U.S. Department of Labor

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

BRB No. 22-0109 BLA

RANDELL SHEPHERD (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INCOAL, INCORPORATED c/o OLD REPUBLIC INSURANCE COMPANY	)	
	)	
and	)	DATE ISSUED: 6/29/2023
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for Claimant.

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

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits (2015-BLA-05275) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on January 7, 2014.[1]

The ALJ found Claimant[2] established 21.34 years of coal mine employment in underground mines and surface employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked 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), and established a change in an applicable condition of entitlement.[4] 20 C.F.R.

[1] This is Claimant's second claim for benefits. On January 21, 1985, the district director denied his prior claim, filed on September 20, 1984, because he did not establish any element of entitlement. Director's Exhibit 1 at 1-156-57, 1-239-42. While Claimant's request for a hearing was pending before the Office of the Administrative Law Judges, he requested a dismissal of that claim because he was receiving state benefits. *Id.* at 1-8-9. On November 20, 1986, Associate Chief ALJ G. Marvin Bober issued a Decision and Order of Dismissal. *Id.* at 1-5. Claimant took no further action until filing his current claim. Director's Exhibit 3.

[2] Claimant died on July 12, 2021. Claimant's Response Brief at 1.

[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 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); *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).

§725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It also argues the removal provisions applicable to Department of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. Further, it contends the ALJ deprived it of due process by refusing to allow it to obtain discovery from the DOL regarding the scientific bases for the preamble to the 2001 regulatory revisions. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[6] It also contends the ALJ erred in finding it did not rebut the presumption.

Claimant responds in support of the ALJ's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Benefits Review Board to reject Employer's Appointments Clause challenge and its contention the

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Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Director's Exhibit 1 at 1-156-57.

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

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

U.S. Const. art. II, § 2, cl. 2.

[6] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established total disability and a change in applicable condition of entitlement. *See* 20 C.F.R. §§718.204(b)(2), 725.309; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

ALJ improperly used the preamble. Employer replied to Claimant's response brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief at 21-27. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[10] Employer's Brief at 23-27. Furthermore, it challenges the

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 10, 11.

[8] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] This case was initially before ALJ Peter B. Silvain, Jr., but it was reassigned to the ALJ in light of the Supreme Court's decision in *Lucia*. Decision and Order at 2.

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

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the

constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 27-32. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 28-29. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 28, 30-32.

For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Employer's Request for Discovery

While the case was before the ALJ, Employer sought discovery from the DOL related to the agency's deliberative process underlying the preamble to the 2001 revised regulations. *See* Incoal's Interrogatories and Requests for Admissions and Documents Regarding the Preamble. In response, the Director filed a Motion for a Protective Order seeking to bar the requested discovery. The ALJ granted the Director's motion, finding "the information [Employer] sought is not relevant to the pending claim," the preamble already sets forth the medical and scientific studies relied on in promulgating the regulations, and every circuit court to have considered the question has found it appropriate for ALJs to refer to the preamble in assessing medical opinions. Order Granting Director's Motion for Protective Order at 2.

Employer does not allege any specific error with the ALJ's finding that its discovery request is not reasonably calculated to lead to admissible, relevant evidence. Instead, it argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians as contrary to the scientific evidence cited in the preamble. Employer's Brief at 52-54. We disagree.

Due process requires Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d

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

Secretary's December 21, 2017 Letter to ALJ Bell.

472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer had the opportunity to develop and submit evidence challenging the science that the DOL relied on in the preamble both when the DOL promulgated its regulations and before the ALJ prior to his reliance on the preamble in weighing the medical evidence. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (party is free to challenge the DOL's position in the preamble by submitting the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 490-91 (4th Cir. 1997). Notably, a protective order barring discovery about the preamble's underpinnings does not in any way burden a party's ability to develop and introduce the type of evidence that would invalidate the science relied on in the preamble.[11]

Because Employer was afforded the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm the ALJ's ruling. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he 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

[11] Employer generally asserts that some of its experts "applied peer-reviewed literature (including some cited by the preamble and other works post-dating the document)," but fails to explain how such literature invalidates the DOL's position. Employer's Brief at 12, 15. Moreover, the preamble is based on the DOL's understanding of the relevant science in 2000. Discovery about the preamble cannot reasonably be expected to lead to evidence about post-2000 scientific developments superseding the preamble's analysis. And with regard to the science the DOL did rely on, the preamble already speaks for itself and Employer was free to (and apparently did) develop evidence challenging the DOL's sources. But the ALJ simply did not find it persuasive.

the number of years he 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 an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ found Claimant established 21.34 years of coal mine employment. Decision and Order at 7. Employer does not challenge the ALJ's length of coal mine employment finding.[12] Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711. Instead, Employer argues the ALJ erred in finding Claimant established he was regularly exposed to coal mine dust in the years he worked aboveground. Employer's Brief at 33-35. We disagree.

The ALJ considered Claimant's deposition testimony and employment history form. Decision and Order at 4-7; Director's Exhibits 4, 5; Employer Exhibit 4. He noted Claimant testified "he worked above and below ground, and that he was exposed to coal dust even in his aboveground work." Decision and Order at 4. Thus, he found Claimant established at least fifteen years of qualifying coal mine employment based on Claimant's testimony. *Id*.

Employer argues Claimant failed to establish his surface work was comparable to underground work in terms of the severity and regularity of his dust exposure. Employer's Brief at 33-35. Employer's argument is wrong.

Contrary to Employer's assertion, a claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Kennard*, 790 F.3d at

[12] Employer included Appendix A to its brief regarding the calculation of Claimant's qualifying coal mine employment. Employer's Brief, Appendix A. This appendix alone does not set forth sufficient detail to permit the Board to consider the merits of Employer's argument regarding the calculations of the length of Claimant's coal mine employment. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Regardless, the Board may not consider new evidence on appeal, so we decline to address this appendix. 20 C.F.R. §802.301; *Berka v. N. Am. Coal Corp.*, 8 BLR 1-183, 1-184 (1985).

664-65; 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Employer's Brief at 37-38. Instead, a claimant need only establish a miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2). Here, Claimant testified his equipment would be covered in coal dust and after work, his clothes and face would be black with coal dust. Employer's Exhibit 4 at 36-37. He stated he was exposed to coal dust working above ground. *Id.* at 38. On his employment history form, he stated he worked as a buggy driver from 1962 to 1984 and was exposed to "dust, gases or fumes." Director's Exhibit 4. He reported to Drs. Mettu, Rosenberg, and Tuteur that he worked underground and on the surface as a roof bolter, scoop operator, and equipment repairman at the face and tipple. Director's Exhibits 19 at 28, 24 at 2; Employer's Exhibit 6 at 1-3.

Contrary to Employer's contentions, the ALJ permissibly found Claimant's uncontested testimony, employment history form detailing his working conditions, and accounts to Drs. Mettu, Rosenberg, and Tuteur credible and established he was regularly exposed to coal mine dust during his entire aboveground coal mine employment. *See Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 664-65; *Sterling*, 762 F.3d at 490 (claimant's testimony that the conditions throughout his coal mine employment were "dusty as it could be" met his burden to establish he was regularly exposed to coal mine dust); *see also Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 1343-44 n.17 (10th Cir. 2014) (claimant's testimony that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Bonner v. Apex Coal Corp.*, 25 BLR 1-279, 1-282-84 (2022) (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust); 78 Fed. Reg. at 59,105; Decision and Order at 4-7, 13-14, 18-19.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b). Thus, we affirm his finding that Claimant invoked the presumption. *Id.*

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he had neither legal nor clinical pneumoconiosis,[13] or that "no part

[13] "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

of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[14]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves,* 761 F.3d 594, 600 (6th Cir. 2014)).

The ALJ considered the medical opinions of Drs. Mettu, Rosenberg, and Tuteur. Director's Exhibits 19, 24, 25; Employer's Exhibits 2, 6, 7. Dr. Mettu opined Claimant had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis related to coal mine dust exposure. Director's Exhibit 19 at 29-32. However, he later opined Claimant's COPD was due to smoking only. Director's Exhibit 25 at 2. Drs. Rosenberg and Tuteur opined Claimant did not have legal pneumoconiosis but COPD, emphysema, and chronic bronchitis related to smoking, and unrelated to coal mine dust exposure. Director's Exhibit 24 at 4, 12-13; Employer's Exhibits 2 at 5, 9-11, 13; 6 at 6-7, 9-10; 7 at 27-31, 42-43, 50-53, 65-67. The ALJ found their opinions not well-reasoned or documented and thus unpersuasive. Decision and Order at 30-32.

Employer argues the ALJ erred in weighing Drs. Mettu's, Rosenberg's, and Tuteur's opinions, generally asserting he improperly relied on the preamble to the revised

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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).

[14] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 29.

2001 regulations to discredit their opinions. Employer's Brief at 40-48; Employer's Reply Brief to Claimant's Response Brief at 3-8.

The preamble sets forth the scientific evidence the DOL found credible in promulgating the regulations. 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011). The ALJ therefore permissibly considered the medical opinions in conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Sterling*, 762 F.3d at 491; *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-03. Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990), and does not constitute evidence from outside of the record requiring the ALJ to give notice and an opportunity to respond. Employer's Brief at 35-40, 49-52; *see generally Adams*, 694 F.3d at 801-03.

Initially, Drs. Mettu, Rosenberg, and Tuteur excluded coal mine dust exposure as a cause of or contributing factor to Claimant's COPD, chronic bronchitis, and emphysema. Director's Exhibits 24 at 12-13; 25 at 2; Employer's Exhibits 2 at 5, 9-11, 13; 6 at 6-7, 9-10; 7 at 28-31, 43-44, 51, 65-67. They stated Claimant's smoking history was the sole cause of his obstructive lung disease. *Id*. In light of the DOL's recognition that the effects of smoking and coal mine dust can be additive, the ALJ permissibly found the physicians failed to adequately explain why Claimant's history of coal mine dust exposure did not significantly contribute, along with cigarette smoking, to his obstructive lung disease. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,939-79,941; Decision and Order at 30-32.

Dr. Rosenberg also supported his opinion by citing studies indicating smoking causes greater reductions in the FEV_1 on pulmonary function testing per year than coal mine dust exposure. He excluded coal mine dust exposure as a causative factor of Claimant's COPD, in part, because he found a markedly reduced FEV_1/FVC ratio on pulmonary function testing which, in his view, was inconsistent with obstruction due to coal mine dust exposure. Director's Exhibit 24 at 4-6; Employer's Exhibits 2 at 5-7; 7 at 40-43, 52-53, 55-57, 64-65. The ALJ permissibly found Dr. Rosenberg's opinion inconsistent with the scientific studies that the DOL credited in the preamble to the 2001 revised regulations that coal dust exposure may cause COPD with associated decrements in the FEV_1 and FEV_1/FVC ratio. *See Sterling*, 762 F.3d at 491 (explaining Dr. Rosenberg's decreased-ratio analysis "plainly contradicts the DOL's position that coal-dust exposure may be associated with decrements in the FEV_1/FVC ratio"); *see also*

Westmoreland Coal Co. v. Stallard, 876 F.3d 663, 671-73 (4th Cir. 2017); 65 Fed. Reg. at 79,943; Decision and Order at 30; Employer's Brief at 40-43.

Further, Dr. Rosenberg stated that because Claimant's lung function was normal in 1984 when he left his coal mine employment, his lung deterioration cannot be due to his coal dust exposure as coal dust-induced obstruction will occur "in the first few years after beginning work." Employer's Exhibits 2 at 11-13; 7 at 12-13, 26-27, 39-40, 42-46, 50-51, 54, 60-65. He also concluded "there's no foundation from a scientific perspective that dust that's in the lungs that's deposited there already is going to aggravate the airway lining cells causing bronchitis or a reduction of air flow over time" and, "in the absence of any further exposure, [the already present coal mine dust] doesn't really have the physiological capability of aggravating anything." Employer's Exhibit 7 at 44. In addition, he stated that looking "at the natural history of legal [coal workers' pneumoconiosis] . . . , miners are not going to develop this kind of air flow obstruction that [Claimant] ha[d] demonstrated decades later."[15] Employer's Exhibit 7 at 39. The ALJ permissibly found Dr. Rosenberg's opinion inconsistent with the regulations that recognize pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[16] 20 C.F.R. §718.201(c)(1); *see* 65 Fed. Reg. at 79,971 ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order

[15] Employer asserts the ALJ's analysis ignores the Secretary's clarification that the regulation meant only that some forms of the disease, and not the most common forms of legal and clinical, could be latent and progressive. Employer's Brief at 45-48 (citing *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001); 68 Fed. Reg. 69931 (Dec. 15, 2003)). But the Board has held a physician's opinion that only simple clinical or complicated pneumoconiosis, and not legal pneumoconiosis, may be latent and progressive cannot be reconciled with the Act or its implementing regulations. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-34-35 (2004) (citing *Nat'l Mining*, 292 F.3d at 863, 869). Further, contrary to Employer's characterization, the ALJ did not state that pneumoconiosis must be latent and progressive, only that it *can* be. Decision and Order at 30-31.

[16] Because the ALJ provided valid reasons for discrediting Dr. Rosenberg's opinion, we need not address Employer's additional arguments regarding the weight he assigned to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 41 n.8, 44-45.

at 31; Employer's Exhibit 7 at 26-27, 39-40, 42-47, 50-51, 54, 60-65; Employer's Brief at 41, 45-48.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Banks*, 690 F.3d at 482-83; *Crisp*, 866 F.2d at 185. Employer's arguments amount to a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 35-54. Because the ALJ acted within his discretion in rejecting the opinions of Drs. Mettu, Rosenberg, and Tuteur, we affirm his finding that Employer did not disprove legal pneumoconiosis. We therefore affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 32.

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 33-34. Contrary to Employer's argument, the ALJ permissibly discredited the disability causation opinions of Drs. Mettu, Rosenberg, and Tuteur because they failed to diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the disease. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Decision and Order at 33-34; Employer's Brief at 54-58. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34.

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

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge