U.S. Department of Labor

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

BRB Nos. 21-0497 BLA
and 21-0498 BLA

EMMA RAYETTA BARTLEY (o/b/o and Widow of JERRY W. BARTLEY)	)	
Claimant-Respondent	)	
v.	)	
HARMAN MINING CORPORATION	)	DATE ISSUED: 11/22/2022
and	)	
ARROWPOINT CAPITAL CORPORATION	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2019-BLA-05551, 2019-BLA-05942) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on October 28, 2016,[1] and a survivor's claim filed on May 25, 2018.[2]

The ALJ found Employer was properly designated as the responsible operator. She accepted the parties' stipulations that the Miner had over fifteen years of qualifying coal mine employment and was totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The ALJ further determined Employer did not rebut the presumption and that Claimant established a change in an applicable condition of entitlement.[4] 20

[1] The Miner filed a previous claim on February 18, 2011, which the district director denied by reason of abandonment. Miner's Claim (MC) Director's Exhibit 1. The regulations provide that, "[f]or purposes of [20 C.F.R.] §725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Claimant is the widow of the Miner, who died on January 18, 2018. Survivor's Claim (SC) Director's Exhibits 1, 5; MC Director's Exhibit 9. She is pursuing the miner's claim as well as her own survivor's claim. SC Director's Exhibit 1.

[3] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the 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); 20 C.F.R. §718.305(b).

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she

C.F.R. §§718.305, 725.309. Thus she awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

On appeal, Employer contends that the ALJ erred in finding that it is the responsible operator. Employer alternatively argues that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's arguments regarding its designation as the responsible operator.[6]

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

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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). Because the Miner's prior claim was denied by reason of abandonment, Claimant must submit new evidence establishing at least one element to warrant a review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; MC Director's Exhibit 1.

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

[6] We affirm, as unchallenged, the ALJ's findings that Claimant established the Miner had over fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment and therefore Claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19. Consequently, we also affirm the ALJ's determination that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *Skrack*, 6 BLR at 1-711; Decision and Order at 35.

with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[8] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). If the operator finally designated as responsible is not the operator that most recently employed the miner, the regulations require the district director to explain the reason for such designation. 20 C.F.R. §725.495(d).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist due to reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3). Where an operator is considered a successor operator, any employment with a prior operator is "deemed to be employment with the successor operator." 20 C.F.R. §725.493(b)(1).

On January 25, 2017, the district director identified Harman Mining Corporation (Harman) as a potentially liable operator. Miner's Claim (MC) Director's Exhibit 26. This

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

[8] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

notice gave Harman ninety days to submit evidence disputing its designation as a potentially liable operator. *Id*. Harman timely responded, generally contesting its designation as a potentially liable operator. MC Director's Exhibit 31.

On August 2, 2018, the district director issued the Schedule for the Submission of Additional Evidence (SSAE), designating Harman as the responsible operator.[9] MC Director's Exhibit 37. The district director informed Harman that it had until October 1, 2018, to submit additional documentary evidence relevant to liability and identify any liability witnesses it intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id*. The district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*. at 3, *citing* 20 C.F.R. §725.456(b)(1).

Employer responded to the SSAE on August 15, 2018, and contested liability. MC Director's Exhibit 38. It did not submit additional evidence to the district director to support its controversion of liability or identify any liability witnesses by October 1, 2018.

The district director issued a Proposed Decision and Order (PDO) on December 28, 2018, awarding benefits and naming Harman as the responsible operator. MC Director's Exhibit 43. Employer requested a hearing and the case was referred to the OALJ.[10] MC Director's Exhibits 49, 51, 52.

On April 14, 2020, before the ALJ, Employer filed a Motion for Partial Summary Judgement asserting Harman should be dismissed as the responsible operator because Great Knobs Mining Corporation (Great Knobs) is the successor operator of Whitetop

[9] The district director found the Miner's subsequent employers, Great Knobs Mining Corporation and North Branch Mining Incorporated, were not the responsible operator as they did not employ the Miner for at least one year. MC Director's Exhibit 37 at 9.

[10] On January 18, 2018, the Miner died while his claim was pending before the district director and Claimant filed a Survivor's Claim on May 28, 2019. SC Director's Exhibits 1; MC Director's Exhibit 9. On February 28, 2019, the district director issued a Proposed Decision and Order Awarding Survivor's Benefits. SC Director's Exhibit 12. Employer requested a hearing, and the case was referred to the OALJ. SC Director's Exhibits 18, 19, 22. The miner's and survivor's claims were consolidated before the ALJ. Decision and Order at 2; SC Director's Exhibit 21.

Mining Corporation (Whitetop)[11] and employed the Miner for a cumulative period of one year more recently than Employer. April 14, 2020 Motion for Partial Summary Judgement at 4-5. Employer attached to the motion records from the Virginia Department of Mines, Mineral and Energy (DMME) regarding the relationship between Great Knobs and Whitetop as Exhibits A and B. *Id.* at 6-11. The Director opposed Employer's motion, asserting it was properly designated as the responsible operator; it never submitted liability evidence nor identified liability witnesses while the case was before the district director; and it failed to establish extraordinary circumstances to warrant admission of its liability evidence. May 18, 2020 Director's Opposition to Employer's Motion for Partial Summary Judgement. The ALJ denied Employer's motion, concluding she lacked regulatory authority to dismiss Harman as the responsible operator except on motion or written agreement of the Director. May 27, 2020 Order Denying Employer's Motion for Partial Summary Judgement (May 27, 2020 Order) at 2, *citing* 20 C.F.R. §725.465(b).

On June 8, 2020, Employer sought to readmit its liability evidence, asserting the DMME records show Great Knobs and Whitetop are the same company. June 8, 2020 Motion to Admit Liability Evidence with attached Exhibits A, B, and C. Employer further argued that because the Miner died and was unable to testify regarding his employment with these companies, his death constituted extraordinary circumstances for admitting the untimely evidence and deprived Employer of the opportunity to present "oral . . . evidence" and "conduct . . . cross-examination" in violation of its right to due process and the Administrative Procedure Act (APA).[12] *Id.* at 7 (unpaginated). It further asserted the district director failed to adequately investigate the relationship between Great Knobs and Whitetop. *Id.* at 7-8 (unpaginated). On June 19, 2020, the Director opposed Employer's Motion to Admit Liability Evidence, asserting Employer failed to timely identify or submit liability evidence when the case was pending before the district director or establish extraordinary circumstances for its failure to do so.

On July 1, 2020, the ALJ denied Employer's June 8, 2020 Motion to Admit Liability Evidence. Order Denying Employer's Motion to Admit Documentary Evidence Pertaining to Liability (July 1, 2020 Order). She found Employer failed to establish "a meaningful

[11] The Miner worked for Harman from 1989 to 1991 and from 1996 to January 15, 1998, Great Knobs in 1998, and Whitetop in 1995 and 1996. Decision and Order at 8; MC Director's Exhibit 6.

[12] Employer notes the APA provides that "a party is entitled to present his case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d).

connection" between the Miner's death and the availability of liability evidence and that it failed to identify specialized knowledge by the Miner about operations or ownership of Great Knobs and Whitetop. *Id.* at 3. She also noted Employer did not attempt to depose the Miner before his death and then waited two years after the Miner's death to request information from the DMME. *Id.* Thus, the ALJ found that Employer did not timely develop its liability evidence, failed to show an APA violation, and did not meet its burden to establish extraordinary circumstance for admitting its liability evidence. *Id.* at 4. She also stated she lacked the authority to determine if the district director's actions were sufficient and thus "decline[d] to address" Employer's argument that the district director failed to adequately investigate the relationship between Great Knobs and Whitetop.[13] *Id.* at 4, *citing* 20 C.F.R. §725.455(a).[14]

In her Decision and Order, the ALJ found Claimant was entitled to benefits and determined Harman is the responsible operator, rejecting Employer's arguments that a successor relationship existed between Great Knob and White Top based on a lack of evidence at 20 C.F.R. §725.495. Decision and Order at 6-9, 35. She also rejected Employer's contention that the district director misstated the law in contending it was Harman's burden to prove another operator was liable. *Id.* at 8; Employer's Post-Hearing Brief at 18, *citing Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555 (6th Cir. 2002). The ALJ further rejected Employer's assertion that the district director did not adequately consider the evidence before him and failed to infer that there was a relationship between Great Knobs and Whitetop based on that evidence. *Id.* at 8-9.

