U.S. Department of Labor

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

BRB Nos. 24-0444 BLA
and 24-0445 BLA

LINDA F. LAYTON (o/b/o and Widow of CLIFFORD V. LAYTON, JR.)	)	
Claimant-Respondent	)	
v.	)	
SOUTHERN APPALACHIAN COAL COMPANY	)	**NOT-PUBLISHED**
and	)	DATE ISSUED: 07/21/2025
AMERICAN ELECTRIC POWER CORPORATION	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

Mark J Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for Employer and its Carrier.

Victoria W. Yee (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, JONES and ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decisions and Orders Awarding Benefits (2021-BLA-06040 and 2022-BLA-05363) 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 claim[1] filed on May 22, 2017, and a survivor's claim filed on March 1, 2022.[2]

The ALJ credited the Miner with sixteen years of underground coal mine employment and found, based on the parties' stipulation, that he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant[3] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] She further found Employer did not rebut the presumption and awarded benefits.

[1] The Miner filed a prior claim on February 4, 2000, but the record for that claim is unavailable. Miner's Claim (MC) Director's Exhibits 2; 58 at 1. Because the Miner's prior claim is unavailable, the ALJ did not treat his current claim as a subsequent claim. MC Decision and Order at 2-3; MC Director's Exhibit 4.

[2] The Benefits Review Board has consolidated Employer's appeal in the miner's claim, BRB No. 24-0444 BLA, and in the survivor's claim, BRB No. 24-0445 BLA, for purposes of decision only.

[3] Claimant is the widow of the Miner, who died on July 12, 2018, while his claim was pending before the district director. MC Director's Exhibits 14, 36, 51, 58. She is pursuing the miner's claim on behalf of her husband's estate and her own survivor's claim. Survivor's Claim (SC) Director's Exhibits 3, 36.

[4] 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

On appeal, Employer argues the ALJ erred in finding Claimant established the Miner had at least fifteen years of coal mine employment and thus invoked the Section 411(c)(4) presumption. Alternatively, Employer argues the ALJ erred in finding it did not rebut the presumption. It further challenges the award of derivative benefits in the survivor's claim. Claimant has not filed a response brief. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject Employer's arguments regarding the length of the Miner's coal mine employment and rebuttal of the Section 411(c)(4) presumption. Employer replied to the Director's response brief, reiterating its arguments on appeal.[5]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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, 361-62 (1965).

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 in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *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 the ALJ's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

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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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); MC Decision and Order at 32.

[6] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 5; SC Director's Exhibit 4.

The ALJ noted the district director found the Miner had sixteen years of coal mine employment. Miner's Claim (MC) Decision and Order at 5. She considered Claimant's testimony, the Miner's employment history forms, and his Social Security Administration earnings records and summarily concluded the evidence "reveals" the district director's "finding of [sixteen] years of coal mine employment is substantially well-supported by the record." *Id*. at 6.

Employer argues the ALJ erred in failing to adequately explain her determination that the Miner had at least fifteen years of coal mine employment. Employer's Brief at 21-25; Employer's Reply at 7-13. The Director responds that Employer failed to introduce evidence or explain why the ALJ's calculation is inaccurate. Director's Brief at 11-14. Thus, the Director asserts Employer "forfeited its opportunity to explain why" Claimant is not entitled to the Section 411(c)(4) presumption by failing to file a "post-hearing brief" addressing the calculation of the length of the Miner's coal mine employment. *Id*. at 11-12. Employer's argument has merit.

Because the ALJ did not explain her method of calculating the length of the Miner's coal mine employment, failed to consider the Miner's hearing testimony,[7] and merely adopted the district director's finding, her conclusion with respect to the length of the Miner's coal mine employment[8] does not satisfy the Administrative Procedure Act (APA).[9] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wensel v. Director, OWCP*,

[7] As Employer asserts, the ALJ did not consider the Miner's testimony that he had approximately fourteen years of coal mine employment. SC Director's Exhibit 32 at 199; Employer's Reply Brief at 9, 13.

[8] With only one exception not applicable here, "any findings or determinations made with respect to a claim by a district director shall not be considered by the [ALJ]." 20 C.F.R. §725.455(a). When a party requests a formal hearing after a district director's proposed decision, an ALJ must proceed *de novo* and independently weigh the evidence to reach her own findings on each contested issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

[9] The Administrative Procedure Act requires that every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 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).

888 F.2d 14, 17 (3d Cir. 1989); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). By failing to substantively discuss and assess all the relevant evidence, the ALJ improperly gave presumptive effect to the district director's finding of sixteen years of coal mine employment. *Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

Further, contrary to the Director's assertion, Employer is not required to submit evidence with respect to the length of the Miner's coal mine employment, as Claimant bears the burden of proof on this issue. *Kephart*, 8 BLR at 1-186. Moreover, contrary to the Director's and our dissenting colleague's assertion that Employer forfeited the length of coal mine employment issue, Employer raised the issue before the miner's claim was transferred to the Office of Administrative Law Judges and at the hearing. *See* 20 C.F.R. §725.463(a) (permits consideration of issues raised in writing before the district director); *Johnson v. Royal Coal Co.*, 326 F.3d 421, 425 (4th Cir. 2003) (20 C.F.R. §725.463(a) is among the "provisions [that] define the outer limit of the scope of the hearing, preventing its expansion"); MC Director's Exhibit 58 at 2; Hearing Tr. at 22-25, 30.

Thus, we vacate the ALJ's length of coal mine employment finding. Because we vacate the ALJ's finding that Claimant established the Miner had at least fifteen years of coal mine employment, we must also vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits in the miner's claim. 30 U.S.C. §921(c)(4) (2018).

Survivor's Claim – Derivative Entitlement

Because we have vacated the award of benefits in the miner's claim, we must vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §923(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Remand Instructions

On remand, the ALJ must reconsider the length of the Miner's coal mine employment,[10] make appropriate findings,[11] and fully explain her findings in accordance with the APA. *See Muncy*, 25 BLR at 1-27; *Wojtowicz*, 12 BLR at 1-165.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer is able to rebut it.[12] 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718 in both the miner's and survivor's claims. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204, 718.205.

[10] We affirm, as unchallenged, the ALJ's finding that all the Miner's coal mine employment constituted qualifying coal mine employment. *Skrack*, 6 BLR at 1-711; MC Decision and Order at 4-6.

[11] The ALJ must determine whether the evidence establishes the beginning and ending dates of the Miner's coal mine employment and may determine the dates and length of coal mine employment by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32); *Daniels Co. v. Mitchell,* 479 F.3d 321, 334-36 (4th Cir. 2007); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the beginning and ending dates of a miner's employment cannot be determined, an ALJ may divide the miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii); *see* Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. A copy of the BLS table must be made a part of the record if an ALJ uses this method to establish the length of a miner's coal mine employment. 20 C.F.R. §725.101(a)(32)(iii); *Osborne*, 25 BLR at 1-204 n.12.

[12] Because we have vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's argument that the ALJ erred in finding it did not rebut the presumption, as her length of coal mine employment finding may affect her credibility findings, and the burdens of proof may shift.

Accordingly, the ALJ's Decisions and Orders Awarding Benefits are 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, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, dissenting:

I respectfully dissent and would affirm the awards in both claims. I agree with the Director that Employer forfeited its position on length of coal mine employment under black letter law by not presenting any argument to the ALJ. I would further reject its remaining entitlement arguments -- which were likewise not submitted to the ALJ -- as contradicting well-settled law.

I. Employer forfeited its position on length of coal mine employment by not presenting any argument to the ALJ.

While at the outset of the ALJ proceedings Employer checked a box indicating it disputed the district director's finding of sixteen years of coal mine employment, and while it listlessly contested the issue at the Miner's hearing, it indisputably did not develop or press the matter below. It presented no oral argument during either hearing, nor did it submit post-hearing briefs countering Claimant's fully-briefed contention (and the district director's initial finding) of sixteen years of coal mine employment.

Yet it nevertheless now claims the ALJ should have sua sponte combed through the record and plucked one line of testimony from a nearly forty-year-old state worker's compensation claim to find "approximately 14.75 years" of coal mine employment. And

it now further asserts that the detailed calculations it belatedly submitted to the Board -- albeit with information available to it all along -- confirm the testimony is accurate.[13]

But *now* is too late for counsel's math. As the United States Court of Appeals for the Fourth Circuit recently emphasized in thoroughly examining the black lung regulatory framework, fundamental concepts of issue preservation demand that litigants present significant enough argument to enable meaningful appellate review by the Board: "Arguments made in initial administrative proceedings should not be treated as a rough draft, to be expanded whenever a new idea pops into a party's head. Instead, the 'very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance.'" *Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 206-07 (4th Cir. 2022) (arguments not made to the ALJ are forfeited before the Board). That necessarily is the case because "'forfeiture is essential to the orderly administration of justice,'" and not "a mere technicality.'" *Id*., *citing Freytag v. Comm'r*, 501 U.S. 868, 894–95 (1991) (Scalia, J., concurring in part and in the judgment) (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure §2472 (1971)).

Indeed, federal courts thus have long (and uniformly) held issues abandoned in circumstances in which the litigants have done far more to press an argument than Employer's counsel's vague suggestion that -- if he did the math -- the result might confirm his suspicions:

> [W]e see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed [forfeited]. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's

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[13] Characterizing Employer's representation at the hearing as disputing length of coal mine employment is perhaps too charitable. More accurately, when the ALJ specifically asked whether he would stipulate to a number of years, Employer's counsel stated he had not yet examined the issue, but he still had a solid hunch about it:

Judge Daum: Okay. Is there a period of time for coal mine employment that you're agreeable to? Do you have a position on how many years of coal mine employment he has, in other words?

Employer's counsel: Yes, I feel that it is less than [fifteen] years of employment. But it would be more than -- probably around, around [fourteen] years. I'd have to do the calculations.

Mar. 2, 2022 Hearing Tr. at 30.

> work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: "Judges are not expected to be mind readers. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace."

United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), *cert. denied*, 494 U.S. 1082 (1992); *accord, Bannister v. Knox County Board of Education*, 49 F.4th 1000, 1011 (6th Cir. 2022) ("a party has forfeited an argument when the party belatedly asserts it on appeal after having failed to raise it" earlier); *Rotskoff v. Cooley*, 438 F.3d 852, 854-55 (8th Cir. 2006); (issue deemed abandoned when not developed in brief); *Vandenboom v. Barnhart*, 421 F.3d 745, 750 (8th Cir. 2005) (rejecting out of hand conclusory assertion that ALJ erred in failing to consider an argument where litigant provided no analysis of relevant law or facts); *Perez v. Barnhart*, 415 F.3d 457, 462 n.4 (5th Cir. 2005) (argument forfeited by inadequate briefing); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) (perfunctory complaint failed to frame and develop issue sufficiently to invoke appellate review); *Hartmann v. Prudential Ins. Co. of America*, 9 F.3d 1207, 1212 (7th Cir. 1993) (failure to press a point, even if mentioned, and to support it with proper argument and authority forfeits it) (Posner, C.J.); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (issues raised in brief which are not supported by argument are deemed abandoned).[14]

Conversely, to permit a party to sit back at the hearing and at long last formulate its basic position on a material issue on appeal -- with information available from the jump -- squarely meets the definition of sandbagging. *See, e.g., Freytag*, 501 U.S. at 895 (Scalia, J., concurring) (sandbagging is "suggesting or *permitting*, for strategic reasons, that the trial court pursue a certain course, and later -- if the outcome is unfavorable -- claiming that the course followed was reversible error") (emphasis added); *Black's Law Dictionary* 1542 (10th ed., 2014) (sandbagging is "[t]he act or practice of a trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem."). We should not do it.[15]

The mere fact that Claimant faces the burden of proof on this issue does nothing to change this analysis. As the Director points out, and Employer does not dispute, an ALJ

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[14] Notably, this case does not present the potentially difficult task of determining how much argument "is enough argument" to preserve an issue. Wherever future disputes might draw that line, its demarcation inevitably will be etched somewhere comfortably beyond the "no argument" threshold presented here.

[15] Indeed, accepting Employer's counsel's position permits employers to simply indicate an issue is contested at the ALJ level and then do nothing further unless and until the ALJ (who apparently has the duty to examine the entire record and anticipate every

may apply any reasonable method of calculation in determining the length of coal mine employment if she reasonably explains how she arrived at the finding. Director's Response Brief at 12, *citing Muncy v. Elkay Mining Co.*, 25 BLR 1-23, 1-27 (2011). Faced with Claimant's fully-briefed position, and nothing from Employer, the ALJ reasonably found the Survivor's testimony, the Social Security earnings records, and the Miner's employment history forms confirmed the district director's finding of sixteen years of coal mine employment. Such a rationale, and others like it, have long been held to satisfy both a claimant's burden of proof and an ALJ's duty of explanation. *See, e.g., Hutnick v. Director, OWCP*, 7 BLR1-326, 1-329 (1984) (finding, for example, that a miner's uncontradicted testimony alone can establish length of coal mine employment). Precedent requires the same here.

Because even now the only concrete error Employer asserts with the ALJ's analysis isn't that the evidence she identified does not reasonably support her decision. It's solely that she did not discuss that one line of testimony, taken completely out of context, and combine it with the calculations Employer did not yet submit to come to an allegedly "better" result. But given Employer did not adequately identify the testimony and explain its significance to the ALJ, black letter law (and plain logic) establish the ALJ's failure to address it was no error at all. *Salmons*, 39 F.4th at 206; *United States v. Dupree*, 617 F.3d 724, 728 (3d Cir. 2010) ("The raise-or-[forfeit] rule is essential to the proper functioning of our adversary system because even the most learned judges are not clairvoyant." As such, "we do not require [ALJs] to anticipate and join arguments that are never raised by

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possible argument) rules against it. Significantly, counsel does not ask the Board to simply forgive its forfeiture and to consider Employer's evidence and argument for the first time on appeal. Rather than acknowledging its transparent fault, it instead lays the blame for missing one line of what it considers dispositive testimony (that it nevertheless did not discuss) squarely at the ALJ's feet: "Although this testimony is only in the survivor's claim, it should be considered because the cases have been consolidated for appeal, and the ALJ should have reviewed it in deciding the survivor's claim." Employer's Brief at 25. In my view, these plainly are not the "exceptional circumstances" that permit us to forgive a forfeiture, assuming counsel even asked for it. *See, e.g., Hicks v. Ferreya*, 965 F.3d 302, 311 (4th Cir. 2020) (under "standard forfeiture and waiver principles," issues raised for the first time on appeal are only considered in "exceptional circumstances"); *Glidden v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging).

the parties." Instead, we "rely on the litigants not only to cite relevant precedents but also frame the issues for decision.").

I would affirm the ALJ's finding on length of coal mine employment. And since Employer stipulated to total disability, which the medical evidence supports, Employer was forced to rebut the presumption implemented at 20 C.F.R. §718.305.

II. *Loper Bright* does not invalidate the rebuttal provisions of 20 C.F.R. §718.305 nor does it alter precedent that an ALJ may refer to the preamble to evaluate medical opinions.

Employer's argument that *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), invalidates 20 C.F.R. §718.305 and overturns *West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015), which upheld the application of the rebuttable provision to coal mine operators, does not survive a plain reading of the two cases. As the Director points out, the Supreme Court in *Loper Bright* explicitly stated that it did "not call into question prior cases that relied on the *Chevron* framework" and it clarified that "[t]he holdings of those cases that specific agency actions are lawful -- including the Clean Air Act holding of *Chevron* itself -- are still subject to *stare decisis* despite our change in interpretive methodology." *Loper Bright*, 603 U.S. at 412 (citing *Chevron U.S.A., Inc. v. v. Natural Res.'s Def. Council, Inc.,* 467 U.S. 837 (1984)). And in *Bender*, the Fourth Circuit held the "no part," or "rule out" rebuttal standard imposed by 20 C.F.R. §718.305(d)(1)(ii) was a permissible exercise of the Department of Labor's power to fill a gap in the statute. *Bender*, 782 F.3d at 143. *Bender* is still the law in the Fourth Circuit, and we are bound to apply it -- ending the discussion. *Id*.

Employer's preamble argument fares no better. Employer suggests the ALJ impermissibly referred to the preamble because *Loper Bright* demands that ambiguities in statutes must be resolved by the courts, not an agency, and an ALJ cannot properly resolve conflicts by simply referring to the preamble. But Employer's argument once again runs headfirst into a brick wall of binding precedent. As the Director points out, the preamble is neither a statute nor a regulation, and the ALJ did not treat it as such. *See, e.g.*, *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1261 (10th Cir. 2015) (an ALJ's reliance on the scientific facts contained in the preamble does not implicate *Chevron*). *Chevron*, thus, is not the issue here. Instead, we once again find ourselves at the foothills of a familiar mountain of explicit precedent establishing that an ALJ may refer to the preamble in weighing medical opinions. I thus would once again reject Employer's worn-out invitation to cross to the other side. *See, e.g., Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 314-15 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798,

800-02 (6th Cir. 2012); *Safeco Insurance/Liberty Mutual Surety v. Director, OWCP*, 103 F.4th 1285, 1289-90 (7th Cir. 2024).

III. Employer's remaining arguments that the ALJ erred in finding it failed to rebut the presumption are without merit.

Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis 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). Employer has failed to rebut the presumption regarding either form of the disease.

First, although stipulating the elements of clinical pneumoconiosis and total disability, Employer has not attempted to demonstrate the former played no role in the latter -- which it must do to avoid liability. The ALJ held that "[a]t the hearing, the Employer conceded that the Claimant has established the existence of simple clinical pneumoconiosis" and that "the totality of evidence consisting of x-ray, CT scans, autopsy, and medical opinions" supports its stipulation. Decision and Order at 39. The ALJ thus concluded "Employer has failed to rebut the presumed existence of clinical pneumoconiosis." *Id*. Employer again admits as much on appeal, Employer's Brief at 10 n.2; we therefore must affirm the ALJ's finding. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). And although the ALJ did not make a specific finding on whether Employer demonstrated that clinical pneumoconiosis played no part in the Miner's disability (and Employer likewise failed to submit any argument on the issue), by operation of law, that fact is presumed. 20 C.F.R. §718.305(d)(1)(ii).

On appeal, Employer limits its causation arguments to the role played by legal pneumoconiosis and coal dust in the Miner's disability; it does not mention clinical pneumoconiosis even once in its causation analysis. Emp. Br. at 34-6. Having failed to present an argument or identify any evidence on the causation element below, and by not (at the very least) arguing here that the ALJ erred by failing to make a finding on the issue, Employer has not rebutted the presumption. Claimant is therefore entitled to benefits on the miner's claim and to derivative benefits in the survivor's claim as a matter of law, regardless of the outcome on the second path of legal pneumoconiosis. *See, e.g.*, *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (remand not required and judgment as a matter of law appropriate when the facts and law permit only one conclusion); 30 U.S.C. §932(*l*) (2018).

Second, Employer nevertheless failed to prove either the Miner did not suffer from legal pneumoconiosis, or that it played no role in his disability. To disprove its existence, Employer by a preponderance of the evidence must affirmatively establish Claimant did

not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). The ALJ gave permissible reasons why she discredited both Drs. Werntz and Swedarsky who opined that the Miner did not suffer from legal pneumoconiosis.[16]

The ALJ explained in detail why she discredited Dr. Werntz's opinion that the Miner's total disability was entirely caused by factors other than pneumoconiosis: it was supported by far less documentation than those of other doctors in the record; Dr. Werntz only considered thirteen years of coal mine employment rather than the ALJ's finding of sixteen years; and the opinion was equivocal in determining how much coal dust contributed to the Miner's chronic obstructive pulmonary disease, given the medical science contained in the preamble. Decision and Order at 36-37. With the exception of Employer's rejected legal argument regarding the preamble, Employer does not point to any error of law in the ALJ's analysis of Dr. Werntz's opinion. Rather, it merely argues the ALJ should have considered the evidence in a different light. In my view, its remaining arguments amount to a simple request to reweigh the evidence, something the substantial evidence standard does not permit us to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

And contrary to Employer's primary argument regarding Dr. Swedarsky, the ALJ did not reject his opinion because she applied the wrong standard in finding he failed to rule out coal dust exposure as a cause of the Miner's impairment. Rather, she permissibly found *his opinion completely excluding coal dust as a causative factor* inadequately reasoned because he failed to explain *his own conclusion* that coal mine dust exposure was not at all additive along with smoking in causing the Miner's disability given the science contained in the preamble. *See, e.g.*, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (ALJ "may reject an opinion where [she] finds the doctor failed to adequately explain [her] diagnosis.").

The ALJ thus gave permissible reasons for rejecting Employer's doctors' opinions on the existence of legal pneumoconiosis. As the ALJ further recognized, an opinion that the miner does not suffer from the disease "can carry very little weight" in assessing the etiology of the miner's total disability. Decision and Order at 40, *citing Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). Permissibly finding Dr. Werntz's opinion contrary to her own finding, and that Dr. Swedarsky did not address the issue at all, the ALJ reasonably found Employer unable to rebut under the second prong of legal

[16] Dr. Go's opinion that the Miner suffered from disabling legal pneumoconiosis cannot help Employer to rebut the presumption, so it is unnecessary to evaluate it.

pneumoconiosis. *Id.*, *citing Big Branch Res., Inc., v. Ogl*e, 737 F.3d 1063, 1074 (6th Cir. 2013) (rejecting contention that an ALJ may not discredit a disability causation opinion that ruled out legal pneumoconiosis where the disease is presumed instead of factually found).

The ALJ thus awarded benefits in both claims. Finding nothing legally or factually wrong with those decisions based on the evidence and argument before her, I would affirm. Because she was not wrong.

IV. Employer's argument regarding offset of the survivor's claim is premature and must be submitted to the district director.

Employer argues it is entitled to a complete offset in the survivor's claim because "based on the amount and period of claimant's West Virginia worker's compensation benefits, any federal lung benefits to the claimant are completely offset." Employer's Brief at 37, *citing* 30 U.S.C. §932(g); 20 C.F.R. §725.535(c).

Employer's request is premature: the majority opinion vacates the award of benefits. It is also made in the wrong forum: in the event of an effective order requiring the payment of benefits, Employer must raise this issue with the district director to obtain the relief it seeks. 20 C.F.R. §725.502(b)(2); *Crider v. Dean Jones Coal Co.*, 6 BLR 1-606, 1-610 (1983).

JONATHAN ROLFE
Administrative Appeals Judge