U.S. Department of Labor

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

BRB No. 20-0231 BLA

JOHN L. BLAND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARTINKA COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 7/13/2022
	)	
PEABODY ENERGY CORPORATION	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

GRESH and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-05351) rendered on a claim filed on November 8, 2016, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Therefore, the ALJ found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4)(2018); Decision and Order at 7. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in failing to address its argument that Peabody Energy Corporation (Peabody) is not the correctly named responsible insurer and that Patriot Coal (Patriot) should have been designated instead. Employer further contends the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), has filed a limited response brief agreeing that the ALJ erred in failing to address Employer's challenge to the designation of Peabody as the responsible insurer and therefore asserts remand is necessary.

The Benefits Review 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

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

[2] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

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

Responsible Insurance Carrier

Claimant last worked for a full year in coal mine employment for Martinka Coal Company (Martinka), a subsidiary of Peabody, from September 28, 1981 to March 8, 1992,[4] and again from January 5, 1995 to October 3, 1995. Director's Exhibits 4, 7; Hearing Transcript at 14-15. In 2007, Peabody sold Martinka to Patriot but Claimant, who ceased work twelve years before the sale, never worked for Patriot. Director's Exhibit 54; Director's Closing Arguments at 2. In 2011, the Department of Labor (DOL) authorized Patriot to self-insure for black lung benefits liabilities relating to the Peabody subsidiaries it purchased, including Martinka, retroactive to July 1, 1973. Director's Exhibit 54. In 2015, Patriot went bankrupt. *Id*.

Employer does not contest that Martinka is the correct responsible operator and was self-insured through Peabody on the last day that Martinka employed Claimant.[5] Employer's Brief at 24; Employer's Closing Arguments at 18. However, it contests Peabody's liability as the responsible carrier. Employer's Closing Arguments at 16-39.

Initially, the ALJ excluded liability evidence Employer submitted after the deadline to do so had passed, finding it was untimely and "no special circumstances exist to override

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5; Director's Exhibit 4; Hearing Transcript at 17.

[4] Southern Ohio employed Claimant from September 28, 1981 to March 8, 1992. Director's Exhibits 4, 7; Hearing Transcript at 14-15. However, the district director found Martinka Coal Company (Martinka) to be a successor operator because it bought the mine and equipment from Southern Ohio. Director's Exhibits 4, 7, 48; Hearing Transcript at 14-15.

[5] Martinka qualifies as a potentially liable operator because it is undisputed that: (1) Claimant's disability arose at least in part out of his employment with Martinka; (2) Martinka operated a mine after June 30, 1973; (3) Martinka employed Claimant for a cumulative period of at least one year; (4) Claimant's employment included at least one working day after December 31, 1969; and (5) Martinka is capable of assuming liability for the payment of benefits through Peabody's self-insurance coverage. 20 C.F.R. §725.494(a)-(e).

the untimeliness" of its submission. Decision and Order at 5. The ALJ further determined Employer's challenges to Peabody's designation as the responsible carrier were moot as it did not timely raise these arguments before the district director, and there were no extraordinary circumstances to excuse its failure. *Id*. He therefore found Martinka, as self-insured by Peabody, is the responsible operator and carrier, respectively. *Id*.

Employer argues the ALJ erred in excluding its liability evidence. Employer's Brief at 24-25. It further argues the ALJ erred in failing to consider its challenges to Peabody's designation as the responsible carrier. *Id.* The Director agrees the ALJ has not adequately explained his exclusion of this evidence, after previously admitting it into evidence. Director's Response Brief at 5. Furthermore, the Director agrees that the ALJ erred in finding Employer failed to timely raise its challenges to Peabody's designation as the responsible carrier. *Id*. at 5-6.

Relevant Procedural History

The district director issued a Notice of Claim on January 18, 2017, designating Martinka, as self-insured through Peabody, as a "potentially liable operator." Director's Exhibit 30. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id*. Employer timely responded, denied liability, and argued Patriot and not Peabody is the correct potentially liable carrier. *Id*. However, it did not provide any documentary evidence or name any witnesses it intended to call to support its contention. *Id*.

Thereafter the district director issued a Schedule for the Submission of Additional Evidence (SSAE) identifying Martinka and Peabody as the responsible operator and carrier, respectively. Director's Exhibit 33. The district director informed Martinka and Peabody that they had until May 25, 2018, to submit additional documentary evidence relevant to liability and should identify any witnesses they intended to rely on if the case were referred to the Office of Administrative Law Judges (OALJ). *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3, *citing* 20 C.F.R. §725.456(b)(1).

Employer responded to the SSAE on April 2, 2018, and contested liability. Director's Exhibit 36. The district director granted Employer's request for additional time to submit evidence, extending the deadline to submit evidence until August 1, 2018. Director's Exhibit 47. Again, Employer did not provide any documentary evidence or name any witnesses it intended to call to support its liability arguments.

The district director issued a Proposed Decision and Order on September 28, 2018, finding Martinka and Peabody are the responsible operator and carrier, respectively.

Director's Exhibit 48. On October 10, 2018, Employer filed a request for reconsideration of the Proposed Decision and Order or, alternatively, a request for a hearing. Director's Exhibit 54. At that time, Employer submitted documentary evidence pertaining to Peabody's liability. *Id.* The district director forwarded the case to the OALJ on December 7, 2018. Director's Exhibit 57.

At the formal hearing, Employer filed deposition testimony of two former DOL Division of Coal Mine Workers' Compensation (DCMWC) employees, Steven Breeskin and David Benedict, with attached exhibits purportedly relevant to liability. Employer's Exhibits 4-7. Employer also filed additional documentary liability evidence. Employer's Exhibit 8. The Director objected to the admission of Director's Exhibit 54[6] and Employer's Exhibits 4 through 8, arguing this evidence was not properly submitted to the district director. Hearing Transcript at 7-8, 11. The ALJ overruled the Director's objection as to Director's Exhibit 54, stating he would "leave it in there for appellate purposes" and would make his "own determination on responsible operator . . . ." *Id.* at 8. Furthermore, the ALJ overruled the Director's objections to the admission of Employer's Exhibits 4 through 8, holding:

> I've been allowing all the Peabody evidence to come [in] to build the record. I make my own determination on the responsible operator, and then allow all that evidence to go to [the] BRB, depending on how I find, and they can decide whether I did the right thing. And from there it can go to the Third Circuit,[7] and from there it can go to the Supreme Court. But I'm going to overrule the objection and I'll allow the evidence, and I'll be making my own determination.

Hearing Transcript at 11-12.

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[6] Although Director's counsel stated she was objecting to Director's Exhibit 53, that exhibit is a return receipt from Employer's receipt of the Proposed Decision and Order. Counsel was clearly referring to the submission of liability evidence, which is found at Director's Exhibit 54.

[7] The ALJ erroneously referenced this case as arising under the jurisdiction of the United States Court of Appeals for the Third Circuit when making his ruling at the hearing. Hearing Transcript at 11-12. However, he accurately stated in his Decision and Order that this case arises under the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his last coal mine employment in West Virginia. *See Shupe*, 12 at 1-202; Decision and Order at 5; Director's Exhibit 4; Hearing Transcript at 17.

The Director renewed his objections in his closing arguments, arguing that Director's Exhibit 54 and Employer's Exhibit 8 should be excluded from evidence as they were not timely submitted to the district director and extraordinary circumstances do not exist to excuse their untimely submission. Director's Closing Arguments at 20-24. Furthermore, the Director argued Employer's Exhibits 4 through 7 should be excluded from evidence as Mr. Breeskin and Mr. Benedict were not identified while the claim was pending before the district director as witnesses who would offer testimony relevant to liability. *Id*. at 27-28. Employer argued extraordinary circumstances exist so the ALJ should admit the liability evidence. Employer's Closing Arguments at 18, 35-36.