On appeal, Employer contends it was deprived of due process by the district director's failure to adequately "investigate the identity of the correct responsible operator." Employer's Brief at 4-9, *citing Hall*, 287 F.3d at 556-565; *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). It argues the ALJ failed to recognize that the 2001 amendment to the regulations did not abrogate the district director's duty to investigate and notify each potentially liable operator, and "contends that its duty to show

[13] On August 20, 2020, the ALJ issued an Order Granting Director's August 3, 2020 Motion for Protective Order barring Employer from requesting written discovery and production of documents, and deposing David Balmforth, the district director, regarding the Department of Labor's (DOL's) deliberative process in determining the responsible operator. August 20, 2020 Order Granting Director's Motion for Protective Order (August 20, 2020 Order).

[14] The ALJ explained that her "role as an ALJ is to resolve contested issues of fact or law, not to decide whether the Director correctly carried out her duties." July 1, 2020 Order at 4.

error on the part of the Director requires that the Director must first meet his initial duty to fully investigate." *Id.* at 8-14. It again argues that the district director did not adequately consider the evidence before him and failed to infer that there was a relationship between Great Knobs and Whitetop based specifically on the Social Security Administration (SSA) earning records.[15] Employer's Brief at 9-10. We disagree.

The regulations do not require the district director to correctly identify all potentially liable operators before designating a responsible operator.[16] 20 C.F.R. §725.495(b). Rather, as the Director correctly points out, it bears only the burden to prove the designated responsible operator is a potentially liable operator. 20 C.F.R. §725.495(b); Director's Brief at 4-7. Accordingly, once the district director identified Harman as a potentially liable operator and the designated responsible operator, the burden shifted to Harman to show that an operator employed the Miner for at least one year subsequent to his tenure with it or that it was financially incapable of paying benefits. 20 C.F.R. §§725.408(b), 725.414, 725.456(b)(1), 725.495(c)(2). As the district director conducted an investigation in accordance with the regulations, there is no merit to Employer's arguments.

Additionally, due process requires that Employer be given notice and an opportunity to mount a meaningful defense.[17] *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183-84 (4th Cir. 1999) (core elements of procedural due process are notice and opportunity to be heard); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). Here, as the ALJ correctly points out, Employer waited for two years after the

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[15] Employer generally asserts the Miner's death deprived it of the opportunity to elicit relevant testimony from the "single most important fact witness." Employer's Brief at 11.

[16] The Director points out that the district director considered the Miner's SSA earning records and determined that no other operator met the criteria of a potentially liable operator. Director's Brief at 6, n.4; MC Director's Exhibits 37 at 9, 43 at 10.

[17] The Director correctly points out that the cases cited by Employer in support of its due process argument, *Hall* and *Crabtree*, were issued before the Department of Labor amended the regulations to place obligations on both the Director and the designated responsible operator to investigate the Miner's employment history, and to require that all evidence relevant to operator liability be submitted before the district director. Director's Brief at 6 n.5; *see* Employer's Brief at 6-9, *citing Hall*, 287 F.3d at 556-565; *Crabtree*, 7 BLR 1-354. Moreover, *Hall* does not govern the resolution of the responsible operator issue in this case, as it was decided by the United States Court of Appeals for the Sixth Circuit, which does not have jurisdiction in this case. *See Shupe*, 12 BLR at 1-202.

Miner's death to begin its investigation into the possible liability of other operators and did not present any liability evidence before the district director. Decision and Order at 6-9. Because Employer was afforded these opportunities, it has failed to demonstrate a due process violation. *See Borda*, 171 F.3d at 184.

For the above reasons, we conclude the ALJ properly found Harman is the responsible operator. 20 C.F.R. §§725.494, 725.495(a)(1). Thus we affirm the ALJ's finding that Employer is liable for benefits.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[18] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer rebutted the presumption that the Miner suffered from clinical pneumoconiosis but did not rebut the presumption that he had legal pneumoconiosis or that no part of his total disability was caused by it.[19] Decision and Order at 27, 32-34.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b),

[18] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[19] We need not address Employer's argument that the ALJ erred in her consideration of the x-ray evidence and computed tomography (CT) scans because the ALJ determined that Employer was successful in rebutting clinical pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 22, 30, 32; Employer's Brief at 24-27.

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Fino and Rosenberg.[20] Decision and Order at 22-27. Dr. Rosenberg opined the Miner's pulmonary impairment was due to his bone marrow transplant[21] and was unrelated to coal dust exposure. MC Employer's Exhibit 1 at 8-10. Similarly, Dr. Fino opined the Miner's pulmonary impairment was due to his numerous medical issues[22] and was unrelated to coal dust exposure. MC Director's Exhibit 19 at 10-11. The ALJ found their opinions were not well-reasoned and, therefore, insufficient to satisfy Employer's burden of proof.[23] Decision and Order at 27.

Employer argues the ALJ erred in considering Drs. Fino's and Rosenberg's opinions. Employer's Brief at 27-33. We disagree. The ALJ permissibly found that although Drs. Fino and Rosenberg discussed other causes of the Miner's respiratory impairment, they did not adequately explain why the Miner's more than fifteen years of coal mine dust exposure did not also contribute to, or aggravate, his disabling pulmonary impairment. *See* 20 C.F.R. §718.201(b) (legal pneumoconiosis includes "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Mingo Logan Coal Co. v. Owens*, 724 F.3d

[20] The ALJ also considered Dr. Green's opinion. Decision and Order at 23-24. Dr. Green conducted the DOL's complete pulmonary evaluation of Claimant on March 2, 2017 and submitted a supplemental report after reviewing additional medical records at the request of the district director. MC Director's Exhibits 12, 20, 22. He opined the Miner's pulmonary disability was due in part to coal dust exposure. MC Director's Exhibits 12 at 3, 22 at 2. As his opinion does not aid Employer on rebuttal, we need not address Employer's argument that the ALJ erred in finding his opinion reasoned and documented. *Larioni*, 6 BLR at 1-1278; *see* Employer's Brief at 27-30.

[21] Dr. Rosenberg attributed the Miner's respiratory impairment to bronchiolitis obliterans, which "is a well-recognized complication of transplantation and the graft-versus-host-reaction." MC Employer's Exhibit 1 at 8.

[22] Dr. Fino stated the Miner had heart disease due to coronary artery disease, leukemia, graft-versus-host disease, colon cancer that spread to his liver, bronchiolitis obliterans organizing pneumonia, and a metastatic disease to the lungs. MC Director's Exhibit 19 at 9.

[23] We affirm, as unchallenged, the ALJ's findings that the Miner's treatment records do not support Employer's burden of proof. *See Skrack*, 6 BLR at 1-711; Decision and Order at 32.

550, 558 (4th Cir. 2013); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 27.

The ALJ also permissibly discounted Dr. Rosenberg's opinion as inconsistent with the regulations which recognize that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.[24] 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) ("[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); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order at 25-26; MC Employer's Exhibit 1.

Because the ALJ rationally discredited the opinions of Drs. Fino and Rosenberg,[25] the only medical opinions supportive of Employer's burden, we affirm her finding Employer did not disprove legal pneumoconiosis.[26] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order at 27, 32. We therefore affirm the ALJ's determination Employer did not rebut the Section 411(c)(4) presumption

[24] As the ALJ noted, Dr. Rosenberg stated that the lack of documentation of medical treatment for respiratory complaints around the time the Miner left coal mine employment in 1999 "supports the fact that current respiratory complaints are of recent onset and are not representative of legal [pneumoconiosis]." MC Employer's Exhibit 1 at 10; *see* Decision and Order at 25-26.

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

[26] Employer also asserts the ALJ erred in failing to make a specific smoking history determination. Employer's Brief at 23-25. As we have affirmed the ALJ's discrediting of Drs. Fino and Rosenberg because they did not adequately explain why coal mine dust exposure did not contribute to the Miner's impairment, error if any in the ALJ's failure to make a specific smoking history finding is harmless. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

by establishing the absence of pneumoconiosis. *See* 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 the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 32-34. The ALJ permissibly discredited the opinions of Drs. Fino and Rosenberg on the cause of the Miner's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to her determination.[27] *See Epling*, 783 F.3d at 504-05; *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 33-34. We therefore affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption and the award of benefits in the Miner's claim. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge as to the survivor's claim, we affirm the ALJ's determination

[27] Drs. Fino and Rosenberg did not address whether legal pneumoconiosis caused the Miner's total respiratory disability independent of their conclusions that he did not have the disease.

that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order at 3, 35.

Accordingly, the ALJ's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge