tuteur's and Rosenberg's death causation opinions because the doctors did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the Miner had the disease. *See Ogle*, 737 F.3d at 1074; *Island*

[17] Further, we reject Employer's implication that the ALJ cannot use the scientific principles in the preamble to make credibility determinations because it was not "subject to notice and comment rule making." Employer's Brief at 28. The Sixth Circuit has held ALJs may rely upon the scientific evidence the DOL found credible in the preamble as guidance or to resolve evidentiary disputes, as long as it is not treated as binding. *Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 838-39 (6th Cir. 2023).

[18] As the ALJ provided valid bases for finding Drs. Tuteur's and Rosenberg's opinions undermined, we need not address Employer's remaining contention that the ALJ mischaracterized their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 28.

Creek Ky. Mining v. Ramage, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 29; Employer's Exhibits 4-6; Employer's Brief at 29-30.

Moreover, contrary to Employer's contention, the absence of a specific diagnosis in the treatment records does not require a finding that pneumoconiosis is absent or could not have contributed to the Miner's death.[19] *See Marra v. Consolidation Coal*, 7 BLR 1-216, 218-19 (1984) (ALJ not required to conclude treatment records silent as to the presence of pneumoconiosis are probative of its absence); Employer's Brief at 31. Thus, the ALJ's finding that the treatment and hospitalization records do not support Employer's burden is also affirmed. Decision and Order at 29.

We therefore affirm the ALJ's finding that Employer failed to establish that no part of the Miner's death was caused by legal pneumoconiosis, 20 C.F.R. §718.305(d)(2)(ii), and thus affirm the ALJ's determination that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(2); Decision and Order at 30.

[19] As Employer appears to concede, Dr. Perper's opinion does not support a finding that pneumoconiosis did not contribute to the Miner's death; thus, we need not address its arguments that his opinion is inadequate to support a finding of death causation. Employer's Brief at 31-32.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge