U.S. Department of Labor

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

BRB Nos. 21-0216 BLA
and 21-0217 BLA

LINDA ROSE ADAMS (o/b/o and Widow of TONY LEE ADAMS) Claimant-Respondent v. WILGAR LAND COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/22/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for Claimant.

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

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judges, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2011-BLA-06068, 2015-BLA-05628) 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 request for modification of a subsequent miner's claim filed on April 21, 2008,[1] and of a survivor's claim filed on October 11, 2013.

In a June 8, 2010 Decision and Order Denying Benefits in the miner's claim, ALJ Daniel F. Solomon found the Miner had 9.36 years of coal mine employment and therefore could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering whether the Miner was entitled to benefits under 20 C.F.R. Part 718, ALJ Solomon found he established the existence of a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §725.204(b)(2), and therefore established a change in an applicable condition of

[1] On May 26, 1997, the district director denied the Miner's prior claim, filed on January 15, 1998, for failure to establish any element of entitlement. Director's Exhibit 1 at 68. Where 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 he 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. §725.309(c)(3). Consequently, to obtain review on the merits of the Miner's current claim, Claimant had to submit new evidence establishing any of the elements of entitlement. *Id.*

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

entitlement. 20 C.F.R. §725.309(c)(1). However, ALJ Solomon found the Miner did not establish the existence of pneumoconiosis, 20 C.F.R. §718.202(a), and denied benefits.

The Miner timely requested modification of the denial of benefits on July 22, 2010, and submitted additional evidence.[3] Director's Exhibit 78. The district director denied his request on May 11, 2011, and pursuant to the Miner's appeal, the case was transferred to the Office of Administrative Law Judges (OALJ) on June 28, 2011. Director's Exhibits 96, 102. The Miner died on September 13, 2013, while the claim was pending before the OALJ. Director's Exhibit 115. On August 6, 2014, ALJ Alice M. Craft remanded the claim to the district director to determine whether the claim should be consolidated with any survivor's claim and to determine who was eligible to pursue the claim on the Miner's behalf. Aug. 6, 2014 Order of Remand.

Claimant[4] filed her survivor's claim on October 11, 2013, which the district director denied on August 4, 2014, for failing to establish the Miner's death was due to pneumoconiosis. Director's Exhibit 135. On April 8, 2015, the district director denied Claimant's timely request for modification, filed on November 17, 2014.[5] Director's Exhibits 136, 148. Claimant timely appealed the denial and on June 8, 2015, both claims were transferred to the OALJ for a consolidated hearing. Director's Exhibits 152, 157, 158.

In his Decision and Order that is the subject of the current appeal,[6] ALJ Golden (the ALJ) credited the Miner with 10.36 years of coal mine employment. He therefore found

[3] Although the Miner initially appealed ALJ Solomon's denial of benefits to the Benefits Review Board, he subsequently requested the Board dismiss his appeal and remand the case to the district director to process his request for modification. Director's Exhibit 78. The Board granted his request. *Adams v. Wilgar Land Co.*, BRB No. 10-0566 BLA (Aug 25, 2010) (Order) (unpub.); Director's Exhibit 80.

[4] Claimant is the Miner's widow, and she is pursuing the miner's claim on his behalf. Director's Exhibit 153.

[5] In cases involving a request for modification of a district director's decision, the ALJ proceeds de novo and "the modification finding is subsumed in the [ALJ's] findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992).

[6] ALJ Peter B. Silvain, Jr. issued a Decision and Order Awarding Benefits on Modification in both claims on May 25, 2017. Pursuant to Employer's appeal, the Board remanded the case to ALJ Silvain, directing him to "reconsider the substantive and procedural actions taken and to issue a decision accordingly." *Adams v. Wilgar Land Co*,

Claimant could not invoke the Section 411(c)(4) presumption in either claim. In the miner's claim, he found the evidence did not establish the Miner had complicated pneumoconiosis, and therefore Claimant 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); 20 C.F.R. §718.304. Considering whether Claimant could establish entitlement under 20 C.F.R. Part 718, the ALJ found she established the Miner had legal and clinical pneumoconiosis arising out of coal mine employment, and was totally disabled due to his pneumoconiosis. He therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and a mistake in a determination of fact. 20 C.F.R. §725.310. The ALJ further found granting modification would render justice under the Act and awarded benefits in the miner's claim. Based on the award of benefits in the miner's claim, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act.[7] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[8] It also argues the removal provisions applicable to ALJs

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BRB Nos. 17-0495 BLA and 17-0496 BLA (Mar 16, 2018) (Order) (unpub.). ALJ Silvain subsequently issued an Order on Remand vacating his prior Decision and Order Awarding Benefits on Modification in both claims and set the case for reassignment for a new hearing before a different, properly appointed ALJ in light of the intervening decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). July 2, 2019 Order on Remand to Vacate. ALJ Golden was then assigned the case.

[7] Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of the miner's 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).

[8] 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.

render his appointment unconstitutional. On the merits, Employer contends the ALJ erred in finding Claimant established pneumoconiosis and disability causation.[9] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the ALJ had the authority to decide the case. In two separate reply briefs, Employer reiterated 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.[10] 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

Employer urges the Board to vacate the 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).[11] Employer's Brief at 22-31. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[12] but maintains the ratification was insufficient

[9] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner was totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 5.

[10] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine work in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[11] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[12] 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

to cure the constitutional defect in ALJ Golden's prior appointment.[13] Employer's Brief at 23-26; Employer's Reply to the Director at 2-5.

The Director argues ALJ Golden had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Response Brief at 2-5. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 5. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a

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> Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Golden. ALJ Golden issued no orders in this case until his August 9, 2019 Notice of Assignment, Notice of Hearing, and Pre-Hearing Order.

[13] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

single letter. Rather, he specifically identified ALJ Golden and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Golden. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Golden "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts," and generally speculates that he did not engage in a "genuine consideration" of qualifications when he ratified ALJ Golden's appointment. Employer's Brief at 26. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal,* 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler,* 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal,* 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should again be remanded for a new hearing before a different ALJ.[14]

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 26-31; Employer's Reply to the Director at 5-8. Employer generally argues the removal provisions 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*. Employer's Brief at 28-30; Employer's Reply to the Director at 6-7. It also relies on the 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 (June 29, 2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019),

[14] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 30, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Golden's appointment, which we hold is a valid exercise of his authority, bringing ALJ Golden's appointment into compliance with the Appointments Clause.

vacated, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 27-31; Employer's Reply to the Director at 6-7.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer,* 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia,* 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[15] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1988. The Court explained that "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court

[15] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (June 29, 2020).

has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-1138.

Entitlement to Benefits - - Miner's Claim

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). Moreover, as the miner's claim involves a request for modification, Claimant had to establish either a change in condition or a mistake in a determination of fact in ALJ Solomon's denial of the claim. 20 C.F.R. §725.310. An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Rasmussen, Baker, Alam, Jarboe, Rosenberg, and Tuteur. Decision and Order at 47-66. Drs. Rasmussen, Baker, and Alam diagnosed legal pneumoconiosis in the form of an obstructive ventilatory impairment,

concluding the Miner had chronic bronchitis and emphysema due to cigarette smoking and coal mine dust exposure or chronic obstructive pulmonary disease (COPD) due in part to coal mine dust exposure. Director's Exhibits 10, 13, 45, 58-60, 63, 66, 66, 81, 93A, 105, 148; Claimant's Exhibit 8-10. Drs. Jarboe, Rosenberg, and Tuteur opined the Miner did not have legal pneumoconiosis, instead attributing his chronic bronchitis and emphysema to cigarette smoking. Director's Exhibits 17, 68, 91A; Employer's Exhibits 3-11, 24-25.

The ALJ found the opinion of Dr. Alam, the Miner's treating pulmonologist, to be the most probative opinion of record and accorded it great weight. Decision and Order at 49-53. He gave only "some" weight to Dr. Baker's opinion because, while it was well reasoned and well documented, it was based on an inaccurate length of the Miner's coal mine employment. Decision and Order at 48-49. However, he accorded no weight to the opinion of Dr. Rasmussen, who relied upon inaccurate smoking[16] and coal mine employment histories. Decision and Order at 48. Similarly, he accorded no weight to the opinions of Drs. Jarboe, Rosenberg, and Tuteur because they were not well reasoned or well documented and were based upon premises contrary to the Act. Decision and Order at 53-66. He therefore found the medical opinion evidence established legal pneumoconiosis in the form of COPD due in part to coal mine dust exposure. *Id*. at 66.

Employer argues the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 35-47. We disagree.

We further reject Employer's arguments that the ALJ erred in his weighing of Dr. Alam's opinion. Employer's Brief at 35-37. Contrary to Employer's arguments, the ALJ did not simply accept Dr. Alam's opinion because he was the Miner's treating pulmonologist. *Id*. Rather, the ALJ accurately found Dr. Alam was the "Miner's treating pulmonologist from April 30, 2008 until he died on September 13, 2013," and "treated the Miner for years and [was] intimately familiar with his condition." Decision and Order at 49, 66. The ALJ noted Dr. Alam opined the Miner had severe obstructive lung disease in the form of chronic bronchitis and emphysema; he concluded coal mine dust exposure substantially contributed to these diseases, though they were due primarily to cigarette smoking. Decision and Order at 49-53; Director's Exhibits 58-60, 63, 66, 81, 93A, 105, 148; Claimant's Exhibits 8, 10. As the ALJ acknowledged, Dr. Alam explained the Miner's heavy tobacco abuse caused the destruction of the alveoli and development of his blebs and bronchitis, while his long history of underground coal mining aggravated this condition, causing the formation of his emphysema. Decision and Order at 51, *citing*

[16] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner had a smoking history of thirty-two pack-years. *See Skrack*, 6 BLR at 1-711; Decision and Order at 47.

Director's Exhibit 93A. The ALJ found this reasoning consistent with the scientific evidence found credible by the Department that cigarette smoking and coal mine dust exposure may have an additive effect. Decision and Order at 53; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

The ALJ also noted that, although Dr. Alam initially based his opinion on an inflated coal mine employment history of seventeen years, he later revised his opinion assuming a history of 9.33 years. Decision and Order at 52; Claimant's Exhibit 10. The ALJ found the physician's explanation for why his conclusions remained intact despite the lesser amount of coal mine employment to be well-documented and well-reasoned, and that his legal pneumoconiosis diagnosis would have been strengthened if he had considered the Miner actually had worked for 10.36 years in coal mine employment. *Id*. Furthermore, the ALJ credited Dr. Alam's opinion because it was consistent with his underlying treatment records and the medical evidence as a whole. *Id*. at 53.

Thus, contrary to Employer's arguments, the ALJ did not "rel[y] on the circular logic that because Dr. Alam treated [the Miner], he must have the best picture of his complete medical condition." Employer's Brief at 36. Rather the ALJ considered the nature and duration of his relationship with the Miner, the frequency and extent of his treatment, and the credibility of his opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole."[17] 20 C.F.R. §718.104(d)(1)-(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade"). Nor does Employer challenge the ALJ's specific credibility determinations. *Skrack*, 6 BLR at 1-711.

There also is no merit to Employer's argument that the ALJ erred by overlooking and rationalizing inconsistencies in the smoking histories Dr. Alam considered. Employer's Brief at 37. The ALJ noted Dr. Alam considered the Miner's reported smoking histories of eighteen, twenty-five, and twenty-eight pack-years. Decision and Order at 52-53; Director's Exhibits 58, 60, 63. Accurately noting Dr. Alam initially relied upon a twenty-five to twenty-eight pack-year smoking history to reach his conclusions, the ALJ found this range sufficiently similar to his determination that the Miner had a thirty-two

[17] Employer suggests the ALJ should not have credited Dr. Alam's legal pneumoconiosis opinion because he discredited the physician's diagnoses of complicated and simple pneumoconiosis by x-ray and biopsy, respectively. Employer's Brief at 35. We disagree. The ALJ properly considered the bases and reliability of Dr. Alam's opinion separately on the issues of whether the Miner had clinical pneumoconiosis and whether his COPD constituted legal pneumoconiosis. 20 C.F.R. §718.201(a)(1)-(2); Decision and Order at 37, 53.

pack-year history. Decision and Order at 53. As Dr. Alam believed the Miner's chronic bronchitis and emphysema were due primarily to cigarette smoking even after the Miner reported only an eighteen-year smoking history, the ALJ rationally declined to discredit his opinion. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); Decision and Order at 53.

Nor is there any merit to Employer's argument that the ALJ should not have considered the preamble to the 2001 revised regulations in evaluating the medical experts' credibility and improperly applied it as a legislative rule.[18] Employer's Brief at 38-47. An ALJ may permissibly evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1225 (10th Cir. 2018); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *see also 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). The ALJ accurately characterized the scientific evidence that the DOL relied upon when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment, and permissibly evaluated the medical opinions of record in light of the DOL's interpretation of those studies. *Sterling*, 762 F.3d at 491.

We further reject Employer's arguments that the ALJ gave impermissible reasons for discrediting its experts. Employer's Brief at 38-47. The ALJ accurately noted that both Drs. Jarboe and Rosenberg relied, in part, on the reduction in the Miner's FEV1/FVC ratio on pulmonary function studies to find his COPD was due solely to cigarette smoking. Decision and Order at 54, 60; Director's Exhibits 17, 91A. Contrary to Employer's

[18] Employer argues the ALJ violated its due process rights by relying upon the preamble after denying its discovery requests related to the preamble, including nineteen interrogatories, fifteen requests for admission, and twenty requests for production to the Department of Labor. Employer's Brief at 47; ALJ's February 14, 2019 Order Granting Director's Motion for Protective Order. As Employer has offered no explanation or argument to support this assertion and has not challenged any of the ALJ's specific findings for not granting its discovery requests, we decline to address this issue, as it is inadequately briefed. *See Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

arguments, the ALJ permissibly discredited their opinions as inconsistent with the studies that 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* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491; *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 54-60.

Moreover, the ALJ accurately found Dr. Jarboe's opinion, that the Miner's chronic bronchitis and emphysema were due solely to cigarette smoking, was based on a smoking history twice as long as the record established and permissibly discredited his opinion for that reason. *Bobick*, 13 BLR at 1-54; *Sellards*, 17 BLR at 1-80-81; Decision and Order at 57. The ALJ further accurately found Dr. Jarboe's exclusion of coal dust as a factor in the Miner's obstructive lung disease was based in part on the partially reversible component of the Miner's impairment. Decision and Order at 54, *citing* Director's Exhibit 17. The ALJ permissibly found this explanation not well reasoned as Dr. Jarboe failed to adequately explain why the irreversible portion of Claimant's pulmonary impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 54. Employer does not challenge either of these credibility determinations. *See Skrack*, 6 BLR at 1-711. Nor does it challenge the ALJ's finding that Dr. Rosenberg's opinion is entitled to les weight because he underestimated the Miner's coal mine employment history. Decision and Order at 58-59; *Bobick*, 13 BLR at 1-54; *Sellards*, 17 BLR at 1-80-81; *see Skrack*, 6 BLR at 1-711; Decision and Order at 58-59.

The ALJ also accurately noted Dr. Tuteur, in excluding coal mine dust exposure as a cause of the Miner's COPD, opined that 20% of non-mining cigarette smokers developed clinical meaningful COPD while only 1% of never smoking miners do. Decision and Order at 64; Employer's Exhibit 24 at 15. The ALJ noted the Miner in this case "was a miner who also smoked" and thus did "not fit into either of the categories [Dr. Tuteur] discussed." Decision and Order at 65. Contrary to Employer's arguments, the ALJ permissibly found Dr. Tuteur's opinion entitled to less weight because it was based on generalities and statistics rather than the specifics of Claimant's condition. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 65.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Banks*, 690 F.3d at 482-83; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson*, 12 BLR at 1-113. Thus, because it is supported by substantial evidence, we affirm the ALJ's finding that Dr. Alam's opinion is the most probative opinion of record and the medical opinion evidence establishes the

Miner had legal pneumoconiosis.[19] 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 835-36 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); Decision and Order at 66.

Disability Causation

To establish disability causation, Claimant must prove pneumoconiosis is a "substantially contributing cause" of the Miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it had "a material adverse effect on the miner's respiratory or pulmonary condition" or "[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).

Employer raises the same arguments on disability causation that it did regarding legal pneumoconiosis. But all the doctors agree the Miner was totally disabled by an obstructive respiratory impairment. Decision and Order at 67-68; Director's Exhibits 10, 13, 17, 45, 58-60, 63, 66, 68, 81, 91A, 93A, 105, 148; Claimant's Exhibits 8-10; Employer's Exhibits 3-11, 24-25. And we have affirmed the ALJ's determination that the Miner's disabling obstructive impairment constitutes legal pneumoconiosis.[20] *See Rowe*, 710 F.2d at 255; Decision and Order at 66; *see supra* at 21. Therefore, the Miner's legal pneumoconiosis is the cause of his total disability. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 69.

Thus we affirm the ALJ's conclusion that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order at 66, 70. We further affirm, as

[19] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Jarboe, Rosenberg, and Tuteur, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[20] Because Claimant has established the Miner was totally disabled due to legal pneumoconiosis, we need not address Employer's challenges to the ALJ's determination that the Miner had clinical pneumoconiosis. *Kozele*, 6 BLR at 1-382 n.4; Employer's Brief at 31-35.

unchallenged, the ALJ's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order at 70-71.

Consequently, we affirm the award of benefits in the miner's claim.

Entitlement to Benefits - - Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in 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*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 71.

Accordingly, the ALJ's Decision and Order Awarding Benefits in the miner's and survivor's claims is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge