U.S. Department of Labor

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

BRB No. 22-0029 BLA

DONNIE D. NEWSOME	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D M & M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 5/10/2023
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

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

David Casserly (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) Jason A. Golden's Decision and Order Awarding Benefits (2011-BLA-06294) rendered on a

claim filed on June 21, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ[1] found Employer is the properly designated responsible operator. He credited Claimant with 17.44 years of underground coal mine employment and determined he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] He further found Employer did not rebut the presumption and therefore 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.[3] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Further, it contends the ALJ erred in finding it is the responsible operator. On the merits, it asserts the ALJ erred in finding

[1] On May 31, 2018, ALJ Monica Markley issued a Decision and Order Awarding Benefits because she found Claimant established all elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). Pursuant to Employer's appeal and consistent with *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), the Board vacated ALJ Markley's Decision and Order and remanded the case to the Office of Administrative Law Judges (OALJ) for reassignment to a new ALJ. *Newsome v. DM&M Coal Co., Inc.*, BRB No. 18-0467 BLA (Jul. 24, 2019) (unpub.). Thereafter the OALJ assigned the case to ALJ Golden.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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.

[3] 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.

Claimant established at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. Finally, it argues he erred in determining it did not rebut the presumption.[4] Claimant has not filed a response brief.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges. Further, the Director urges the Board to affirm the ALJ's determination that Employer is the responsible operator. Employer has filed a reply brief reiterating its arguments.

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.[5] 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 Challenge

Employer urges the Board to vacate the award 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).[6] Employer's Brief at 15-18; Employer's Reply Brief at 1-3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointment of all sitting

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *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 3, 17.

[5] 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); Decision and Order at 3; Director's Exhibit 3; Hearing Tr. at 14.

[6] *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*, 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.

Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.*

The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response Brief at 4-9. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id*. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). 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 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. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

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[7] The Secretary of Labor (the 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 [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

Under the presumption of regularity, we therefore 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 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 [DOL]" when ratifying the appointment of Judge Golden "as an [ALJ]." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts" or did not make a "detached and considered judgment" when he ratified ALJ Golden's appointment, but instead generally speculates he did not provide "genuine consideration" of the ALJ's qualifications. Employer's Brief at 17. It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification 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*" all its earlier actions was proper).

Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 18-22; Employer's Reply Brief at 2-4. 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, supra*. Employer's Brief at 19-21; Employer's Reply Brief at 2-3. 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 opinion of the United States Court of Appeals for the Federal Circuit 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 18-22; Employer's Reply Brief at 3-4. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the operator must have employed the miner in coal mine employment for a cumulative period of not less than one year.[8] 20 C.F.R. §725.494(a)-(e). 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 the responsible operator, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 10-16. We affirm this finding as Employer does not challenge it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does it allege it is financially incapable of assuming liability for benefits. Thus, it can avoid liability only by establishing that another financially capable operator more recently employed Claimant for at least one year.

Before the ALJ, Employer argued DBH Coal employed Claimant more recently and the district director should have named it the responsible operator. Employer's Post-Hearing Brief at 30-31. Although Claimant did not work for this entity for one year in isolation, Employer argued it is a successor operator[9] to Employer under the regulations

[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).

[9] If a successor relationship is established between two coal mine employers, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c). 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)-

and thus the time Claimant spent working for Employer and DBH Coal should be aggregated to establish one year of employment with DBH Coal. *Id*. Employer's argument did not persuade the ALJ as he found no successor operator relationship between Employer and DBH Coal. Decision and Order at 10-16. Rather, he found Employer and DBH Coal "were operated as a single entity and they should be treated as one in the same for purposes of liability." *Id*. at 15-16. Thus the ALJ found Employer is the properly designated responsible operator. Employer argues the ALJ erred in reaching this conclusion. Employer's Brief at 23-30. We disagree.

As the ALJ noted, Claimant's Social Security Administration (SSA) earnings records list the same address for Employer and DBH Coal. Decision and Order at 14; Director's Exhibit 6 at 7. Employer and DBH Coal both had insurance policies through Old Republic Insurance Company and their policy numbers differ by only one digit. Director's Exhibits 14, 28-32. Claimant testified that there was common ownership between Employer and DBH Coal and the same employees worked for both entities. Director's Exhibit 27 at 5-6. He also testified that, when he worked for DBH Coal, he was paid with checks from Employer. ALJ Exhibit 14 at 34-36, 45-46. Further, he stated equipment was transferred between the mines of the two entities. *Id*. at 49-53. Contrary to Employer's argument, the ALJ permissibly found the evidence establishes Employer "and DBH [Coal] are one in the same entity for purposes of liability as the responsible operator." Decision and Order at 15-16; *see Ridings v. C & C Coal Co*., 6 BLR 1-227, 1-231 (1983) (affirming ALJ's determination that two successive coal mine employers with the same officers and mailing address were a single entity).

Employer argues the ALJ's finding constitutes an improper piercing of its corporate veil. Employer's Brief at 23-30. As the Director correctly argues, however, nothing in the ALJ's decision indicates he disregarded the corporate form of either Employer or DBH Coal to hold any of their owners, shareholders, or officers personally liable. *See Kinney v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (defining piercing the corporate veil as an equitable remedy to disregard corporate form to prevent injustices or inequitable consequences); Director's Brief at 16-17. Nor are we persuaded by Employer's argument that the ALJ acted sua sponte, as the Director raised this argument to the ALJ in his post-hearing brief. Director's Brief at 5-7. Thus we reject this argument as the ALJ did not err in finding Employer and DBH Coal are one entity for liability purposes. *See Armbruster*

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(3). If the successor operator is financially incapable of assuming liability for benefits, however, liability falls to its predecessor if the predecessor meets the definition of a potentially liable operator – namely, that it employed the miner for at least one year and is financially capable of paying benefits. 20 C.F.R. §§725.492(d), 725.494(c), (e), 725.495(a)(3).

v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983) (evaluating whether a parent corporation and its subsidiary should be treated as a single employer); *Ridings*, 6 BLR at 1-231. As Employer raises no further argument, we affirm the ALJ's finding that Employer is the responsible operator.[10]

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See 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 if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Employer argues the ALJ erred in finding at least fifteen years of coal mine employment established. Employer's Brief at 30-32. We disagree.

The ALJ considered Claimant's deposition and hearing testimony, employment history forms, SSA earnings records, and sworn affidavits. Decision and Order at 3-10; Director's Exhibits 2-6, 27 at 4-6; Claimant's Exhibit 4 at 1-3; Hearing Tr. at 15-17, 19, 22-23, 29, 31-38, 41, 43, 44-46, 48. He permissibly found Claimant's SSA earnings records to be the most probative evidence. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA records over testimony and other sworn statements); Decision and Order at 7.

Because he could not ascertain the beginning and ending dates of Claimant's coal mine employment, the ALJ applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii).[11] Decision and Order at 7-9. He divided Claimant's yearly earnings as reported in his SSA earnings records by the coal mine industry's average daily earnings,

[10] We need not address the Director's argument that the ALJ erred in finding Employer designated Claimant as a liability witness before the district director. Director's Response Brief at 13-15.

[11] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. 20 C.F.R. §725.101(a)(32)(iii).

as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*, to ascertain the number of working days Claimant had in any given year. *Id.*

Citing the Sixth Circuit's holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), the ALJ concluded that if Claimant's earnings reflect 125 or more working days in a given year, he would credit him with one year of coal mine employment. *Id.* If Claimant had less than 125 working days, the ALJ credited him with a fractional portion of a year based on the ratio of the actual number of days worked to 125. 20 C.F.R. §725.101(a)(32)(i); Decision and Order at 7-9. Based on this method of calculation, he found Claimant had a total of 17.44 years of employment. *Id.*

Employer argues the ALJ's reliance on *Shepherd* is misplaced as the relevant discussion he cited is dicta. Employer's Brief at 30-32. Contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, holding that 125 days may constitute a year of coal mine employment even if the miner did not have a calendar year employment relationship with an employer, is not dicta. The Sixth Circuit held a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a calendar year, "regardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year." 915 F.3d at 401-02. Thus, a miner need not have a full 365-day employment relationship with an employer. *Id.* The court in *Shepherd* expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)," including Section 725.101(a)(32)(i) which states 125 working days comprises a year of coal mine employment for all purposes under the Act. *Id.* at 407.

Employer also argues the ALJ erred in crediting Claimant's hearing testimony as establishing that his self-employment earnings constitute coal mine employment. Employer's Brief at 30-31. The ALJ found Employer conceded this issue, however, as he noted it "agrees that Claimant's self-employment wages from 1974, 1975, 1978, 1979, 1985, 1988, and 1990 are from coal mine employment." Decision and Order at 7, *citing* Employer's Brief at 5. Stipulations of fact that are fairly entered into are binding on the parties. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996). Because Employer has offered no reason why it should not be bound by its stipulation, we affirm the ALJ's finding. *Skrack*, 6 BLR at 1-711.

Employer does not challenge the ALJ's finding that all of Claimant's coal mine employment took place in underground mines; thus we also affirm it. *Skrack*, 6 BLR at 1-711 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 3. As Claimant has at least fifteen years of underground coal mine employment and is totally disabled by a respiratory or pulmonary impairment, we affirm the ALJ's finding that Claimant invoked the Section

411(c)(4) presumption. Decision and Order at 17; *see* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[12] 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)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does 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 Sixth Circuit holds 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 opinions of Drs. Jarboe and Rosenberg that Claimant does not have legal pneumoconiosis. Decision and Order at 21-24. Dr. Jarboe diagnosed Claimant with chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to cigarette smoking and asthma. Employer's Exhibits 8, 9, 10. He opined these conditions are unrelated to coal mine dust exposure. *Id.* Dr. Rosenberg diagnosed COPD in the form

[12] "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).

of emphysema due to cigarette smoking. Director's Exhibit 11, Employer's Exhibits 5, 6, 7. He also opined this condition is unrelated to coal mine dust exposure. *Id.*

The ALJ found the opinions of Drs. Jarboe and Rosenberg unpersuasive, contrary to the regulations, and based on premises inconsistent with studies the DOL cited in the preamble to the 2001 revised regulations. *Id.*

Employer contends the ALJ erred in reaching these credibility findings. Employer's Brief at 39-42. We disagree.

In excluding legal pneumoconiosis, Dr. Rosenberg opined Claimant's pulmonary function testing demonstrates a reduced FEV1/FVC ratio. Director's Exhibit 11 at 4. He explained that "with smoking-related forms of COPD, the FEV1/FVC ratio is generally reduced" but a reduction in the ratio is not consistent with coal mine dust-induced airway obstruction. *Id.* at 4-5; *see* Employer's Exhibit 5 at 3. Dr. Jarboe also excluded legal pneumoconiosis because pulmonary function testing revealed a "disproportionate reduction of FEV1 compared to FVC" and that this "is the type of the functional abnormality seen in cigarette smoking and/or asthma and not coal [mine] dust inhalation." Employer's Exhibit 8 at 5-6. The ALJ permissibly found this reasoning inconsistent with studies set forth in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 21-22.[13]

Dr. Jarboe excluded coal mine dust exposure as a cause of Claimant's chronic bronchitis because Claimant "had no exposure to coal mine dust in about [fifteen] years" and "chronic cough and mucous production due to coal [mine] dust inhalation clears after removal from the dust." Employer's Exhibit 8 at 10. The ALJ permissibly found this reasoning contrary to the regulations which recognize pneumoconiosis may be a latent and progressive disease. 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's decision to discredit a physician

[13] Contrary to Employer's argument, an ALJ may, as part of the deliberative process, 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 Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Brief at 20-22.

whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); Decision and Order at 24.

Dr. Rosenberg concluded Claimant has diffuse emphysema and "a diffuse emphysematous destruction of lung tissue" consistent with cigarette smoking and "not characteristic of coal mine dust exposure." Director's Exhibit 11 at 6. The ALJ acted within his discretion in finding Drs. Rosenberg's opinion inadequately explained given the DOL's recognition in the preamble to the 2001 regulatory revisions that coal mine dust can cause centrilobular emphysema - which is a diffuse-type emphysema - and that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See Adams*, 694 F.3d at 801-02; 65 Fed. Reg. at 79,941, 79,943; Decision and Order at 22. Thus we affirm the ALJ's decision to discredit the opinions of Drs. Rosenberg and Jarboe.

We next reject Employer's argument that the ALJ erred in failing to consider Dr. Alam's opinion as one supporting its burden to disprove legal pneumoconiosis. Employer's Brief at 35-38. During a December 9, 2013 deposition, Dr. Alam testified that if Claimant had a thirteen year coal mine employment history and a forty pack-year cigarette smoking history, then he would attribute ninety percent of Claimant's obstructive impairment to cigarette smoking and ten percent to coal mine dust exposure. Employer's Exhibit 11 at 16-17. Based on these percentages, he opined Claimant's obstructive impairment is still significantly related to coal mine dust exposure and thus Claimant has legal pneumoconiosis. *Id*. During a second deposition, Dr. Alam was asked if his opinion would change if he assumed a thirteen year coal mine employment history, a fifty pack-year smoking history, and x-rays that are negative for clinical pneumoconiosis. Employer's Exhibit 19 at 35-39. In that scenario, Dr. Alam stated it is "possible" that less than ten percent of Claimant's obstructive impairment is due to coal mine dust exposure. *Id*. In this case, the ALJ found Claimant had a 17.44 year coal mine employment history and a forty-five pack-year cigarette smoking history. Decision and Order at 9, 21. Because Dr. Alam did not exclude legal pneumoconiosis based on these assumed exposure histories, we discern no error in the ALJ's finding that his opinion cannot support Employer's burden to disprove the disease. Decision and Order at 17.

Because the ALJ permissibly discredited the opinions of Drs. Jarboe and Rosenberg,[14] the only opinions supportive of Employer's burden on rebuttal, we affirm his determination that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 24. Employer's failure

[14] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Jarboe and Rosenberg, we need not address Employer's additional arguments regarding the weight that the ALJ assigned their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 35-42.

to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[15] Therefore, we affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 24.

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 24-25. He permissibly discredited the opinions of Drs. Jarboe and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to his finding Employer failed to disprove the disease. *See Big Branch Res., 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); Decision and Order at 25. We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[15] Because we affirm the ALJ's findings on legal pneumoconiosis, we need not address Employer's arguments with respect to clinical pneumoconiosis. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 33-35.

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