U.S. Department of Labor

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

BRB Nos. 22-0269 BLA, 22-0269 BLA-A,
22-0270 BLA, and 22-0270 BLA-A

REBA LYNN SMITH (o/b/o and Widow of JERRY L. WHITE) Claimant-Respondent Cross-Respondent v. EASTERN ASSOCIATED COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner Cross-Respondent	)	DATE ISSUED: 5/10/2023 DECISION and ORDER

Appeal of the Errata Decision and Order Awarding Benefits, Errata Decision and Order Revoking Abeyance and Awarding Benefits, Decision and Order Awarding Benefits, and Decision and Order Revoking Abeyance and Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, 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, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals and Employer and its Carrier (Employer) cross-appeal Administrative Law Judge (ALJ) Patricia J. Daum's Errata Decision and Order Awarding Benefits, Errata Decision and Order Revoking Abeyance and Awarding Benefits, Decision and Order Awarding Benefits, and Decision and Order Revoking Abeyance and Awarding Benefits (2018-BLA-06158 and 2020-BLA-06028) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on October 14, 2016,[1] and a survivor's claim filed on June 26, 2018.[2]

The ALJ found the Miner's duties as a security guard with Black Diamond Security & Detective Agency (Black Diamond) qualify as the work of a miner and he was employed by this entity for at least one year after working for Employer. 20 C.F.R. §725.202(a). She therefore determined the district director should have designated Black Diamond, and not Employer, as the responsible operator in this case. Thus she shifted liability for the payment of benefits to the Black Lung Disability Trust Fund (Trust Fund). On the merits

[1] The Miner filed four prior claims for benefits. Miner's Claim (MC) Director's Exhibits 1-4. The district director denied the previous claim filed on April 22, 2010, because the Miner failed to establish pneumoconiosis. MC Director's Exhibit 4.

[2] Claimant is the widow of the Miner, who died on February 8, 2018. MC Director's Exhibit 19; Survivor's Claim (SC) Director's Exhibit 9. She is pursuing both the miner's subsequent claim and her survivor's claim. MC Director's Exhibit 6; SC Director's Exhibit 3.

of entitlement, she found the Miner had at least fifteen years of qualifying coal mine employment, notwithstanding the years he worked as a security guard, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309,[3] and invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits in the miner's claim. February 18, 2022 Decision and Order Awarding Benefits.

Adjudicating the survivor's claim, the ALJ found Claimant established each fact necessary for derivative entitlement under Section 422(*l*) of the Act:[5] 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*). Thus, she found Claimant derivatively entitled to survivor's benefits under Section 422(*l*).[6] February 18, 2022 Decision and Order Revoking Abeyance and Awarding Benefits.

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[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must 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). Because the Miner did not establish the existence of pneumoconiosis in his prior claim, Claimant had to submit new evidence establishing that element of entitlement to obtain review of the merits of the Miner's current claim. *Id*.

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

[5] Section 422(*l*) of the Act provides that the 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 the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] The ALJ initially found Employer should pay benefits in both claims. Subsequently, she issued an Errata Decision and Order Awarding Benefits in the miner's claim and an Errata Decision and Order Revoking Abeyance and Awarding Benefits in the

On appeal, the Director argues the ALJ erred in finding the Miner's duties working as a security guard for Black Diamond qualifies as the work of a miner and therefore in concluding Employer is not the properly designated responsible operator. Claimant responds in support of the award of benefits. Employer also responds, arguing the Director waived his right to contest the ALJ's responsible operator determination and urges the Benefits Review Board to reject his arguments.

On cross-appeal, Employer alleged the ALJ erred in failing to address its argument that Peabody Energy Corporation (Peabody Energy) is not the responsible carrier. It also challenges the ALJ's evidentiary rulings to admit the January 7, 2017 pulmonary function study into the record and to admit an incomplete copy of the record of Claimant's prior claim. On the merits of entitlement, Employer asserts the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption in the Miner's claim. The Director responds, urging the Board to reject Employer's arguments.[7]

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.[8] 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).

The Director's Appeal of the Responsible Operator Finding

survivor's claim "clarifying the district director's improper identification of the Employer/Carrier as the liable responsible operator" and ordering the Trust Fund to pay benefits. Errata Decision and Order Awarding Benefits (Errata Decision and Order) at 2; Errata Decision and Order Revoking Abeyance and Awarding Benefits at 1.

[7] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established at least fifteen years of qualifying coal mine employment, total disability, a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c), and invocation of the Section 411(c)(4) presumption in the Miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Errata Decision and Order at 13, 15-30.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 7.

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[9] 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 potentially liable 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).

The ALJ found the Miner worked as a security guard with Black Diamond for at least one year after working for Employer and that this work constitutes coal mine employment. Errata Decision and Order at 7-9. Thus she found another potentially liable operator employed the Miner more recently than Employer and therefore the district director should have named Black Diamond the responsible operator. Errata Decision and Order at 8. The Director alleges this finding is erroneous. Director's Brief at 2-7. The Director's argument has merit.[10]

[9] 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).

[10] We reject Employer's assertion that the Director waived his right to challenge the ALJ's designation of the responsible operator because he neither attended the hearing nor submitted any evidence or a post-hearing brief. Employer's Response Brief at 2-4. It is well established that the Act provides that the Director is a party in all proceedings relating to black lung claims. 30 U.S.C. §932(k) ("The Secretary [represented by the Director] shall be a party in any proceeding relative to a claim for benefits" under the Act); *see also* 20 C.F.R. §725.360(a)(5). Further, the Director's failure to participate in an earlier stage of a case does not preclude the Director from later participation. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 574 (6th Cir. 2000) ("With respect to the Director's absence below, its absence before the Board does not preclude the Director from participating on appeal.").

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that work duties meeting situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 41-42. The implementing regulation provides "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19).

The Director does not dispute the Miner's work as a security guard with Black Diamond satisfied the situs requirement. Director's Brief at 2-7. He correctly contends, however, that the Miner's work did not satisfy the function requirement as a matter of law. *Id*.

The work of a security guard does not constitute coal mine work when the individual sits in a guardhouse and occasionally drives around the coal mine; such duties are not sufficiently integral to the extraction or preparation of coal and are "merely convenient." *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989) (night watchman who sat in a guardhouse and occasionally drove around the mine was not a miner). A security guard's work can constitute coal mine employment, however, if it involves operational, safety, and repair duties and thus involves duties beyond simply providing security. *See Sammons v. EAS Coal Co.*, 980 F.2d 731 (Table), 1992 WL 348976 (6th Cir. Nov. 24, 1992) (unpub.) (night watchman worked as a miner because part of his shift included safety checks, repairs, and replacements that kept the mine "operational, safe, and in repair" and thus his duties were essential to the production and extraction of coal); *Wackenhut Corp. v. Hansen*, 560 F. App'x 747 (10th Cir. 2014) (unpub.) (security guard was a miner because he patrolled mines and inspected equipment to eliminate fire and safety hazards, duties that were integral to the operation of the mine and coal extraction; court noting that the guard's security duties of patrolling for trespassers and checking in employees at the gate "do not negate [claimant's] essential work in insuring the safe operation of the mine").

There was no basis in the record for the ALJ to conclude that the Miner's security guard work with Black Diamond involved any operational, safety, or repair duties, as he

merely sat in a guardhouse and occasionally patrolled the mines.[11] During his deposition, the Miner described his duties as a security guard for Black Diamond as entailing sitting in a guard shack or his car and "watching for thieves" to prevent theft of the equipment. Director's Exhibit 12 at 7, 11. He also indicated he did not perform any other job duties. *Id*. On his CM-913 Form, the Miner stated he sat inside a guard shack "and sometimes in [his] car," guarding "mine property and mining equipment," and that the job required him to sit for four hours and to stand for four hours. Director's Exhibit 8 at 3. He stated further he did not engage in any lifting or carrying of equipment. *Id.* In addition, he checked the appropriate boxes on the CM-913 form indicating his job did not necessitate the use of any tools, machinery, or mining equipment, technical knowledge or special skills, or supervisory responsibilities. *Id.* Thus the ALJ erred in finding the Miner's work for Black Diamond constitutes coal mine employment. *Clemons*, 873 F.2d at 922; Errata Decision and Order at 7-8.

While factual determinations are the province of the ALJ, reversal is warranted where no factual issues remain to be determined and no further factual development is necessary. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (reversing a denial, with directions to award benefits without further administrative proceedings); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (same). There is no factual support in the record to support the ALJ's conclusion that the Miner's work as a security guard for Black Diamond involved any mine-safety duties beyond theft prevention. We therefore reverse the ALJ's finding that the Miner's position as a security guard with Black Diamond

[11] The ALJ's reliance on two unpublished Board decisions to hold otherwise was misplaced. Errata Decision and Order at 8, *citing McCall v. Holbrook Mining Co. Inc.*, BRB No. 17-0033 (Oct. 30, 2017); *Hansen v. The Wackenhut Corp.*, BRB. No. 12-0044 BLA (Oct. 24, 2012) (unpub.). In *McCall*, the Board addressed the relevant burden of proof under 20 C.F.R. §725.202(a) and specifically noted the ALJ had credited the miner's testimony that his work as a night watchman encompassed non-security duties, including pumping water, washing and greasing mining equipment, and accompanying coal loaders into the pit (as safety inspectors required). *McCall*, BRB No. 17-0033, slip op. at 3-6. The United States Court of Appeals for the Tenth Circuit upheld the Board's decision in *Wackenhut Corp. v. Hansen*, 560 F. App'x 747 (10th Cir. 2014) (unpub.), holding that a security guard who patrolled mines and inspected equipment to eliminate fire and safety hazards was integral to the operation of the mine and coal extraction, and that a security guard's duties of patrolling for trespassers and checking in employees at the gate did not contravene his work in insuring the safe operation of the mine.

constitutes coal mine employment. *See* 20 C.F.R. §§725.101(a)(19), 725.202(a); Errata Decision and Order at 7-9.

Employer does not allege it is financially incapable of assuming liability for benefits or that another "potentially liable operator," other than Black Diamond, that is financially capable of assuming liability had more recently employed the Miner for at least one year. Consequently, we reverse her determinations that the district director should have identified Black Diamond as the responsible operator and that liability should transfer to the Trust Fund, as we hold Employer is the responsible operator in this case. 20 C.F.R. §725.495(c).

Employer's Responsible Carrier Argument

Employer asserts that should the Board vacate the ALJ's determinations regarding the responsible operator issue, it should remand the case for the ALJ to "address Employer's arguments regarding liability, which had been submitted before the [ALJ] in this matter." Employer's Brief at 5.

In its post-hearing brief to the ALJ, Employer raised several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim. Employer's Post-Hearing Brief at 23-41. We conclude these arguments are not persuasive.

Employer does not dispute that Eastern Associated Coal (Eastern) was self-insured by Peabody Energy on the last day Eastern employed the Miner; thus we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Employer's Post-Hearing Brief at 23-41. Nonetheless, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Trust Fund. Employer's Post-Hearing Brief at 23-41.

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 38. In 2007, after the Miner ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id*. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. *Id*. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company.

Employer argues Peabody Energy was incorrectly found liable for benefits because: (1) the district director and the claims examiner are inferior officers not properly appointed under the Appointments Clause;[12] (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the Department of Labor (DOL) also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on Peabody Energy; and (6) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

Although the ALJ did not address these arguments, remand is not required because the Board has previously considered and rejected identical arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (October 25, 2022), *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). *Bailey*, *Howard*, and *Graham* control this issue in this case and establish -- as a matter of law -- that Peabody Energy is the responsible carrier and is liable for this claim.

Employer's Cross-Appeal of the Award of Benefits in the Miner's Claim

We next address Employer's remaining arguments with respect to the merits of the Miner's claim.

Evidentiary Issue

During the hearing, Employer objected to the admission of the Director's Exhibits on the ground that the record was incomplete. Hearing Transcript at 7-10. It asserted that, while the title pages for Director's Exhibits 1 through 4 were included, approximately 500 pages were missing. *Id.* Noting Director's Exhibits 1 through 4 consisted of records from the Miner's four prior claims, the ALJ acknowledged that the title page identifying the number of pages for each exhibit did not conform to the actual number of pages submitted. *Id*. After the hearing, Employer renewed its objection in a motion and, on February 20, 2020, the ALJ issued an order directing the Director to cure any deficiencies, provide the parties with a full and complete set of the Director's Exhibits, and provide a statement to

[12] Employer raised this argument for the first time in this claim in its post-hearing brief to the ALJ. Employer's Post-Hearing Brief at 2.

the ALJ confirming the actions taken to resolve this issue. Order for the Director to Cure the Record and Extend the Briefing Deadline at 1-2. Although the Director did not provide an update to the ALJ, he did forward the missing exhibits to Employer. Errata Decision and Order at 3. Employer, however, renewed its contention that liability should transfer to the Trust Fund because, despite receiving nearly all the missing pages from the exhibits in question, the Director purportedly abdicated his responsibility to provide all the documents from the prior claims and prejudiced Employer's ability to defend the claim. *Id.*

In addressing this issue, the ALJ found Director's Exhibit 1 contained the Miner's withdrawn claim and, because withdrawn claims are deemed not to have been filed, the omission of these records did not affect Employer's ability to defend the claim. Errata Decision and Order at 3. She found Director's Exhibit 2 consisted of fifty-five pages[13] from the Miner's June 6, 1996 claim. *Id.* Notably, she observed the medical evidence contained in Director's Exhibit 2 "is more than [twenty] years old." *Id.* at 4. Next, she found Director's Exhibit 3 contained 161 pages from the Miner's June 4, 2003 claim. *Id.* She likewise concluded "the medical evidence is contained in the file but is also significantly attenuated in time" as it preceded the Miner's current claim by thirteen years. *Id.* Lastly, the ALJ acknowledged Director's Exhibit 4 contains all 266 pages associated with the Miner's April 22, 2010 claim. *Id.* Thus, the ALJ concluded "the record appears complete" and therefore, because the Director's resolution of this issue has not "significantly compromised the Employer's ability to defend the claim," she declined to shift liability to the Trust Fund due to the incomplete record. *Id.* at 3.

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Employer asserts there are approximately twenty pages collectively missing from Director's Exhibits 3 and 4 and that, because these documents may be medical or employment records relevant to the Miner's current claim's adjudication, their omission may be prejudicial.[14] Employer's Response Brief at 7-9. The Director responds, arguing

[13] The ALJ noted that while the title page to Director's Exhibit 2 states it contains 62 pages, a second title page appears immediately after the first one indicating Director's Exhibit 2 contains 55 pages. Errata Decision and Order at 3; Director's Exhibit 2.

[14] Employer asserts that the title page to Director's Exhibit 2 does not indicate how many pages it contains, that the title page to Director's Exhibit 3 indicates it contains 161 pages whereas it contains 151 pages, and that the title page to Director's Exhibit 4 states it contains 266 pages whereas it contains 256 pages. Employer's Response Brief at 9. The

he cured any deficiencies in the record by submitting Director's Exhibits 2-4. He further asserts that if the record were deemed incomplete, Employer has not shown how its lack of access to records from the Miner's closed claims dating from 2010 and earlier is prejudicial to the adjudication of the Miner's current claim. Director's Response Brief at 3-4.

We reject Employer's assertion that it was prejudiced on the basis of an incomplete record. The ALJ consistently noted the medical evidence generated in the Miner's prior claims is considerably older than the evidence submitted with his current claim. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc) (more recent evidence may be accorded dispositive weight because pneumoconiosis is recognized as a latent and progressive disease); Errata Decision and Order at 4. Noting Employer's admission that it received all but approximately twenty pages of the exhibits in question, the ALJ rationally found "the records are not so woefully incomplete to support a finding that the Employer is unable to reasonably defend the claim." Errata Decision and Order at 4. As this determination is within the purview of the ALJ's broad discretion, we reject Employer's argument. *See Dempsey*, 23 BLR at 1-63; *Blake*, 24 BLR at 1-113

Employer also argues the ALJ erred in admitting Director's Exhibit 21, containing the January 7, 2017 pulmonary function study. Employer's Response Brief at 7. The ALJ found two pulmonary function studies dated January 7, 2017, and October 11, 2017, filed in the Miner's current claim produced qualifying values[15] and there is no contrary pulmonary function evidence; thus this evidence supports finding total disability. 20 C.F.R. §718.204(b)(2)(i); Errata Decision and Order at 17. Because the October 11, 2017 study, standing alone, supports finding total disability, Employer has not explained how it was prejudiced by the ALJ's admission of the January 7, 2017 pulmonary function study into the evidence of record. *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*

ALJ recognized Employer's "frustration over the state of the Director's exhibits," but nevertheless she "found the records are not so woefully incomplete to support a finding that the Employer is unable to reasonably defend the claim." Errata Decision and Order at 4.

[15] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

v. Director, OWCP, 6 BLR 1-1276, 1-1278 (1984). We therefore decline to address Employer's assertion of evidentiary error in this regard.

Rebuttal of the Presumption

Because Claimant invoked the Section 411(c)(4) presumption in the miner's claim, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[16] or "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 failed to rebut the presumption by either method.

Clinical Pneumoconiosis

The ALJ found the x-ray, computed tomography (CT) scan, medical opinion, and treatment record evidence does not rebut the presumption of clinical pneumoconiosis. Errata Decision and Order at 31-46. Employer argues the ALJ erred in her evaluation of the medical opinion evidence.[17] Employer's Response Brief at 5-6. We disagree.

The ALJ considered the opinions of Drs. Rosenberg and Zaldivar that the Miner did not have clinical pneumoconiosis.[18] Errata Decision and Order at 15-16. Dr. Rosenberg

[16] "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). "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).

[17] As Employer has not challenged the ALJ's finding that the x-ray, CT scan, and the Miner's treatment record evidence is insufficient to rebut the presumption of clinical pneumoconiosis, we affirm this finding. *Skrack*, 6 BLR at 1-711; Errata Decision and Order at 31-38, 41-45.

[18] The ALJ also considered the opinions of Drs. Raj and Sood that the Miner had clinical pneumoconiosis. Director's Exhibits 21, 30; Claimant's Exhibit 3; Employer's Exhibit 20. While she found Dr. Raj's opinion well-reasoned and documented, the ALJ noted the physician did not consider the CT scan evidence unlike the other physicians. Errata Decision and Order at 39. She accorded great weight to Dr. Sood's opinion because the physician conducted a comprehensive review of all of the medical records and provided a detailed explanation for why the abnormalities on the Miner's x-rays and CT scans demonstrated clinical pneumoconiosis. Errata Decision and Order at 40.

diagnosed congestive heart failure with pneumonia and emphysematous changes. Employer's Exhibits 8, 19. Dr. Zaldivar also diagnosed congestive heart failure with pleural effusion and scarring in the left lung. Director's Exhibit 31. The ALJ found the opinions of Drs. Rosenberg and Zaldivar unpersuasive and thus insufficient to rebut the presumption of clinical pneumoconiosis. Errata Decision and Order at 39-41.

We reject Employer's argument that the ALJ erred in discrediting Dr. Rosenberg's opinion.[19] Employer's Response Brief at 5-6. Dr. Rosenberg stated the abnormalities evident on the Miner's CT scans were not attributable to clinical pneumoconiosis, but instead were due to a past episode of pneumonia which "probably caused some scarring." Employer's Exhibit 19 at 24. The ALJ found Dr. Rosenberg's opinion equivocal and therefore entitled to reduced weight. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Justice v. Island Creek Coal Co.*, 11 BLR 1-90, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Errata Decision and Order at 40. Because Employer does not specifically challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

Employer argues the ALJ should have credited Dr. Rosenberg's opinion because he reviewed all of the evidence of record and is the most qualified physician. Employer's Response Brief at 5. This argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Thus we affirm the ALJ's determination that Dr. Rosenberg's opinion is insufficient to disprove clinical pneumoconiosis in the Miner's subsequent claim.

As Employer raises no further argument on this issue, we affirm the ALJ's finding that Employer did not disprove the presumed existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Errata Decision and Order at 45-46. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).[20]

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[19] We affirm, as unchallenged on appeal, the ALJ's finding that Dr. Zaldivar's opinion is insufficient to disprove the presumed existence of clinical pneumoconiosis in the Miner's subsequent claim. *See Skrack*, 6 BLR at 1-711; Errata Decision and Order at 40-41.

[20] The ALJ also found the opinions of Drs. Rosenberg and Zaldivar that the Miner did not have legal pneumoconiosis neither well-reasoned nor documented and inconsistent with the scientific studies found credible by the Department of Labor in the preamble to the revised 2001 regulations. Errata Decision and Order at 46-47. Employer does not

Disability Causation

Upon finding Employer did not disprove pneumoconiosis, the ALJ next addressed whether Employer established "no part of the miner'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).

Employer argues the opinions of Drs. Rosenberg and Zaldivar are well-reasoned and documented and therefore worthy of dispositive weight. Employer's Response Brief at 6. Drs. Rosenberg and Zaldivar opined the Miner was not totally disabled due to pneumoconiosis based on their opinions that he does not have the disease. Director's Exhibit 31; Employer's Exhibits 8, 19. An ALJ may discount the opinion of a physician as to disability causation because the physician did not diagnose pneumoconiosis, contrary to the ALJ's finding. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995). Thus, we affirm the ALJ's finding that the opinions of Drs. Rosenberg and Zaldivar are not credible on disability causation because they failed to diagnose pneumoconiosis, contrary to the ALJ's finding. Errata Decision and Order at 48-50; see *Epling*, 783 F.3d at 504-05; *Toler*, 43 F.3d at 116. We further affirm the ALJ's determination that Employer failed to prove that no part of the Miner's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Errata Decision and Order at 50. Consequently, we affirm the ALJ's finding that Employer

challenge these findings; thus, we affirm them. *See Skrack*, 6 BLR at 1-711; see also Employer's Brief at 5-6.

did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the Miner's claim and neither the Director nor Employer raise a specific challenge as to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Errata Decision and Order Awarding Benefits, Errata Decision and Order Revoking Abeyance and Awarding Benefits, Decision and Order Awarding Benefits, and Decision and Order Revoking Abeyance and Awarding Benefits are affirmed, but modified to reflect Employer as the properly designated responsible operator.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge