U.S. Department of Labor

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

BRB Nos. 24-0347 BLA
and 24-0348 BLA

SHARON R. O'QUINN (o/b/o and Widow of CARLOS W. O'QUINN)	)	
Claimant-Respondent	)	**NOT-PUBLISHED**
v.	)	
TRIPLE B COAL COMPANY	)	DATE ISSUED: 07/11/2025
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits Following Remand of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

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

David Casserly (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting 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 appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits Following Remand (2020-BLA-05581 and 2021-BLA-05196) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 7, 2018,[1] and a survivor's claim filed on December 6, 2019,[2] and is before the Benefits Review Board for a second time.

In her initial Decision and Order Denying Benefits, the ALJ found Claimant did not establish the Miner had complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. She also credited the Miner with 11.92 years of underground coal mine employment based on the parties' stipulation and thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, she found Claimant established total disability and therefore a change in an applicable condition of entitlement.[4] 20 C.F.R.

[1] This is the Miner's fourth claim for benefits. On April 12, 1999, the district director denied the Miner's first claim, filed on January 12, 1999, because he failed to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. He subsequently filed two more claims, but he withdrew them. Director's Exhibits 2, 3. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b). The Miner took no further action until filing his current claim. MC Director's Exhibit 5.

[2] Claimant is the widow of the Miner, who died on October 30, 2019, while his claim was pending before the district director. MC Director's Exhibit 17. She is pursuing the miner's claim on her husband's estate's behalf and her survivor's claim. Survivor's Claim (SC) Director's Exhibit 2.

[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 upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *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.

§§718.204(b)(2), 725.309(c). However, she found Claimant did not establish the Miner had clinical pneumoconiosis or legal pneumoconiosis,[5] and thus denied benefits in the miner's claim.

Further, the ALJ determined that because the Miner was not entitled to benefits at the time of his death, Claimant was not automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6] Because she also found Claimant did not establish the Miner had clinical pneumoconiosis or legal pneumoconiosis, 20 C.F.R. §718.202(a), she denied benefits in the survivor's claim.

Pursuant to Claimant's appeal, the Board affirmed the ALJ's findings that Claimant did not invoke the irrebuttable presumption at Section 411(c)(3) and established less than fifteen years of coal mine employment, and thus did not invoke the Section 411(c)(4) presumption. *O'Quinn v. Triple B Coal Co.*, BRB Nos. 22-0370 BLA and 22-0371 BLA, slip op. at 5 & 5-6 n.8 (Sept. 28, 2023) (unpub.). The Board further affirmed the ALJ's findings that Claimant established total disability and a change in an applicable condition of entitlement but did not establish the Miner suffered from clinical pneumoconiosis. *Id.* at 10-13. However, it vacated the ALJ's finding that Claimant failed to establish legal pneumoconiosis because she erred in weighing the medical opinions. *Id.* at 16. Thus, the Board vacated the denial of benefits in the miner's and survivor's claims and remanded the case for the ALJ to reconsider whether Claimant established legal pneumoconiosis and total disability due to the disease under Part 718. *Id.* at 17.

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§725.309(c)(3). Because the Miner did not establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*

[5] 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).

[6] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

On remand, the ALJ determined Claimant established legal pneumoconiosis and total disability causation, and therefore found the Miner was entitled to benefits at the time of his death. She thus awarded benefits in both claims. Because she reversed her denial of benefits, she addressed Employer's challenge to its designation as the responsible operator, which Employer had previously raised but the ALJ did not reach given the denial in her initial Decision and Order; she found Employer is the responsible operator.

On appeal, Employer argues the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis and that it contributed to his total pulmonary disability. It contends the ALJ's finding that Claimant established legal pneumoconiosis is inconsistent with the decision of the United States Court of Appeals for the Fourth Circuit in *American Energy, LLC v. Director, OWCP* [*Goode*], 106 F.4th 319 (4th Cir. 2024). Additionally, it contends the ALJ erred in finding it is the responsible operator. Claimant did not file a response brief. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response, distinguishing the facts of this case from those in *Goode* and urging the Board to reject Employer's responsible operator argument. Employer filed a reply, 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, 362 (1965).

Miner's Claim

Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(4) presumption, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 6; SC Director's Exhibit 3; Hearing Transcript at 23.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

The ALJ considered three medical opinions. Decision and Order on Remand at 3-9; MC Director's Exhibit 22; MC Employer's Exhibits 2, 6. Dr. Nader diagnosed legal pneumoconiosis in the form of a moderate chronic obstructive pulmonary disease (COPD) due to the Miner's significant histories of coal mine dust exposure and cigarette smoking based on the results of the August 1, 2018 pulmonary function study that he conducted and the Miner's reported history of pulmonary symptoms. MC Director's Exhibit 22. In contrast, Drs. Tuteur and Fino did not diagnose legal pneumoconiosis; they opined Dr. Nader's pulmonary function study showed the Miner had mild COPD, which they attributed solely to his 40-pack year smoking history and not coal mine dust exposure. MC Employer's Exhibits 2 at 6; 6 at 13-14, 19. The ALJ credited Dr. Nader's opinion as reasoned and documented and consistent with the science that the Department of Labor (DOL) relied on in the preamble to the 2001 revised regulations. Decision and Order on Remand at 5. She found the opinions of Drs. Tuteur and Fino inadequately reasoned and, therefore, less persuasive. *Id*. at 7-9. Based on Dr. Nader's opinion, the ALJ found Claimant established the Miner suffered from legal pneumoconiosis prior to his death. *Id*. at 9. Employer challenges this finding.

Initially, Employer contends Dr. Nader's opinion is "equivocal" and "legally insufficient" to establish the existence of legal pneumoconiosis because he conceded "'it is not possible to distinguish the relative contribution'" of smoking and coal dust exposure to the Miner's chronic pulmonary disease. Employer's Brief on Remand at 16-18; Employer's Reply on Remand at 4; MC Director's Exhibit 22 at 4. We disagree.

The definition of legal pneumoconiosis includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," and a claimant can carry this burden in a Part 718 claim by establishing the miner's chronic pulmonary disease was caused "in part" by coal mine dust exposure. 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 308-09 (4th Cir. 2012). Therefore, as Dr. Nader specifically identified the Miner's coal dust exposure as a contributing cause of his moderate COPD, the ALJ accurately characterized his opinion as diagnosing legal pneumoconiosis. Decision and Order on Remand at 5; MC Director's Exhibit 22 at 4 (Dr. Nader stating "the 14 years['] occupational history of exposure to respirable coal and rock dust is considered a significant contributing and aggravating factor for diagnosis of [COPD]").

We further disagree with Employer that the ALJ's determination to credit Dr. Nader's diagnosis of legal pneumoconiosis over the contrary opinions of Drs. Tuteur and Fino is inconsistent with the holding in *Goode*, 106 F.4th at 332-33, that an ALJ may *not* resolve the conflict in medical opinions as to whether the miner's COPD is due solely to smoking or is also due in part to coal dust exposure by mere citation to the preamble.[8] Employer's Brief on Remand at 15-18. Unlike the case in *Goode*, the ALJ, in this case, did not rely solely on the preamble's recognition that the effects of smoking and coal dust exposure may be additive to credit and discredit opposing medical opinions. Rather, the ALJ assessed the credibility of each medical opinion and found Dr. Nader's opinion most persuasive. Decision and Order on Remand at 4-9. Although the ALJ noted Dr. Nader's opinion is consistent with the preamble, she also found it well-reasoned because he accurately understood the Miner's significant smoking and coal mine employment histories and supported his COPD diagnosis with reference to the Miner's moderate obstructive impairment as indicated on his pulmonary function study and symptoms of chronic cough, wheezing, shortness of breath, and mucus expectoration.[9] *Id.* at 5. We affirm this finding

[8] In *American Energy, LLC v. Director, OWCP* [*Goode*], 106 F.4th 319 (4th Cir. 2024), the employer's physicians attributed the claimant's impairment to smoking only, while the claimant's expert attributed it to both smoking and coal dust exposure. The ALJ credited the claimant's physicians and discredited the employer's physicians solely because the preamble to the revised 2001 regulations states that coal mine dust inhalation and smoking may have additive effects, 65 Fed. Reg. 79,940, 79,941, 79,943 (Dec. 20, 2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, reversed, holding that citation to the preamble cannot meet a claimant's burden of proving coal dust exposure significantly contributes to a smoking-related impairment without further reasons for preferring the claimant's expert. *Goode*, 106 F.4th at 332-33. The court explained the burden remains on the claimant to establish the miner's lung disease more likely than not arose from coal mine employment; it is not the employer's burden to explain why coal dust exposure is not a contributing cause of the disease. *Id.* at 327, 332-33.

[9] Dr. Nader considered a 41-pack-year smoking history, and the ALJ previously found in her initial decision the Miner had a 30-pack-year smoking history. MC Director's Exhibit 22 at 2-3; Decision and Order at 3. Dr. Nader also considered a 14-year history of underground coal mine employment with "heavy" exposure to coal and rock dust. MC Director's Exhibit 22 at 2. In her Decision and Order on Remand, the ALJ noted Dr. Nader's consideration of a 14-year coal mine employment history is inconsistent with the parties' stipulation to 11.92 years of coal mine employment; however, she found the approximately two-year difference immaterial as nothing in Dr. Nader's opinion led her to believe that such difference would have impacted his opinion. Decision and Order on

as it is supported by substantial evidence.[10] *See Extra Energy, Inc., v. Lawson*, 140 F.4th 138, 151-52 (4th Cir. 2025); *Looney*, 678 F.3d at 313; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); MC Director's Exhibit 22 at 2, 4.

We further see no error in the ALJ's determination to discount the opinions of Drs. Tuteur and Fino. The ALJ accurately observed Dr. Tuteur attributed the Miner's COPD entirely to smoking because "20% of adults who never mined coal, but smoked cigarettes developed COPD while coal miners who never smoke develop this condition only 1% of the time." Decision and Order on Remand at 6 (quoting MC Employer's Exhibit 2 at 6). The ALJ permissibly found this rationale unpersuasive as Dr. Tuteur conceded the Miner's coal mine employment history placed him at risk for the development of pulmonary issues but relied on statistics rather than the specific facts of the Miner's case in attributing his COPD solely to smoking. *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 6-7; MC Employer's Exhibit 2 at 2, 6. Thus, the ALJ permissibly discounted Dr. Tuteur's opinion.[11] *Looney*, 678 F.3d at 310.

Remand at 5 n.4. We affirm this finding as Employer does not challenge it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[10] We reject Employer's contention that the ALJ failed to consider the credibility of Dr. Nader's opinion given her finding that the Miner does not have clinical pneumoconiosis, which the Board affirmed. Employer's Brief on Remand at 20. Even if true, remand is not required. Dr. Nader's medical report specifically notes the Miner had coal workers' pneumoconiosis (clinical pneumoconiosis) based on the positive x-ray. MC Director's Exhibit 22 at 4. He separately diagnosed COPD (legal pneumoconiosis) based on the Miner's moderate obstruction indicated on his pulmonary function test and history of chronic cough, wheezing, shortness of breath, and mucus expectoration. *Id.*; *see generally Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). We similarly reject Employer's assertion that Dr. Nader's lack of awareness of the Miner's subsequent lung cancer diagnosis is material to the credibility of his diagnosis of legal pneumoconiosis. As both Employer's experts diagnosed the Miner with smoking-related COPD and the record contains no evidence attributing his COPD to lung cancer, the significance of Employer's assertion is unclear. *See Shinseki*, 556 U.S. at 413; MC Director's Exhibits 2 at 5, 6 at 6; Employer's Brief on Remand at 22.

[11] Because the ALJ gave valid reasons for discounting Dr. Tuteur's opinion, we need not address Employer's contention that the ALJ erred in discounting it as inconsistent with

The ALJ accurately observed Dr. Fino attributed the Miner's COPD entirely to smoking because he first developed a mild obstruction in 2013, twenty-seven years after ceasing coal mine employment but continued to smoke. Decision and Order on Remand at 8; MC Employer's Exhibit 11 at 13-14, 19. She permissibly found Dr. Fino's opinion unpersuasive because he acknowledged the Miner's cigarette smoking and coal mine employment histories were each significant enough to cause lung disease and did not explain how he eliminated coal dust exposure as a contributing cause of the Miner's COPD. *See Looney*, 678 F.3d at 313-14; *Compton*, 211 F.3d at 212; *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order on Remand at 8; MC Employer's Exhibit 11 at 11-12.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the ALJ did *not* rely solely on the preamble to resolve the conflict in the medical opinions and as she provided permissible reasons for finding Dr. Nader's opinion more persuasive than Employer's experts' opinions, we reject Employer's assertion of error and affirm her finding that Claimant established the Miner had legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Lawson*, 140 F.4th at 151-52; *Looney*, 678 F.3d at 313; Decision and Order on Remand at 9.

Disability Causation

To establish disability causation, Claimant must prove the Miner's legal pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (4th Cir. 1990).

The ALJ considered the medical opinions of Drs. Nader, Tuteur, and Fino. Decision and Order on Remand at 14-15. Dr. Nader opined the Miner's legal pneumoconiosis contributed to his total pulmonary disability, while Drs. Tuteur and Fino opined legal pneumoconiosis did not play a role in the Miner's impairment.[12] MC Director's Exhibit

her finding of total disability at 20 C.F.R. §718.204(b)(2). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief on Remand at 22.

[12] We reject, as a mischaracterization of the record, Employer's assertion that Dr. Nader did not identify the Miner's legal pneumoconiosis as a cause of his totally disabling

22 at 4; MC Employer's Exhibits 2 at 7, 6 at 7-8, 11 at 21. The ALJ permissibly discredited the opinions of Drs. Tuteur and Fino that the Miner did not have legal pneumoconiosis, contrary to her finding that Claimant established the presence of the disease. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224 (4th Cir. 2006) (physician's opinion that did not properly diagnose pneumoconiosis can carry, at most, "little weight" on disability causation); *Scott v. Mason Coal Co.*, 289 F.3d 263, 270 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Remand at 14-15.

Further, we see no error in the ALJ's implicit determination to credit Dr. Nader's causation opinion. Decision and Order on Remand at 14-15 (citing *Scott*, 289 F.3d at 269, as supporting determination to discount Employer's experts' opinions and concluding Claimant established disability causation); MC Director's Exhibit 22 at 4. As the Board previously affirmed the ALJ's determination to credit Dr. Nader's opinion as to total disability at 20 C.F.R. § 718.204(b)(2)(iv), and as we now affirm her determination to also credit his opinion as to legal pneumoconiosis, Dr. Nader's opinion necessarily constitutes substantial evidence supporting pneumoconiosis as a "substantially contributing cause" of the Miner's disability. *See Scott*, 289 F.3d at 270; *O'Quinn*, BRB Nos. 22-0370 BLA and 22-0371 BLA, slip op. at 9-10. Therefore, as the opinions of Drs. Tuteur and Fino do not constitute substantial evidence disputing the Miner's legal pneumoconiosis as a cause of his total pulmonary disability, we affirm the ALJ's finding that Claimant established the

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pulmonary impairment. Employer's Brief on Remand at 23-24. As discussed above, Dr. Nader diagnosed the Miner's pulmonary symptoms and moderate obstruction as indicated on his pulmonary function study as COPD/legal pneumoconiosis. *See supra* at 5; MC Director's Exhibit 22 at 4. Further, Dr. Nader explicitly opined this condition precluded the Miner's usual coal mine work and contributed to his disabling hypoxemia:

> [The Miner] is totally disabled from a pulmonary capacity standpoint and. . . . has been unable to perform his previous exercise requirement of the last coal mine job based on [his qualifying arterial blood gas test demonstrating] hypoxemia at rest. This gentleman has chronic cough, wheezing, shortness of breath and mucus expectoration which contributes to his total pulmonary disability. Even though his pulmonary function test does not meet the Federal criteria for total pulmonary disability, this gentleman has obstructive airway disease on his pulmonary function test which makes patient unable to perform his previous exercise requirement of the last coal mine job and contributes to his total pulmonary impairment.

MC Director's Exhibit 22 at 4.

Miner was totally disabled due to pneumoconiosis.[13] 20 C.F.R. §718.204(c); *see Scott* 289 F.3d 263 at 270; Decision and Order at 15. We therefore affirm the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co*., 25 BLR 1-121, 1-126 (2013); Decision and Order on Remand at 20.

Responsible Operator & Due Process

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than one year and be financially capable of assuming liability for the payment of benefits.[14] 20

[13] We reject Employer's assertion that the ALJ impermissibly shifted the burden of proof to Employer to disprove disability causation. Employer's Brief on Remand at 23. Employer mischaracterizes the ALJ's decision as relying on the United States Court of Appeals for the Fourth Circuit's decision in *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109 (4th Cir. 1995), in which Employer alleges the burden to disprove disability causation had shifted to the employer. *Id.* n.5. Contrary to Employer's assertion, the ALJ cited *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002), in discounting the causation opinions of Employer's experts. Decision and Order on Remand at 14-15. Further, although the claimant in *Toler* had invoked the rebuttable presumption under 20 C.F.R. §718.203(b) linking his clinical pneumoconiosis to coal mine employment, the burden remained on the claimant to establish disability causation under 20 C.F.R. §718.204(c). *See Toler*, 43 F.3d at 111-12, 116. Moreover, the facts of this case are analogous to those in *Scott* in that the miner's entitlement to benefits was the only possible factual conclusion so any error the ALJ may have made in failing to explicitly state her basis for crediting Dr. Nader's causation opinion is harmless. *Scott*, 289 F.3d at 270; *see Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984).

[14] For a coal mine operator to meet the regulatory definition of a "potentially liable operator": a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability

C.F.R. §725.494(c). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer does not dispute it is a potentially liable operator,[15] but argues the ALJ erred in finding it did not establish Big Track Coal Company (Big Track), which more recently employed the Miner for more than one year, is financially capable of assuming liability. Employer's Brief at 25-39. We disagree.

In designating the responsible operator, the district director acknowledged the Miner worked for Employer as a miner from 1978 to February 16, 1979. MC Director's Exhibit 37 at 9. He also determined the Miner subsequently worked for Triple B Coal Co. 2 for less than one year in 1979. *Id*. Since this period of employment is less than one year, he found this operator cannot be named as a potentially liable operator. *Id.* He then noted the Miner also worked for Big Track from August 6, 1979 to July 25, 1986, but concluded Big Track's federal black lung claim liabilities were covered by Rockwood Insurance Company, which became insolvent in 2010. *Id*. Thus he determined Big Track is also financially incapable of assuming liability. MC Director's Exhibits 31, 37 at 9. Because the district director's reasons for not designating Big Track included its inability to assume liability for the payment of benefits, he submitted a statement pursuant to 20 C.F.R. §725.495(d) that the Office of Workers' Compensation Programs had no record of insurance coverage or of an authorization to self-insure on the Miner's last day of employment for either operator.[16] MC Director's Exhibits 31, 37 at 9.

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for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[15] The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order on Remand at 17. We affirm this finding as Employer does not challenge it. *Skrack*, 6 BLR at 1-711.

[16] If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. Such a

The ALJ found the district director's statements submitted in accordance with 20 C.F.R. §725.495(d) constitute prima facie evidence that Big Track is not financially capable of assuming liability for the claim and therefore Employer bears the burden to establish Big Track is, in fact, financially capable of paying benefits.[17] Decision and Order on Remand at 15, 17; *see* 20 C.F.R. §725.495(c), (d). She rejected Employer's argument that the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA), a state guaranty fund, or the Virginia Uninsured Employers Fund (VUEF), a state uninsured fund, are obligated to pay benefits on the claim as guarantors of Rockwood Insurance Company. Decision and Order on Remand at 18. Thus, she rejected Employer's assertions that Big Track should have been identified as the responsible operator and that VPCIGA and VUEF should have been notified of their potential liability for this claim. *Id*. at 17-18. Consequently, she found Employer is the responsible operator. *Id*. at 18.

In challenging this determination, Employer argues for the first time that it should be relieved of liability because: 1) the DOL failed to enforce the insurance coverage regulations against Big Track prior to its insurer's insolvency; 2) the burden of persuasion did not shift to Employer to prove it is not the responsible operator; 3) the district director failed to investigate whether Big Track had resources or assets beyond its commercial insurance policy to cover its liability and determine whether the officers of either entity could cover the liability; 4) the Act preempts the Virginia guaranty statute from limiting a guaranty fund's liability to claims arising under state law; and 5) the Kentucky guaranty statute has similar language to the Virginia statute and, as the Kentucky statute would cover this claim, the Virginia statute also would guaranty this claim. Employer's Brief on Remand at 29-39. We agree with the Director's position that Employer forfeited these arguments in failing to raise them before the ALJ. 20 C.F.R. §802.301(a) (Board's review authority limited to "findings and conclusions of law on which the decision or order appealed from was based"); *see Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (parties forfeit arguments before the Board not first raised to the ALJ); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995); Director's Brief on Remand at 2; Employer's Post-Hearing Brief.

Employer next argues the DOL was required to notify VPCIGA and VUEF and have them participate in the proceedings before the district director. Employer's Brief on Remand at 25-28. It asserts the ALJ erred to the extent she did not dismiss it as responsible

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statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. *Id*.

[17] The ALJ first addressed this issue in her Decision and Order on Remand; she did not reach this issue in her initial Decision and Order because she denied benefits in that decision. Decision and Order at 3.

operator and transfer liability to the Black Lung Disability Trust Fund (Trust Fund) based on the DOL's failure to do so. *Id*. The Director responds that the VUEF applies only to cases arising under the Virginia Workers' Compensation Act, not federal law, and that he is not obligated to notify a party of a claim for which it cannot be held liable as a matter of law. Director's Brief on Remand at 2-3. Similarly, he argues that VPCIGA coverage is not available, so it also cannot be held liable. *Id.* We agree with the Director's arguments.

The Fourth Circuit rejected this same argument in *RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 283, 286-87 n.9 (4th Cir. 2016). In that case, the Fourth Circuit affirmed the ALJ's and the Board's holdings that "the district director had no duty to notify the [VPCIGA] or name it as a party" for claims for which "the Guaranty Association is not liable."[18] *Mullins*, 842 F.3d at 283. The court further explained that because the designated responsible operator had "an opportunity to be heard," due process did not require the DOL to "provide notice first to the VPCIGA, regardless of whether it was liable for the claim [as a guarantor] under state law." *Id*. at 286-87 n.9. Thus, contrary to Employer's argument, the DOL's failure to investigate or notify a state guarantee fund of a federal black lung claim that would have been paid by an insolvent insurer or uninsured operator is not a basis to dismiss a designated responsible operator when that operator has otherwise failed to meet its burden of establishing the guaranty fund is liable for the payment of benefits. *Id.* at 283, 286-87 n.9.

For the reasons set forth in *Mullins*, the Director had no obligation to notify VPCIGA. With respect to the VUEF, we note Employer submitted no evidence before the district director or the ALJ showing that the VUEF would cover this claim. More importantly, the Virginia legislature created the Fund to provide for workers' compensation benefits awarded against any uninsured or self-insured employer under any provision of the Virginia Workers' Compensation Act. Va. Code §65.2-1201(A). Thus, it is specifically for workers' compensation claims arising under Virginia law. Because this claim arises under federal law, the VUEF cannot provide coverage for the miner's claim or the survivor's claim.[19] *See id.* As the VUEF cannot guarantee the obligations of Big Track, Employer cannot establish that it would provide coverage for this claim nor, contrary to Employer's contention, can the Trust Fund be liable on the basis that the VUEF

[18] The Fourth Circuit's rationale in *RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 283, 286-87 n.9 (4th Cir. 2016), is equally applicable to VUEF.

[19] We reject Employer's assertion that *Mounts* stands for the proposition that the Uninsured Fund is liable for this claim. Employer's Brief on Remand at 13-14 (citing *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1988)). *Mounts* is distinguishable from this case because it involved a Virginia state workers' compensation claim. 484 S.E.2d at 466.

should have been notified of liability. *See* 20 C.F.R. §725.495(c)(2). We therefore affirm the ALJ's finding that Employer is the responsible operator. Decision and Order on Remand at 18; 20 C.F.R. §725.495(c), (d).

Finally, we also reject Employer's contention that it should be absolved of liability in this case because the DOL did not provide notice of the miner's claim until July 24, 2019, more than a year after he filed it on June 7, 2018, and three months before he died on October 30, 2019. Employer's Brief on Remand at 40. Employer's argument that the DOL's "inexcusable" delay compromised its right to due process by denying it the "opportunity to subject the Miner to objective testing at sea level, which may have resulted in more favorable test results disputing the total disability finding the ALJ made" is unpersuasive. *Id.*

Due process requires an employer be afforded notice of the claim and fair opportunity to respond or mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). The pertinent inquiry is whether the complainant suffered prejudice. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999).

In this case, Employer received notice of the Miner's June 7, 2018 claim on July 24, 2019.[20] MC Director's Exhibits 5, 34. This was approximately three months prior to the Miner's death on October 30, 2019, and one year after the DOL-sponsored complete pulmonary evaluation that Dr. Nader conducted. MC Director's Exhibits 17, 22. Even if the three-month window between the issuance of the Notice of Claim and the Miner's death was insufficient for Employer to arrange its own examination, the ALJ accurately observed Employer was able to obtain medical opinions from Drs. Tuteur and Fino, both of whom evaluated Dr. Nader's report and examination test results and offered opinions disputing Dr. Nader's conclusion. Decision and Order on Remand at 16; MC Employer's Exhibits 2, 6, 11. Moreover, the ALJ stated that she "did not afford any less weight to Employer's medical opinions because they were based on a records review only." Decision and Order on Remand at 16. As Employer had the opportunity to contest the Miner's claim with the medical opinions of Drs. Tuteur and Fino, the ALJ rationally concluded Employer was not prejudiced by the district director's delay, if any, in notifying Employer of the Miner's claim. *See Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807; Decision and Order on Remand at 16-17. We therefore affirm the ALJ's finding Employer, and not the Trust Fund, is liable for benefits in these claims.

[20] This is the same date that the district director produced his 20 C.F.R. §725.495(d) statements indicating Triple B Coal Co. 2 and Big Track do not satisfy the criteria to be potentially liable operators. MC Director's Exhibits 31, 32.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge