U.S. Department of Labor

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

BRB Nos. 22-0046 BLA
and 22-0535 BLA

LEONA STACY (o/b/o and Widow of ROGER STACY) Claimant-Respondent v. LITTLE MOE COAL CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 5/26/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a miner's claim and Decision and Order Awarding Benefits in a survivor's claim of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Steven Winkelman and Jeffrey S. Goldberg (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, BUZZARD and ROLFE, Administrative Appeals Judges

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits in a miner's claim and Decision and Order Awarding Benefits in a survivor's claim (2017-BLA-06201, 2021-BLA-05372) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent miner's claim filed on November 16, 2015,[1] and a survivor's claim filed on August 24, 2020.[2]

The ALJ credited the Miner with 14.95 years of coal mine employment. Thus, Claimant could not invoke the rebuttable presumption of total disability due to

[1] The Miner's prior claim was denied, and the record was destroyed in accordance with the Department of Labor's record retention policy. Miner's Claim (MC) Director's Exhibits 1, 3. Thus, the ALJ noted there is no information from the Miner's prior claim available for consideration in this claim. Decision and Order at 2 n.2, 6.

After the Miner filed his current claim, his three adult daughters filed claims for benefits as augmentees. Leona E. Stacy's, Michelle R. Stacy Ball's, and Mahalia L. Stacy's December 18, 2017 Augmentee Claims. The district director issued an Amended Proposed Decision and Order, modifying the Miner's award of benefits to include augmented benefits for Leona E. Stacy and Michelle R. Stacy Ball, but determined Mahalia L. Stacy did not qualify as an augmentee. April 9, 2019 Amended Proposed Decision and Order.

[2] Claimant is the widow of the Miner, who died on June 13, 2020. MC Director's Exhibit 10; Survivor's Claim (SC) Director's Exhibit 5. She is pursuing the miner's claim on behalf of the Miner's estate as well as her own survivor's claim. SC Director's Exhibit 1; September 2, 2020 Letter from Leona M. Stacy to the ALJ.

pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering whether Claimant established entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the Miner had clinical and legal pneumoconiosis and he was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). He therefore found Claimant established a change in an applicable condition of entitlement and awarded benefits in the miner's claim.[4] 20 C.F.R. §725.309. In addition, the ALJ found the Miner's adult daughters, Leona E. Stacy and Michelle R. Stacy Ball, did not qualify as dependents pursuant to 20 C.F.R. §725.209 and thus did not augment the award of 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] He also found the Miner and Claimant's daughters, Michelle R. Stacy Ball and Leona E. Stacy, qualified as dependents for purposes of augmenting Claimant's survivor's benefits. 20 C.F.R. §725.209.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to the ALJ rendered his appointment

[3] Section 411(c)(4) 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). The ALJ found Employer was not prejudiced by the destruction of the Miner's prior claim. MC Decision and Order at 5-6. The ALJ then determined Claimant established every element of entitlement based on the new evidence and thus was entitled to review of the Miner's subsequent claim on the merits. *See White*, 23 BLR at 1-3; *Id.* at 2 n.2, 5-6; 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).

unconstitutional. On the merits in the miner's claim, Employer contends the ALJ erred in calculating the length of the Miner's coal mine employment and in finding the Miner suffered from pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's constitutional challenge and its arguments regarding the length of the Miner's coal mine employment. The Director further contends the ALJ permissibly relied on the preamble to the 2001 revised regulations in weighing the medical opinions. Employer replied to Claimant's and Director's briefs in the miner's claim, reiterating its contentions on appeal.

In a separate appeal of the survivor's claim, Employer reiterates the contentions it raised in the miner's claim. It further contends the award of benefits in the survivor's claim was premature and the ALJ erred in augmenting Claimant's benefits. The Director responds, urging the Board to reject Employer's constitutional challenge, its contention that the award was premature, and its challenge to the award of augmented benefits. Employer replied to the Director's brief in the survivor's claim, reiterating its contentions on appeal.[6]

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

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs.[8] MC Employer's Brief at 16-21; MC Employer's Reply Brief to Claimant at 3-4;

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had a totally disability respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 30-31.

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner 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 Exhibits 4, 7; MC Decision and Order at 3.

[8] We reject Employer's assertion that the Board lacks authority to decide constitutional issues. MC Employer's Brief at 16-17, *citing Carr v. Saul*, 141 S. Ct. 1352 (2021); MC Employer's Reply Brief to the Director at 2-3. Employer's reliance on *Carr* is misplaced as its holding is not on point. In *Carr*, the United States Supreme Court held that Social Security procedures did not require claimants for Social Security disability

MC Employer's Reply Brief to the Director at 2-6; SC Employer's Brief at 18-24; SC Employer's Reply Brief at 1-3. 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 v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] MC Employer's Brief at 19-20. 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), and on Justice Gorsuch's concurring opinions in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 594 U.S. , 141 S. Ct. 1970 (2021) and *Collins v. Yellen*, 141 S. Ct. 1761 (2021). *Id.* at 18-20. It also asserts the United States Court of Appeals for the Ninth Circuit wrongly decided *Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2021) because it ignored the practical realities of Department of Labor (DOL) adjudications. *Id.* at 21 n.6; MC Employer's Reply Brief to Claimant at 3-4; MC Employer's Reply Brief to the Director at 5-6. 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.

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benefits to raise their Appointments Clause challenges to their respective Social Security Administration ALJs. 141 S. Ct. at 1356, 60-62. Contrary to Employer's assertion, the Board has both the inherent authority and vested authority to consider constitutional questions arising in cases before it. *See McCluseky v. Zeigler Coal* Co., 2 BLR 1-1248, 1-1258-62 (1981); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). In addition, the United States Court of Appeals for the Sixth Circuit has held that the Board may address timely-raised Appointment Clause challenges. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019).

We also note Employer generally asserts that ALJs need to be properly appointed but does not raise any specific arguments other than challenging the ALJ's removal protections, which are addressed herein. MC Employer's Brief at 17.

[9] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, 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).

Miner's Claim Entitlement Under 20 C.F.R. Part 718

Without the benefit of the Section 411(c)(3)[10] and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Existence of Pneumoconiosis[11]

The ALJ found the x-ray evidence supported a finding of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[12] He determined Dr. Raj's medical opinion diagnosing clinical and legal pneumoconiosis, and "to a lesser extent" Dr. Green's opinion also

[10] The ALJ found Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, as the record does not contain evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304; MC Decision and Order at 22.

[11] "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).

[12] The ALJ considered eleven interpretations of five x-rays. MC Decision and Order at 11-12; 22-23. He considered the physicians' credentials as well as the quality and quantity of the interpretations in finding that the January 9, 2016 x-ray is positive for simple clinical pneumoconiosis while the x-rays dated October 20, 2016, December 30, 2017, January 18, 2018, and January 30, 2018 are inconclusive for the disease. *Id.*; MC Director's Exhibits 12-15; MC Claimant's Exhibits 1, 2, 4; Employer's Exhibits 1, 2, 4, 5. The ALJ also considered three x-rays contained in the Miner's treatment records but found they "do not reference the presence or absence of pneumoconiosis." MC Decision and Order at 12, 23.

diagnosing both diseases, outweighed the negative or inconclusive computed tomography (CT) scan evidence[13] and the contrary medical opinions of Drs. Fino and Rosenberg. 20 C.F.R §718.204(b)(2)(iv); MC Decision and Order at 29. Considering the evidence as a whole,[14] the ALJ found Claimant established the Miner had both clinical and legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2)(iv); MC Decision and Order at 29.

Initially, we reject Employer's contentions that the ALJ failed to separately analyze the medical opinions relevant to clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that he improperly shifted the burden of proof to Employer. MC Employer's Brief at 32-33. The ALJ accurately noted Claimant has to establish that the Miner suffered from either clinical or legal pneumoconiosis and properly set forth the legal requirements for establishing both diseases. MC Decision and Order at 20-21. Further, the ALJ specifically recognized "Claimant bears the burden of demonstrating each of the [] elements by a preponderance of the evidence." *Id.* at 20. The ALJ then separately analyzed the medical evidence regarding the existence of clinical and legal pneumoconiosis and found Claimant established both by a preponderance of the evidence. *Id.* at 22-29. Having rejected Employer's contention regarding the legal standards the ALJ applied, we address Employer's specific arguments about the ALJ's finding on legal pneumoconiosis below.

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must demonstrate the Miner had 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). Claimant need not establish that the Miner's coal mine dust exposure was the sole cause of his

[13] The ALJ noted Employer designated a May 22, 2018 CT scan that "included '[n]o small or large opacities of occupational lung disease' and '[n]o evidence of coal worker[s'] pneumoconiosis'" and that there were five CT scans in the Miner's treatment records that "did not reference the presence of absence of pneumoconiosis." MC Decision and Order at 19; MC Claimant's Exhibit 6; MC Employer's Exhibit 14. The ALJ concluded that the CT scan evidence does not support a finding of pneumoconiosis. MC Decision and Order at 24.

[14] Because the record does not contain biopsy or autopsy evidence, the ALJ correctly found Claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). MC Decision and Order at 22.

respiratory impairment. *Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013).

The ALJ considered the medical opinions of Drs. Raj, Green, Fino, and Rosenberg. MC Decision and Order at 25-28. The ALJ found Drs. Raj's and Green's opinions diagnosing legal pneumoconiosis to be well-reasoned and discredited Drs. Fino's and Rosenberg's contrary opinions. *Id.* at 25-28. Employer contends the ALJ did not consider whether the physicians had an accurate understanding of the Miner's coal mine employment and smoking histories, improperly relied on the preamble to the 2001 revised regulations, and erred in assessing whether the medical opinions were adequately reasoned. We disagree.

Length of Coal Mine Employment and Smoking History

Employer asserts the ALJ erred in calculating the Miner's coal mine employment and smoking histories and therefore also erred in evaluating the medical opinions concerning legal pneumoconiosis based on those findings. MC Employer's Brief at 21-27, 33-35; MC Employer's Reply Brief to the Director at 6-8. The Director contends there is some merit to Employer's argument concerning the ALJ's calculation of the Miner's coal mine employment determination but asserts that any error is harmless. MC Director's Brief at 8-10. We agree with the Director that any error is harmless.

The ALJ determined the Miner had 14.95 years of coal mine employment, but Employer asserts the "ALJ overstated [the Miner's] employment history by 3.1 years." MC Employer's Brief at 26; MC Decision and Order at 8. Employer concedes that its proposed calculation of 11.86 years would not impact the applicability of any statutory presumptions. MC Employer's Brief at 26. Additionally, as the Director correctly points out, Employer has failed to explain how its proposed calculation would have impacted the ALJ's analysis of any evidence apart from its general assertion that the ALJ's reasoning could be different on remand.[15] *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); MC Director's

[15] While Employer generally asserts the ALJ "credited experts who assumed grossly overstated employment histories," this is not accurate. MC Employer's Brief at 22. Dr. Raj initially reported the Miner had twenty-three years of coal mine employment but later revised his opinion to account for just 12.47 years of coal mine employment based on information provided by a DOL claims examiner. MC Director's Exhibit 12 at 1-4, 8; MC Claimant's Exhibit 2 at 3-5 (unpaginated). Dr. Green reported that the Miner had 12.47 years of coal mine employment. MC Claimant's Exhibit 1 at 7 (unpaginated).

Brief at 9; MC Employer's Brief at 6. Consequently, we decline Employer's request to remand this case for the ALJ to reconsider the length of the Miner's coal mine employment.

We further reject Employer's contention that the ALJ underestimated the Miner's smoking history.[16] MC Employer's Brief 33-35. As the trier of fact, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985) (ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history). The ALJ reviewed the conflicting accounts of the Miner's smoking history and noted "[t]he record contains varied smoking histories." MC Decision and Order at 4 n.20. Based on his review of all the relevant evidence of record, the ALJ concluded that the Miner's treatment records from 2018 through 2019 provided the most consistent account of his smoking history and determined the Miner smoked at least one-half pack of cigarettes per day from 1969 until his death in 2020. *Id.* As Employer has not identified any evidence the ALJ failed to consider or any other errors in his calculation of the Miner's smoking history, we consider its arguments to be a request to reweigh the evidence, which we cannot do. *See Anderson*, 11 BLR at 1-113; *Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988) (en banc) (Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable). We therefore affirm the ALJ's finding that the Miner smoked at least one-half pack of cigarettes per day for approximately fifty years. MC Decision and Order at 4 n.20.

Reliance on the Preamble

Employer also contends the ALJ erred in relying on the preamble to the 2001 revised regulations in evaluating the credibility of its medical experts. MC Employer's Brief at 36-42; MC Employer's Reply Brief to the Director at 8-15. It alleges the ALJ erroneously applied the preamble as a legislative rule, as it was not subject to notice and comment. MC Employer's Brief at 37-38. We disagree.

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, 1-139 (1990); MC Employer's Brief at 38. Further, an ALJ may 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 Looney*, 678 F.3d at 313; *see*

[16] Employer asserts that "[r]ather than the 25 pack-years that the ALJ conservatively estimated, [the Miner] likely had 44.5 pack years of smoking." MC Employer's Brief at 34.

also Spring Creek Coal Co. v. McLean, 881 F.3d 1211, 1225 (10th Cir. 2018); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127 (9th Cir. 2014); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). As discussed below, the ALJ accurately characterized the scientific evidence that the DOL relied upon when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment, and he permissibly evaluated the medical opinions of record in light of the DOL's interpretation of those studies. MC Decision and Order at 27-28.

Drs. Raj and Green

Dr. Raj conducted the DOL's complete pulmonary evaluation of the Miner on January 9, 2016, and diagnosed chronic obstructive pulmonary disease (COPD) based on the Miner's objective testing, pulmonary symptoms, and his employment and smoking histories. MC Director's Exhibit 12 at 10-11. He opined "it is not possible to state [the] individual contribution" of the Miner's coal dust exposure and smoking history to his pulmonary impairment, but given the length of his coal mine employment, coal mine dust exposure played a "substantial aggravating role" in the Miner's COPD.[17] *Id.* at 11. His two supplemental reports are consistent with his initial diagnosis of legal pneumoconiosis.

[17] Dr. Raj initially reported the Miner had twenty-three years of coal mine employment and that he smoked one pack of cigarettes per day beginning when he was forty-five years old. MC Director's Exhibit 12 at 8-9. A DOL claims examiner subsequently requested Dr. Raj reconsider his diagnosis because the DOL could only confirm the Miner had 12.47 years of coal mine employment. *Id.* at 1-2. In his February 2016 supplemental report, Dr. Raj indicated that amending the Miner's coal mine employment history to 12.47 years did not change his diagnosis of legal pneumoconiosis. *Id.* at 3. He also revised the Miner's smoking history to an average of one pack per week beginning when the Miner was forty-five years old. *Id.*

In his January 30, 2018 supplemental report, Dr. Raj initially reported the Miner had twenty-three years of coal mine employment but when discussing the Miner's pulmonary diagnosis and its etiology, he indicated the Miner had 12.47 years of coal mine employment and that this level of coal dust exposure had a "substantial and significant role in [the Miner's] diagnosis." MC Claimant's Exhibit 2 at 2-5 (unpaginated). He further reported the Miner smoked on average one pack of cigarettes per week from age twelve to forty-eight years old "on and off" and that he might have quit "intermittently for [twenty] years in between." *Id.* at 3 (unpaginated).

Id. at 3-4; MC Claimant's Exhibit 2 at 3-4. Dr. Green examined the Miner on December 30, 2017, and diagnosed him with "very severe" COPD and "significant resting hypoxemia" based on a combination of cigarette smoking and coal dust exposure.[18] MC Claimant's Exhibit 1 at 9-11 (unpaginated).

We reject Employer's challenge to Dr. Raj's opinion on legal pneumoconiosis based on his understanding of the length of the Miner's coal mine employment. MC Employer's Brief at 34-35. The effect of an inaccurate coal mine dust exposure history on the credibility of a medical opinion is a determination for the ALJ to make. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The ALJ noted that while Dr. Raj initially relied on an inflated coal mine employment history of twenty-three years, he continued to maintain his diagnosis of legal pneumoconiosis when considering the Miner had just 12.47 years of coal mine employment. MC Decision and Order at 25; MC Director's Exhibit 12 at 3-4, 8; MC Claimant's Exhibit 2 at 2-5 (unpaginated). The ALJ did not find that this detracted from the credibility of his opinion but rather permissibly found Dr. Raj's opinion to be well-documented because it was based on the objective studies, the Miner's symptoms, and his review of the Miner's coal mine employment and smoking histories. *See Looney*, 678 F.3d at 316-17; MC Decision and Order at 25-26.

We also reject Employer's challenges to Drs. Raj's and Green's opinions based on their understanding of the Miner's smoking history. MC Employer's Brief at 34-35. The effect of a lesser smoking history on the credibility of a medical opinion is for the ALJ to determine. *See Bobick*, 13 BLR at 1-54. Further, Employer has failed to explain why Drs. Raj's and Green's opinions that the Miner's COPD was caused by a combination of coal mine dust exposure and smoking was undermined by their consideration of a smoking history that was less than what the ALJ found. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; MC Employer's Brief at 34-35.

Drs. Raj and Green opined that while they could not determine the relative contribution of coal dust and smoking on the Miner's condition, his coal mine dust exposure was at least a significant contributing factor.[19] MC Director's Exhibit 12; MC

[18] Dr. Green reported the Miner had 12.47 years of coal mine employment and smoked one pack of cigarettes per week for approximately 40 years. MC Claimant's Exhibit 1 at 7-8 (unpaginated).

[19] Employer argues the ALJ failed to consider that Dr. Raj acknowledged the Miner had bullous emphysema without explaining how it was caused by coal dust exposure. MC Employer's Brief at 34. But emphysema is a form of COPD. As Dr. Raj specifically

Claimant's Exhibits 1, 2. We see no error in the ALJ's determination that their opinions are reasoned and documented and consistent with DOL's position in the preamble that the effects of smoking and coal mine dust are additive. MC Decision and Order at 25-26; *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017) (ALJ may rely on the principle from the preamble that the effects of smoking and coal dust exposure are "additive"); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *see also Trumbo*, 17 BLR at 1-89; *Sellards*, 17 BLR at 1-80-81; *Bobick*, 13 BLR at 1-54. We therefore affirm his crediting of their opinions that the Miner had legal pneumoconiosis.

Dr. Fino

Dr. Fino examined the Miner on October 20, 2016, and diagnosed "a severe obstructive ventilatory defect" due to severe bullous emphysema that "is not caused by coal mine dust inhalation"; "it is either hereditary or secondary to cigarette smoking." MC Director's Exhibit 16 at 7-9. After reviewing additional medical records, he reiterated his opinion in his May 3, 2018, December 23, 2020, and February 1, 2021 supplemental reports and during his May 29, 2018 deposition. MC Employer's Exhibits 9; 11 at 15-23; 15; 17. At his deposition he further explained he excluded coal mine dust as a contributing factor to the Miner's respiratory disease based, in part, on his belief that bullous emphysema is not caused by coal mine dust inhalation unless the miner suffers from complicated pneumoconiosis. MC Employer's Exhibits 15 at 15-16.

Employer asserts the ALJ erred in summarily dismissing Dr. Fino's opinion on the cause of the Miner's bullous emphysema and the impact that bullous emphysema had on the interpretations of the Miner's chest x-rays. MC Employer's Brief at 30. It also contends the ALJ impermissibly substituted his opinion for Dr. Fino's opinion and that Dr. Fino's opinion was not inconsistent with the preamble. MC Employer's Brief at 31, 41. We disagree.

The ALJ correctly noted that the preamble does not make a distinction between types of emphysema and states that "[COPD] includes . . . chronic bronchitis, emphysema and asthma." MC Decision and Order at 27, *quoting* 65 Fed. Reg. at 79,939, 79,944. Further, the ALJ permissibly found Dr. Fino's opinion that bullous emphysema is not caused by coal mine dust exposure unpersuasive because it was unsupported by "reference

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opined the Miner's COPD was significantly related to or substantially aggravated by coal dust exposure, we see no error in the ALJ's conclusion that Dr. Raj's opinion supports a finding of legal pneumoconiosis. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); MC Decision and Order at 24.

or citation to a medical text, treatise, or other source." [20] MC Decision and Order at 27; *see Compton*, 211 F.3d at 211.

Dr. Rosenberg

Dr. Rosenberg examined the Miner on January 18, 2018, and diagnosed COPD and severe bullous emphysema. MC Employer's Exhibit 7 at 5, 8. He determined the Miner's impairment was due solely to cigarette smoking based, in part, on the reduction in the Miner's FEV1/FVC ratio and his "marked reduction of FEV1" on pulmonary function testing. *Id.* at 6-8, 10. After reviewing additional medical records, he reiterated his findings in his June 4, 2019 and February 22, 2021 supplemental reports. Employer's Exhibits 12, 18.

We reject Employer's contention that the ALJ erred in finding Dr. Rosenberg's opinion on legal pneumoconiosis inadequately reasoned. MC Employer's Brief at 31-42; MC Employer's Reply Brief to Claimant at 8-9; MC Employer's Reply Brief to the Director at 10-15. The ALJ permissibly discredited Dr. Rosenberg's opinion, in part, as inconsistent with medical science the DOL credited in the preamble indicating that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio.[21] *See* 65 Fed. Reg. at 79,943; *Looney*, 678 F.3d at 314-15; *Sterling*, 762 F.3d at 491; MC Decision and Order at 28.

After reviewing the conflicting medical opinions, the ALJ permissibly determined Drs. Raj's and Green's opinions on legal pneumoconiosis were better reasoned than Drs. Fino's and Rosenberg's opinions. *See Looney*, 678 F.3d at 316-17; *Compton*, 211 F.3d at 211; MC Decision and Order at 25-29. Employer's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the ALJ sufficiently explained his credibility determinations in accordance with the APA, and his findings are supported by substantial evidence, we affirm his conclusion that Claimant established that the Miner had legal pneumoconiosis by a preponderance of

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

[21] Because the ALJ provided valid reasons for discrediting Dr. Rosenberg's opinion on legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele*, 6 BLR at 1-382 n.4.

the evidence.[22] *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied as long as the reviewing court can discern what the ALJ did and why he did it); MC Decision and Order at 29.

We further affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a change in an applicable condition of entitlement and the ALJ's determination that pneumoconiosis substantially contributed to the Miner's respiratory or pulmonary disability. *See* 20 C.F.R. §§718.204(c)(1), 725.309; *Skrack*, 6 BLR at 1-711; MC Decision and Order at 6, 31-33. Accordingly, we affirm the award of benefits in the miner's claim.

Survivor's Claim

The ALJ found Claimant established each element necessary to demonstrate entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); SC Decision and Order at 4-5.

We reject Employer's argument that the ALJ's application of Section 422(l) was erroneous because the Miner's award of benefits was not yet final. SC Employer's Brief at 24-27; SC Employer's Reply Brief at 3-5. The Board has rejected that argument and has held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits under Section 422(*l*).[23] *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). We decline Employer's request to reconsider the Board's holding in *Rothwell*.

[22] As we have affirmed the ALJ's determination that Claimant established the Miner had legal pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; MC Employer's Brief at 27-33; MC Employer's Reply Brief to Claimant at 6-7.

[23] Employer contends *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014) is inapplicable because it involved modification proceedings that left intact an ALJ's "effective order," and it did not involve an appeal. SC Employer's Reply Brief at 5. *Rothwell* specifically states that benefits under the Act are due "after the issuance of an effective order requiring the payment of benefits . . . notwithstanding the *pendency of a motion for reconsideration before an* [*ALJ*] *or an appeal to the Board or court* . . . ." 25 BLR at 1-146, *quoting* 20 C.F.R. §725.502(a)(l) (emphasis added). Additionally, "[a]n effective order shall remain in effect *unless it is vacated* by an [ALJ] on reconsideration, or, upon review . . . by the [Board] or an appropriate court . . . ." 20 C.F.R. §725.502(a)(l) (emphasis added). The implementing regulation similarly conditions automatic survivor's

Because we have affirmed the award of benefits in the miner's claim and Employer raises no other specific challenge to the ALJ's determination that Claimant is entitled to benefits under Section 422(*l*), we affirm it. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Augmentation of Survivor's Benefits

Procedural Arguments: Law of the Case, *Res Judicata*, and Collateral Estoppel

Employer asserts an award of augmented survivor's benefits is barred, as Claimant forfeited the right to relitigate the dependency issue because she did not cross-appeal the ALJ's contrary determination in the miner's claim, making it the law of the case in the survivor's claim, and based on the doctrines of *res judicata* and collateral estoppel.[24] SC Employer's Reply Brief at 6-7; SC Employer's Brief at 6, 27; SC Employer's Post-Hearing Brief at 10-11. We disagree.

After the Miner submitted his current claim, his adult daughters submitted claims as augmentees. MC Director's Exhibit 3; Leona E. Stacy's, Michelle R. Stacy Ball's, and Mahalia L. Stacy's December 18, 2017 Augmentee Claims. In his Decision and Order Awarding Benefits in the miner's claim, the ALJ found the Miner's daughters, Leona E. Stacy and Michelle R. Stacy Ball, did not meet the dependency requirements to be augmentees at 20 C.F.R. §§725.209(a), 725.221 in the miner's claim. MC Decision and Order at 10-11. On August 24, 2020, Claimant filed a survivor's claim, and on October 26, 2020, the district director issued a Proposed Decision and Order awarding Claimant augmented survivor's benefits, finding that Leona E. Stacy and Michelle R. Stacy Ball were dependents. SC Director's Exhibits 1, 9. In his Decision and Order Awarding

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entitlement on a miner's claim that "results or resulted in a final award of benefits," which the Board interpreted as encompassing awards that are final (a claim which "resulted" in a final award) and those that are not yet final (a claim which "results" in a final award). 20 C.F.R. §725.212(a)(3)(ii); *Rothwell*, 25 BLR at 1-146.

[24] We note that in its Post-Hearing Brief in the survivor's claim, Employer did not raise any arguments about *res judicata* and collateral estoppel, but rather merely asserted the law of the case bars reconsideration of this issue. SC Employer's Post-Hearing Brief at 10-11. Additionally, Employer does not directly raise any of these issues in its Brief in Support of Petition for Review in the survivor's claim beyond noting the ALJ made different dependency determinations in the miner's and survivor's claims, and that Claimant did not cross-appeal the ALJ's determination in the miner's claim. *See* SC Employer's Brief at 6, 27. Nevertheless, we will address all of Employer's procedural arguments together, as they are related.

Benefits in the survivor's claim, the ALJ stated he erred in determining that Leona E. Stacy and Michelle R. Stacy Ball were not dependents in the miner's claim, determined that Leona E. Stacy and Michelle R. Stacy Ball were dependents in the survivor's claim, and augmented the award of survivor's benefits. SC Decision and Order at 6 n.33, 7.

The Forth Circuit has explained that, as "most commonly defined, the doctrine [of the law of the case] posits that when a *court decides upon a rule of law*, that decision should continue to govern the same issues in *subsequent stages in the same case*." *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999), *quoting Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) (internal quotation marks omitted) (alteration in original)) (emphasis added). Additionally, the doctrines of *res judicata* and collateral estoppel foreclose "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994). Concerning *res judicata*, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (internal citations omitted). A party seeking to rely on the doctrine of collateral estoppel must establish:

> (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum.

Sedlack v. Braswell Servs. Grp., Inc., 134 F.3d 219, 224 (4th Cir. 1998).

While Claimant pursued the miner's claim on behalf of the Miner's estate after the Miner's death, Claimant was not a party to the previously adjudicated miner's claim. MC Director's Exhibit 3; SC Director's Exhibit 1. The miner's claim and the survivor's claim are separate claims brought by different parties and the factual findings in the survivor's claim regarding the daughters' eligibility for augmented survivor benefits were not necessary to the award of benefits in the miner's claim. *See Sedlack*, 134 F.3d at 224. Moreover, Employer has not sufficiently explained how the facts of this case satisfy the requirements of these doctrines. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *see* SC Employer's Reply Brief at 6-7.

Therefore, Employer has not established that the doctrines of law of the case, *res judicata*, or collateral estoppel bar the ALJ from considering whether Claimant's and the Miner's daughters are dependents for the purpose of augmenting Claimant's benefits in her survivor's claim.

Dependency Requirements

Federal black lung benefits may be augmented if the requisite standards of relationship and dependency are met. 20 C.F.R. §725.201(c). For the purpose of augmenting the benefits of a surviving spouse, a child will be considered a dependent if: the child is unmarried and either under eighteen years of age or has a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), or is eighteen years or older and is a student. *See* 20 C.F.R. §725.209(a); *Hite v. Eastern Assoc. Coal Co.*, 21 BLR 1-46, 1-49 n.4 (1997). The ALJ found that the Claimant and the Miner's daughters, Leona E. Stacy and Michelle R. Stacy Ball, are unmarried and suffer from disabilities as defined in Section 223(d) of the Social Security Act, and therefore both satisfy the dependency requirement for augmented survivor's benefits. SC Decision and Order at 5-7.

Citing *Reigh v. Director, OWCP*, 20 BLR 1-44 (1996), Employer contends Leona E. Stacy and Michelle R. Stacy Ball are not "unmarried," as they were each previously married and divorced, which it asserts makes them ineligible to receive benefits pursuant to 20 C.F.R. §725.209. SC Employer's Brief at 27-28. As the Director points out, nothing in the regulations requires an augmentee to have never been married and 20 C.F.R. §725.219(d), which was amended after the Board's decision in *Reigh*, states "[a] child whose entitlement to benefits has been terminated pursuant to §725.219(b)(2) [because the child marries] may thereafter again become entitled to such benefits upon filing [an] application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of [20 C.F.R.] §725.218." SC Director's Brief at 5-6, *citing* 20 C.F.R. §§725.209(a), 725.219(d). Further, the preamble to the 2001 revised regulations addressed the Board's decision in *Reigh*:

> The literal language of the statute does not preclude a child's eligibility for all time based upon the existence of a marriage. . . . If a marriage terminates prior to any period of eligibility, the child is nevertheless unmarried when (s)he becomes entitled to benefits. *See Adler* v. *Peabody Coal Co.*, Black Lung Rep., BRB No. 98–1513 BLA (Feb. 4, 2000). If the child marries while receiving benefits, (s)he cannot continue as an eligible survivor for the duration of the marriage. *Sullenberger* v. *Director, OWCP*, Black Lung Rep., BRB No. 99–0449 BLA (March 8, 2000)[.] Upon cessation of the marital relationship, however, the child again ''is unmarried,'' which complies with the statutory requirement. Assuming all other conditions for

> eligibility are met, an ''unmarried'' child retains his or her status as a "child" under the plain language of the statute notwithstanding the occurrence of the marriage. In this regard, the Department disagrees with the broad statement in *Reigh* v. *Director, OWCP*, 20 Black Lung Rep. 1–44 (1996), that a surviving child of a miner cannot revive her status as the unmarried dependent of her parents upon the death of her husband. 20 Black Lung Rep. at 1–48.

65 Fed. Reg. at 79,966.[25]

Leona E. Stacy was married on June 28, 1993, and divorced on August 4, 1994. SC Director's Exhibit 7 at 7-9. Michelle R. Stacy Ball was married on November 20, 1986, and divorced on March 15, 2012. SC Director's Exhibit 6 at 5-12. We therefore affirm the ALJ's finding that Leona E. Stacy and Michelle R. Stacy Ball were "unmarried" when Claimant became eligible for augmentable benefits. SC Decision and Order at 6.

We also reject Employer's assertion that Leona E. Stacy and Michelle R. Stacy Ball are ineligible for benefits because neither was disabled until after turning twenty-two years old. SC Employer's Reply Brief at 7-8; SC Employer's Brief at 27-28, *citing* 33 U.S.C. §902(g). The clear language of the regulations does not support this interpretation. *See* 20 C.F.R. §725.209. The Board has held that "the child as a dependent and augmentee under 20 C.F.R. §725.209 remains unfettered by the age cut-off requirement mandated in 20 C.F.R. §725.221[26] for the disabled adult child who seeks benefits in his/her own right." *Hite*, 21 BLR at 1-50. Further, the DOL, in revising the regulation at 20 C.F.R. §725.209, rejected similar arguments that applying Section 725.209, without the age cut-off, is inconsistent with the Act:

> In the initial notice of proposed rulemaking, the Department erroneously proposed changing §725.209(a)(2)(ii) to state that, in order to be considered a dependent, a child who is at least 18 and not a student must be under a disability that commenced before the age of 22. The purpose of the change was to reflect in the regulation itself the age by which certain children's

[25] This discussion applies to child beneficiaries and augmentees. *See* 65 Fed. Reg. at 79,963.

[26] The regulation at 20 C.F.R. §725.221 states that "for purposes of determining whether a child was dependent upon a deceased miner, the provisions of 20 C.F.R. §725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained the age of 22."

> disabilities must commence, a requirement imposed by an incorporated provision of the Social Security Act. After further consideration, however, the Department re-proposed the regulation without the new language. Eliminating the age by which the disability must have begun for a dependent child harmonizes §725.209 with the statutory definition by preserving the distinction between a child/augmentee and a child/beneficiary. A child who claims benefits in his or her own right based on personal disability (child/beneficiary) must prove the disability arose before age 22 as required by 30 U.S.C. 902(g). A dependent child who is an augmentee of a beneficiary [under 30 U.S.C. 902(a)(1)], however, is exempt from this requirement *because the statutory definition of "dependent" explicitly exempts a "child" from the requirement that disability begin by a certain age.*

65 Fed. Reg. at 79,963 (emphasis added) (internal citations omitted).

As Employer does not challenge the ALJ's determination that Leona E. Stacy and Michelle R. Stacy Ball were disabled as defined in Section 223(d) of the Social Security Act, we affirm it. *Skrack*, 6 BLR at 1-711; SC Decision and Order at 5-6. We therefore also affirm, as supported by substantial evidence, the ALJ's finding that both Leona E. Stacy and Michelle R. Stacy Ball meet the relationship and dependency requirements for child augmentees and that Claimant is entitled to augmented survivor's benefits.[27] 20 C.F.R. §§725.208, 725.209; SC Decision and Order at 5-7.

[27] We are not persuaded by Employer's assertion that the ALJ failed to address whether Leona E. Stacy and Michelle R. Stacy Ball are incapable of "self-support" and that someone capable of marriage is "not wholly dependent upon" her parents. SC Employer's Brief at 28, *citing* 33 U.S.C. §902(14) (defining "Child"). To establish dependency under 20 C.F.R. §725.209(a), the ALJ was required to consider whether each daughter was unmarried and either under eighteen years of age or has a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), or eighteen years or older and is a student. *See* 20 C.F.R. §725.209(a). This is exactly what the ALJ did.

Nor are we persuaded by Employer's reference to the United States Court of Appeals for the Third Circuit's and the Board's decisions in *Kidda v. Director, OWCP*, 769 F.2d 165 (3d Cir. 1985) and 7 BLR 1-202 (1984). SC Employer's Reply Brief at 6-7. In *Kidda*, the Third Circuit affirmed the Board's determination that an unmarried disabled adult child was not entitled to survivor's benefits based on a disability that reemerged after a period of substantial gainful employment. 769 F.2d 165. As discussed above, there is a

Accordingly, the ALJ's Decision and Order Awarding Benefits in a miner's claim and Decision and Order Awarding Benefits in a survivor's claim are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

material statutory and regulatory distinction between a child augmentee and a child beneficiary; thus *Kidda* provides little to no guidance in the present case.