In his Decision and Order, the ALJ found that "Employer failed to raise its arguments before the district director" and that "no extraordinary circumstances excuse such a failure." Decision and Order at 5. He further found that Employer's liability evidence was untimely submitted and that "no special circumstances exist to override the untimeliness of its raising of the issue of liability, and its arguments are therefore moot." *Id*.

Exclusion of Evidence

We agree with the arguments of Employer and the Director that the ALJ failed to adequately explain his exclusion of Director's Exhibit 54 and Employer's Exhibits 4 through 8. Employer's Brief at 25-26; Director's Response Brief at 5.

Because the district director must designate the responsible operator or carrier before a case is referred to the OALJ, liability evidence pertaining to the responsible carrier must be timely submitted to the district director, absent extraordinary circumstances. 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79920, 79,989 (Dec. 20, 2000). Similarly, an employer must designate potential liability witnesses "in accordance with the schedule issued by the district director." 20 C.F.R. §725.414(c). "Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances." *Id*.

Here, the ALJ correctly found Employer's submission of the documentary evidence was untimely. 20 C.F.R. §§725.414(d), 725.456(b)(1); Decision and Order at 5. However, it is unclear if he considered whether "extraordinary circumstances" exist for the admission of this evidence. Decision and Order at 5. The ALJ appears to conflate two separate concepts: (1) whether Employer timely challenged Peabody's designation as the responsible carrier, and (2) whether it timely submitted documentary liability evidence or identified liability witnesses. *Id.* Moreover, the ALJ refers to "special circumstances,"

which is not a standard for considering the admission of this evidence. *Id.* He also failed to address the parties' specific arguments as to whether extraordinary circumstances exist for the admission of the evidence. Director's Closing Arguments at 20-24; Employer's Closing Arguments at 18, 35-36. Absent any analysis, we cannot discern the basis for his decision to exclude the evidence that he had previously admitted, and thus we cannot determine if he abused his discretion in doing so. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (court could not "guess at what the [ALJ] meant to say, but didn't"); *V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009). Because the ALJ's findings do not satisfy the Administrative Procedure Act (APA),[8] we vacate his exclusion of Director's Exhibit 54 and Employer's Exhibits 4 through 8.

Liability Arguments

We also agree with the argument raised by Employer and the Director that the ALJ erred in finding Employer did not timely contest Peabody's designation as the responsible carrier, and therefore erred in not considering its challenges to that determination. Employer's Brief at 24-25; Director's Response Brief at 5-6.

The record reflects Employer timely controverted its liability before the district director; contrary to the ALJ's findings, it specifically denied Peabody was the responsible carrier and alleged Patriot should instead be designated. Director's Exhibits 32, 36; *see* 20 C.F.R. §§725.408(a)(2), 725.412(a)(1). Employer further submitted evidence to support its position in a request for reconsideration of the Proposed Decision and Order or, alternatively, requested a hearing. Director's Exhibit 54. At the hearing, the ALJ acknowledged Employer's arguments and admitted additional liability evidence and the depositions of Mr. Breeskin and Mr. Benedict, over the Director's objections. Hearing Transcript at 8, 11-12. Employer further raised the liability issue in its closing arguments. Employer's Closing Arguments at 16-39.

Consequently, the ALJ erred in finding Employer did not timely challenge the designation of Peabody as the responsible carrier and therefore erred in failing to address its arguments.[9] 20 C.F.R. §§725.408(a)(2), 725.412(a)(1).

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] As the Director notes, even if the ALJ had not erred in excluding Employer's liability evidence, its arguments were not exclusively based on that evidence and therefore

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[10] nor clinical pneumoconiosis,[11] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.[12] Decision and Order at 23.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-159.

The ALJ considered the opinions of Drs. Tuteur and Rosenberg,[13] who opined Claimant does not have legal pneumoconiosis, but instead has chronic obstructive

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would not be moot on that basis. Director's Response Brief at 6; Employer's Closing Arguments at 16-39.

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[11] "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 disproved clinical pneumoconiosis but not legal pneumoconiosis. Decision and Order at 11, 14; *see* 20 C.F.R. §718.305(d)(1)(i).

[13] The ALJ also considered the opinions of Drs. Klayton and Lenkey, but he accurately found they do not assist Employer in rebutting the existence of legal pneumoconiosis as they diagnosed the disease. Decision and Order at 12-13; Director's Exhibits 15, 17; Claimant's Exhibit 1.

pulmonary disease (COPD) due to cigarette smoking. Employer's Exhibits 1, 2, 9. The ALJ found neither physician's opinion persuasive or well-reasoned, and therefore determined Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 15.

Employer asserts the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 4-23. We disagree.

Initially we reject Employer's argument that the ALJ applied an improper burden of proof in evaluating its experts' opinions. Employer's Brief at 4-5. Contrary to Employer's contention, the ALJ correctly stated it must establish Claimant's impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 14; 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A). Moreover, the ALJ did not reject Employer's experts because they failed to meet a heightened legal standard; rather, as discussed below, he found their opinions inadequately reasoned and thus not credible. Decision and Order at 15.

The ALJ accurately noted Dr. Tuteur opined that Claimant's COPD was unrelated to his coal mine dust exposure based on a relative risk assessment between smoking and coal mine dust exposure. Decision and Order at 13; Employer's Exhibits 1, 9. Specifically, Dr. Tuteur acknowledged the following: "this clinical picture of COPD may be due to either inhalation of coal mine dust or cigarette smoke;" the clinical picture of COPD, "whether caused by the inhalation of tobacco smoke or coal mine dust, is generally similar;" and "one cannot use available characteristics to differentiate between these two etiologies." Employer's Exhibit 1 at 3-4. However, he opined that the sole cause of Claimant's COPD was cigarette smoking, based on the relative risks associated with smoking and coal mine dust exposure.[14] *Id*. Thus, contrary to Employer's arguments, the ALJ permissibly rejected Dr. Tuteur's opinion as based on statistical generalities rather than the specific facts of Claimant's case. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 15; Employer's Brief at 7-12.

The ALJ further accurately noted Dr. Rosenberg attributed Claimant's COPD solely to cigarette smoking based in part on the marked reduction in his FEV1 in relationship to his FVC on pulmonary function testing. Decision and Order at 13-14; Employer's Exhibit

[14] Dr. Tuteur noted that coal miners who never smoke develop COPD about 1% of the time while smokers who do not work as coal miners develop COPD about 20% of the time. Employer's Exhibit 1.

2. The ALJ permissibly discredited his opinion because it is based on premises inconsistent with the studies that the DOL cited in the preamble to the 2001 revised regulations that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. at 79,943; *Stallard*, 876 F.3d at 671-72; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); Decision and Order at 15. Dr. Rosenberg further opined that Claimant's COPD is due to smoking because "cigarette smoking is dramatically more destructive than coal dust," his emphysema is not characteristic of coal mine dust-induced emphysema,[15] and his chronic bronchitis would have dissipated at the end of his exposure to coal dust if it constituted legal pneumoconiosis. Employer's Exhibit 2. Thus, contrary to Employer's arguments, the ALJ permissibly found Dr. Rosenberg's reliance on "epidemiological factors" to conclude "Claimant's COPD is more likely to be caused by his smoking than his coal mine dust exposure" is not well reasoned as it is based on generalities and not the specifics of Claimant's condition. *See Stallard*, 876 F.3d at 671-72; *Owens*, 724 F.3d at 558; *Knizer*, 8 BLR at 1-7; Decision and Order at 15; Employer's Brief at 12-19.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). Employer's arguments amount to a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the ALJ permissibly discredited the opinions of Drs. Tuteur and Rosenberg, we affirm his determination that Employer failed to establish Claimant does not have legal pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i)(1); Decision and Order at 14. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[15] Dr. Rosenberg opined coal mine dust does not cause diffuse emphysema as it does not carry as many particles as cigarette smoke and the particles are larger. Employer's Exhibit 2. He also opined that one would expect widespread emphysematous destruction due to coal mine dust exposure to be related to dust retention in the lungs. *Id*.

[16] Because Employer bears the burden of proof on rebuttal and we affirm the ALJ's rejection of its experts' opinions, we need not address Employer's arguments concerning the ALJ's weighing of the opinions of Drs. Lenkey and Klayton that Claimant has legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 19-23.

Disability Causation

In order to disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ permissibly found that the same reasons for discrediting Drs. Tuteur's and Rosenberg's opinions that Claimant does not suffer from legal pneumoconiosis also undercut their opinions that Claimant's totally disabling COPD is unrelated to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505-06 (4th Cir. 2015); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); Decision and Order at 25. Having affirmed the ALJ's findings on legal pneumoconiosis, and because Employer raises no other arguments, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25. We therefore affirm the award of benefits.

Remand Instructions

On remand, the only issue for the ALJ to consider is whether Peabody is the responsible carrier in this case. The ALJ must first determine if extraordinary circumstances exist so that the lack of notice in naming Mr. Breeskin and Mr. Benedict should be excused and the depositions found at Employer's Exhibits 4 through 7 should be admitted into evidence. 20 C.F.R. §725.414(c). Then the ALJ must determine if extraordinary circumstances exist for the untimely submission of the documentary evidence at Director's Exhibit 54, Employer's Exhibit 8, and the exhibits attached to the depositions. 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. at 79,989.

After determining if any of the liability exhibits should be admitted into evidence, the ALJ should address Employer's challenges to the designation of Peabody as the responsible carrier and the Director's response.[17] 20 C.F.R. §§725.408(a)(2), 725.412(a)(1). In doing so, the ALJ must set forth his findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[17] The Director argues that the ALJ should exclude Employer's liability evidence on remand and find Peabody is the properly designated responsible carrier. Director's Response Brief at 7-12. The ALJ should address these arguments on remand.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with my colleagues that the ALJ erred in failing to adequately explain his decision to exclude Employer's liability exhibits after admitting them into evidence. I further agree the ALJ erred in finding Employer did not timely challenge the designation of Peabody as the responsible carrier and therefore erred in failing to address its arguments.

I disagree with my colleagues that the ALJ applied the correct legal standard in finding Employer did not rebut the existence of legal pneumoconiosis. Rather, the ALJ erroneously required Employer to "rule out" any contribution of coal mine dust exposure to Claimant's totally disabling respiratory impairment.[18] Decision and Order at 16. Contrary to the ALJ's finding, Employer may rebut the existence of legal pneumoconiosis by establishing Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The "rule out" or "no part" standard is relevant to rebutting the presumption that Claimant's

[18] The ALJ concluded that Employer did not rebut the existence of legal pneumoconiosis because "the evidence is insufficient to establish that Claimant's respiratory impairment is entirely unrelated to coal mine dust exposure." Decision and Order at 16.

totally disabling respiratory impairment is due to his pneumoconiosis. 20 C.F.R. §718.305(d)(ii).

However, I would hold that this error was harmless because he did not discredit Drs. Tuteur and Rosenberg on the basis of the standard *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Rather, as my colleagues note, the ALJ discounted the opinions of the physicians submitted by Employer because he found their opinions are not credible. Decision and Order at 15-16. I further agree with my colleagues that the ALJ's bases for discounting their opinions rested on permissible grounds. *See supra* at 9-10. Consequently, the ALJ's determination that Employer failed to rebut the presumption of legal pneumoconiosis rests on a basis that does not depend on the erroneous standard he applied, and may be affirmed. *See Larioni*, 6 BLR at 1-1278.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge