U.S. Department of Labor

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

BRB No. 22-0229 BLA

STEVEN HOLBROOK (on behalf of DONALD HOLBROOK) Claimant-Respondent v. ARCH OF KENTUCKY/APOGEE COAL COMPANY and ARCH RESOURCES, formerly ARCH COAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/13/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (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: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2017-BLA-05857) rendered on a miner's subsequent claim filed on March 18, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Apogee Coal Company, doing business as Arch of Kentucky (Apogee), is the responsible operator. On the merits, he found the Miner had 16.4 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant[2] invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[3] and established a change in an applicable condition of entitlement.[4]

[1] The Miner filed three prior claims. Director's Exhibits 1, 2. The district director denied his first claim on June 10, 1998, as he failed to establish any element of entitlement. The Miner did not further pursue this claim. Director's Exhibit 1. He filed a second claim on December 14, 2001, which was denied in a decision issued by ALJ Thomas F. Phalen, Jr. that the Benefits Review Board affirmed on September 18, 2006, for the Miner's failure to establish pneumoconiosis and total disability due to pneumoconiosis. *Holbrook v. Apogee Coal Co./Arch of Ky., Inc.*, BRB No. 06-0220 BLA (Sept. 18, 2006) (unpub.); Director's Exhibit 2. The Miner took no further action on that claim. He subsequently filed a third claim, but later withdrew it. Director's Exhibit 3. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Claimant, the son of the Miner, is pursuing the Miner's claim due to the Miner's death on April 26, 2016. Director's Exhibits 15, 16.

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

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date

30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to the ALJ rendered his appointment unconstitutional. Further, Employer argues the ALJ erred in finding it is the properly designated responsible operator and in denying its request for discovery regarding Black Lung Benefits Act (BLBA) Bulletin No. 16-01. On the merits, Employer argues the ALJ erred in finding the Miner worked at least fifteen years in underground coal mine employment, and thus improperly invoked the Section 411(c)(4) presumption. Finally, it argues he erred in determining it did not rebut the presumption.[6]

Claimant has not filed a response in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and removal protections. The Director also urges the Board to reject Employer's arguments regarding

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upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner did not establish pneumoconiosis or total disability due to pneumoconiosis in his prior claim, evidence establishing one of these elements was required to obtain review of the merits of his current claim. *Id*.

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

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

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-24.

its request for discovery on BLBA Bulletin No. 16-01, and to affirm the ALJ's determination that Arch is the properly designated responsible operator. Employer has filed a reply brief, reiterating its contentions.

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

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 36-41; Employer's Reply Brief at 19-20. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the

[7] 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 6.

[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to 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 has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

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

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Johnson; *see* Employer's Brief at 38-39.

ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 41-46. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* 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.* For the reasons set forth in *Johnson v. Apogee Coal Co.*, BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that it is the correct responsible operator, self-insured on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 6. In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 3-4. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 21; Employer's Brief at 4. In 2015, Patriot went bankrupt. *Id*.; *see* Director's Exhibit 52 at 5-6. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company, as the Director states. Director's Brief at 21-22.

Employer raises one argument on appeal to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 15-22; Employer's Reply Brief at 7-15. It argues the ALJ erred in finding it liable for benefits because he abused his discretion and deprived it of

procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01.[10] *Id.*

The Board has previously considered and rejected this argument under the same material facts in *Howard*, 25 BLR at 1-308-19. For the reasons set forth in *Howard* we reject Employer's argument. Thus we affirm the ALJ's determination that Employer is the self-insured responsible operator liable for this claim.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The ALJ credited the Miner's Employee Service Record indicating the beginning and ending dates of his coal mine employment as May 19, 1978 to October 1, 1996, and establishing 16.04 years of coal mine employment. Decision and Order at 5-6; Director's Exhibit 8. Even though the ALJ was able to ascertain the specific beginning and ending dates of the Miner's employment, he also referenced the formula at 20 C.F.R. §725.101(a)(32)(iii),[11] and calculated the Miner's length of coal mine employment using

[10] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Department of Labor issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" effected by Patriot's bankruptcy.

[11] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

this method. Decision and Order at 6. He divided the Miner's yearly income, as set forth in his Social Security Earnings Statement by the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual. Id*. For each year in which the Miner's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, the ALJ credited him with a full year of coal mine employment. *Id*. For 1996, the one year in which the Miner's earnings fell short, he did not credit him with a full calendar year of employment. *Id*. Based on this method of calculation, he found the Miner had a total of seventeen years of coal mine employment from 1978-1987 and 1989-1995. *Id.* Despite this calculation however, the ALJ ultimately relied on "the detailed record" generated by Employer,[12] and credited the Miner with 16.4 years of coal mine employment between 1978 and 1996. *Id*.

Employer contends the ALJ improperly ignored the beginning and ending dates of Claimant's employment and thus erred in relying on a 125-day divisor to credit the Miner with full, rather than partial, years of coal mine employment. Employer's Brief at 22-25. Its arguments are not convincing as this case arises with the jurisdiction of the Sixth Circuit, which made clear in *Shepherd v. Incoal, Inc*., 915 F.3d 392 (6th Cir. 2019) that, under the definition of a "year" at 20 C.F.R. §725.101(a)(32):

> [I]f the beginning and ending dates of the miner's employment cannot be determined *or* – even if such dates are ascertainable – if the miner was employed by the mining company for "less than a calendar year," the adjudicator may determine the length of coal mine employment by the average daily earnings of an employee in the coal mining industry. If the quotient from that calculation yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. If the calculation shows that the miner worked fewer than 125 days in the calendar year, the miner still can be

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The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual.*

[12] The ALJ relied on the Miner's Employee Service Record, which was generated by U.S. Steel Mining Company and shows the Miner's "service record with this company and other U.S. Steel subsidiaries" beginning on May 19, 1978, until his retirement on October 1, 1996. Director's Exhibit 8. It specifically delineates the beginning and ending dates when the Miner worked, what occupation he held, and where he worked. *Id.* Further, it also notes the two time periods during the Miner's career when he did not work or was "idle." *Id.*

> credited with a fractional portion of a year based on the ratio of the days worked to 125. 20 C.F.R. §725.101(a)(32)(i).

Shepherd, 915 F.3d at 402 (emphasis in original).

We also reject Employer's assertion that the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) constitutes dicta. The court in *Shepherd* expressly remanded that case for the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating the miner's length of coal mine employment. *Shepherd*, 915 F.3d at 407. Thus, regardless of Employer's disagreement with *Shepherd*, the court's interpretation of the regulation constitutes controlling law in this case.[13] *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

As Employer raises no further challenge to the ALJ's length of coal mine employment calculation, we affirm his finding that Claimant established 16.4 years of qualifying coal mine employment. *See* 20 C.F.R. §725.101(a)(32); *Shepherd*, 915 F.3d at 402.

Because we affirm the ALJ's findings that the Miner worked at least fifteen years in underground coal mine employment and had a totally disabling respiratory or pulmonary impairment, we also affirm his conclusion that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.305(b); Decision and Order at 24. Consequently, we affirm his finding Claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); Decision and Order at 36-37.

[13] It is well-settled that a lower court is required to give full effect to the execution of an appellate court's mandate, both express and implied, without altering or amending the mandate. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it." *Hall*, 12 BLR at 1-82; *see Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Rosenberg and Tuteur that the Miner did not have legal pneumoconiosis.[15] Decision and Order at 10-22. Dr. Rosenberg opined the Miner had diffuse emphysema and pulmonary fibrosis related to cigarette smoking, and not coal mine dust exposure. Director's Exhibit 2; Employer's Exhibits 2, 6. Dr. Tuteur diagnosed the Miner with chronic obstructive pulmonary disease (COPD) due to smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 3, 7. The ALJ found their

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

[15] The ALJ also considered Dr. Forehand's opinion that the Miner had legal pneumoconiosis. Decision and Order at 27-28; Director's Exhibits 27, 31. Because Dr. Forehand's opinion does not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of Dr. Forehand's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 26-27.

opinions unpersuasive and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 28-34.

We initially reject Employer's argument that the ALJ applied the wrong standard when addressing rebuttal. Employer's Brief at 25-26. The ALJ properly required Employer to establish the Miner did not have a chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 27; *see* 20 C.F.R. §718.201(b). Moreover, he discredited the opinions of Drs. Rosenberg and Tuteur because he found them inadequately reasoned and therefore insufficient to support their own conclusions, not because they failed to meet a particular legal standard. *See Minich*, 25 BLR at 1-155 n.8; Decision and Order at 34.

Employer generally asserts the ALJ erred in relying on the preamble to the revised 2001 regulations as a basis for discrediting the opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 27-28. We disagree. It has consistently been held that an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the Department of Labor's (DOL) resolution of questions of scientific fact relevant to the elements of entitlement. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Here, the ALJ permissibly evaluated the opinions of Drs. Rosenberg and Tuteur in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. Moreover, his references to the preamble did not, as Employer suggests, result in substituting his opinion for that of the physicians; rather, as discussed below, he properly evaluated whether these physicians satisfied Employer's burden by credibly explaining their opinions that the Miner did not have legal pneumoconiosis. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; Employer's Brief at 30.

The ALJ accurately noted Dr. Rosenberg attributed the Miner's emphysema solely to cigarette smoking based in part on the marked reduction in his FEV1 result in relationship to his FVC result on pulmonary function testing. Decision and Order at 30, 32-33; Director's Exhibit 28; Employer's Exhibits 2, 6. Thus, the ALJ permissibly discredited his opinion because it is based on premises inconsistent with studies the DOL cited in the preamble that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Sterling*, 762 F.3d at 491-92; *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); 65 Fed. Reg. at 79,943; Decision and Order at 30.

In addition, the ALJ noted Dr. Rosenberg opined the Miner's emphysema is due to smoking because smoking is more damaging to the lungs than coal mine dust, his emphysema is not characteristic of coal mine dust-induced emphysema, and the long period between the end of his coal mine employment and the onset of his symptoms demonstrates his pulmonary disease could not be due to his coal mine dust exposure. Decision and Order at 30-31; Director's Exhibit 28; Employer's Exhibits 2, 6. Contrary to Employer's arguments, the ALJ permissibly found Dr. Rosenberg's opinion not well reasoned as it is based on generalities, *see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Consol. Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008), and it is inconsistent with the regulations and the preamble which recognize that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-07 (6th Cir. 2020); *Stallard*, 876 F.3d at 671-72 n.4; 20 C.F.R. §718.201(a)(2), (b), (c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 31.

The ALJ accurately noted Dr. Tuteur opined the Miner'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 33; Employer's Exhibits 3, 7. Specifically, Dr. Tuteur acknowledged the Miner "was exposed to sufficient amounts of coal mine dust to produce a coal mine dust related disease process in a susceptible host." Employer's Exhibit 3 at 3. However, he opined the sole cause of the Miner's COPD was cigarette smoking based on the concept of relative risk. Employer's Exhibit 3. Thus, contrary to Employer's argument, the ALJ permissibly rejected Dr. Tuteur's opinion as based on statistical generalities rather than the specific facts of the Miner's case. *See Goodin*, 743 F.3d at 1345-46; *Beeler*, 521 F.3d at 726; *Knizner*, 8 BLR at 1-7; 65 Fed. Reg. at 79,941 (statistical averaging can hide the effect of coal mine dust exposure in individual miners); Decision and Order at 33-34; Employer's Brief at 32.

Contrary to Employer's allegations of error, while Drs. Rosenberg and Tuteur attributed the Miner's emphysema and COPD to cigarette smoking, the ALJ permissibly found neither physician persuasively explained why coal mine dust exposure did not significantly aggravate the disease. Decision and Order at 28; *see Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 34. Employer's

failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner'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); *see* Decision and Order at 34-36. He found the opinions of Drs. Rosenberg and Tuteur unpersuasive as to the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); (physician who fails to diagnose pneumoconiosis, contrary to the ALJ's finding, cannot be credited on rebuttal of disability causation absent specific and persuasive reasons); Decision and Order at 35; Director's Exhibit 28; Employer's Exhibits 2, 3, 6, 7. As Employer does not specifically identify any error in the ALJ's credibility finding, we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 154-56.

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in this claim.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge