U.S. Department of Labor

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

BRB Nos. 21-0416 BLA
and 21-0432 BLA

KATHY WHITE (o/b/o/ and Widow of WILFORD WHITE) Claimant-Respondent v. PINE RIDGE COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/24/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on May 11, 2021, the Decision and Order Awarding Benefits on March 31, 2021, and the Order Granting Director's Motion to Strike Employer's Exhibits and Order Denying Dismissal of Employer As Responsible Operator on March 30, 2021 of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

William M. Bush (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: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

BUZZARD and ROLFE, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits on May 11, 2021, Decision and Order Awarding Benefits on March 31, 2021, and Order Granting Director's Motion to Strike Employer's Exhibits and Order Denying Dismissal of Employer As Responsible Operator on March 30, 2021 (2018-BLA-06083 and 2018-BLA-06024), 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 claim filed on March 16, 2017,[1] and a survivor's claim filed on August 28, 2017.[2]

The ALJ found Pine Ridge Coal Company (Pine Ridge), self-insured through Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He also found Claimant established the Miner had twenty-six years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the presumption that the Miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not

[1] Employer's appeal in the miner's claim was assigned BRB No. 21-0432 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0416 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

[2] Claimant is the widow of the Miner, who died on June 20, 2017. Miner's Claim (MC) Director's Exhibit 13; Survivor's Claim (SC) Director's Exhibit 10. She is pursuing both the miner's claim and her survivor's claim.

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

rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer argues the ALJ erred in finding Peabody Energy is liable for the payment of benefits. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established the Miner was totally disabled. It further contends the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption in the miner's claim.[5]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the ALJ's determination that Employer is liable for benefits.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Pine Ridge is the correct responsible operator and was self-insured by Peabody Energy on the last day it employed the Miner; thus we affirm these findings. *See* 20 C.F.R. §§725.494, 725.495, 726.203(a); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Order Granting Director's Motion at 3; Hearing Tr. at 21; Employer's Brief to ALJ at 3. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus

[4] 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).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[6] 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 Exhibits 4, 7, 8.

liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Survivor's Claim (SC) Director's Exhibit 37; (Miner's Claim) MC Director's Exhibit 58. In 2007, after the Miner ceased his coal mine employment with Pine Ridge, Peabody Energy transferred a number of its subsidiaries, including Pine Ridge, to Patriot. MC Director's Exhibit 58. 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 Pine Ridge, Patriot later went bankrupt and can no longer provide for those benefits. *Id.*; SC Director's Exhibit 37. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Pine Ridge when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Order Granting Director's Motion at 10.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim and thus the Trust Fund is responsible for the payment of benefits: (1) the Director failed to present evidence that Peabody Energy self-insured Pine Ridge; (2) the Department of Labor (the DOL) released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the Director is equitably estopped from imposing liability on Peabody Energy; and (6) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. Employer's Brief at 15-28. Moreover, 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.[7] Employer's Brief at 20-21.

[7] We reject Employer's arguments that the district director erred in failing to put the Black Lung Disability Trust Fund (the Trust Fund) on notice of this claim as a potentially responsible party and act on its request for reconsideration of the Proposed Decision and Order (PDO). Employer's Brief at 2-3. The Act provides that the Director is a party in all black lung claims and represents the interests of the Trust Fund. 30 U.S.C. §932(k); *see Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 502 n.5 (4th Cir. 1999) (Director is a party in all black lung claims); *see also Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-65-66 (1992); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199, 1-202 (1979); Director's Brief at 7 n.7. Further, while Employer requested reconsideration of Peabody Energy Corporation's designation as the responsible carrier in the district director's PDO, it also

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *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.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Pine Ridge and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.[8]

Miner's Claim

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if he had a pulmonary or respiratory impairment that, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[9] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all

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requested the district director to forward the claim for a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 69. The district director forwarded the claim to the OALJ as requested. Director's Exhibits 70, 72.

[8] Employer argues the ALJ erred in excluding the depositions of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation employees. Employer's Brief at 24-26. In *Bailey*, the same depositions were admitted and the Board held they do not support Employer's argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit that Patriot financed under Peabody Energy's self-insurance program. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n.17. Given that the Board has previously held these depositions do not support Employer's argument, any error in excluding them here is harmless. *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).

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ considered the pulmonary function study and the arterial blood gas study Dr. Raj conducted during the Miner's complete pulmonary evaluation on June 5, 2017. Decision and Order 6-7, 14-15; MC Director's Exhibit 16. The pulmonary function study produced qualifying values without a bronchodilator and the arterial blood gas study produced qualifying values at rest. *Id.* The ALJ found Claimant established the Miner was totally disabled by a respiratory impairment based on the pulmonary function study, arterial blood gas study, and medical opinions, and in consideration of the evidence as a whole.[10] Decision and Order 14-17. As Employer does not challenge the ALJ's finding that the medical opinion evidence established the Miner was totally disabled, we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14-16.

We reject Employer's argument that the ALJ erred in discrediting Dr. Basheda's opinion that the June 5, 2017 pulmonary function and arterial blood gas studies are invalid. Employer's Brief at 3-6. When considering pulmonary function and arterial blood gas studies, an ALJ must determine whether they are in substantial compliance with the quality standards.[11] *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987); 20 C.F.R. §§718.101, 718.103, 718.105; 20 C.F.R. Part 718, Appendices B and C; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the factfinder, must determine the probative weight to assign the study. *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

[10] The ALJ found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 15.

[11] An ALJ must consider a reviewing physician's opinion regarding the validity and reliability of a pulmonary function study or an arterial blood gas study. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study or an arterial blood gas study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

Dr. Basheda opined the June 5, 2017 pulmonary function and arterial blood gas studies are invalid because they were conducted two days before the Miner was "hospitalized for severe legionella pneumonia."[12] SC Employer's Exhibit 13 at 17-19. He stated the Miner's "hypoxemia was related to his acute pneumonia." *Id*. at 18. He also opined the pulmonary function study is invalid because the Miner exhaled for less than six seconds. SC Employer's Exhibit 3 at 3, 13; 13 at 17-19. In contrast, Dr. Gaziano validated both of these studies. MC Director's Exhibit 18. The ALJ found Dr. Basheda's opinion unpersuasive. Decision and Order at 14-15.

We find Employer has not demonstrated error in the ALJ's findings. As discussed, the Miner was hospitalized two days *after* Dr. Raj conducted on June 5, 2017 pulmonary function and arterial blood gas studies. MC Director's Exhibit 16; SC Director's Exhibit 15 at 287-88. The ALJ noted the regulations deem invalid a pulmonary function study or arterial blood gas study that is "performed during or soon after an acute respiratory illness." Decision and Order at 14 n.11; *see* 20 C.F.R. Part 718, Appendix B(2)(i), Appendix C. Based on the date of the miner's hospitalization, he concluded the Miner's pulmonary function and arterial blood gas studies were "not performed during or soon after an acute respiratory illness."[13] Decision and Order at 14 n.11. Since the only dated record evidence definitively showing the Miner had an acute respiratory illness at that time was his hospitalization, the ALJ permissibly rejected Dr. Basheda's conclusion that the studies are invalid because of the Miner's subsequent hospitalization for legionella pneumonia. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal*

[12] The Miner was admitted to Charleston Area Medical Center on June 7, 2017, where his positive test for urine legionella indicated he had legionella pneumonia. SC Director's Exhibit 15 at 287-288. Dr. Basheda explained legionella pneumonia is a bacterial pneumonia that presents in symptoms such as septic shock. SC Employer's Exhibit 13 at 6.

[13] Employer does not point to any treatment record or other evidence that the Miner was acutely ill at the time of the June 5, 2017 pulmonary function and arterial blood gas studies. SC Director's Exhibits 16, 19. Contrary to Employer's argument, the regulation is clear: a study is invalid if taken "*during* or *soon after* an acute respiratory illness." 20 C.F.R. Part 718, Appendix B(2)(ii); Employer's Brief at 4. Apart from his conclusory statement that the Miner was ill at the time of testing, Dr. Basheda testified that the onset of the Miner's infection was "pretty sudden." SC Employer's Exhibit 13 at 13. He offered no explanation as to how he concluded the Miner was acutely ill when he was tested. *Id*. at 17-19.

Co. v. Akers, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 14; Employer's Brief at 4.

Further, the ALJ correctly acknowledged Appendix B[14] prohibits reliance on a pulmonary function study in which the Miner failed to blow for at least seven seconds, unless a plateau arises for the last two seconds in the volume-time curve. 20 C.F.R. Part 718, Appendix B(2)(ii); Decision and Order at 14. Pulmonary function studies are presumed valid in the absence of evidence to the contrary, and the party challenging the validity of a study must affirmatively establish the results are suspect or unreliable. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Vivian*, 7 BLR at 1-361. As Dr. Basheda did not refute that a plateau existed, no other physician opined as to the validity or absence of a plateau, and Dr. Gaziano opined that the study was valid, the ALJ permissibly found Employer failed to rebut the presumption of validity. *See id.*; Decision and Order at 14; Employer's Brief at 5-6.

Because Employer has not shown that the ALJ erred in determining that the pulmonary function and arterial blood gas studies are qualifying and valid, we affirm his finding that the studies establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 14-15. As Employer raises no other challenge, we affirm the ALJ's finding that the medical opinion evidence and evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Skrack*, 6 BLR at 1-711; Decision and Order at 15-16. We thus affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 16-17.

[14] The quality standards at Appendix B(2)(ii) of 20 C.F.R. Part 718 state, in pertinent part:

> The subject will then make a maximum inspiration from the instrument and when maximum inspiration has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort.

20 C.F.R. Part 718, Appendix B(2)(ii).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] 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 failed to establish rebuttal by either method.[16]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The ALJ considered the medical opinions and depositions of Drs. Tuteur and Basheda, and the autopsy reports of Drs. Oesterling and Swedarsky.[17] SC Employer's Exhibits 1-3, 13, 14.

Drs. Tuteur and Basheda opined the Miner did not have legal pneumoconiosis. SC Employer's Exhibit 2 at 8; 3 at 14-15; 14 at 16-17. Drs. Oesterling and Swedarsky did not

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[15] "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).

[16] We affirm, as unchallenged, the ALJ's finding that Employer failed to disprove the existence of clinical pneumoconiosis. *Skrack*, 6 BLR at 1-711; *see* Decision and Order at 27; Employer's Brief at 10.

[17] The ALJ also considered the opinions of Drs. Raj and Perper that the Miner had legal pneumoconiosis. Decision and Order at 23-24, 27-28; MC Director's Exhibit 16; Claimant's Exhibits 1. Because their opinions do not aid Employer in rebutting the Section 411(c)(4) presumption, we decline to address Employer's arguments regarding the ALJ's weighing of their opinions. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9, 11-15.

specifically render an opinion on whether the Miner had legal pneumoconiosis. SC Employer's Exhibit 4 at 5; 14 at 28. The ALJ found Drs. Tuteur's and Basheda's opinions unpersuasive and thus insufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 27. He also found Drs. Oesterling's and Swedarsky's opinions not well-reasoned. *Id.* at 23-24.

Dr. Tuteur excluded coal mine dust exposure as a cause of the Miner's obstructive respiratory impairment based, in part, on a negative chest x-ray reading. SC Employer's Exhibit 2 at 8. He also noted there was "no symptomatic evidence that any primary pulmonary process was present" for more than ten years after his coal mine employment ceased in 2002. *Id.* Contrary to Employer's argument, the ALJ permissibly found Dr. Tuteur's opinion unpersuasive as the regulations recognize legal pneumoconiosis may be diagnosed "notwithstanding a negative X-ray" and pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §§718.201(c); 718.202(a)(4), (b); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (explaining that a medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,945, 79,971 (Dec. 20, 2000); Decision and Order at 16-17; Employer's Brief at 12-15.

Additionally, Dr. Basheda opined there was insufficient data to determine if the Miner had legal pneumoconiosis as there were no valid pulmonary function or arterial blood gas studies. SC Employer's Exhibits 3 at 15; 13 at 16-18. Contrary to Employer's argument, the ALJ permissibly rejected Dr. Basheda's opinion because it is contrary to his finding that the Miner was totally disabled based on his valid objective testing.[18] *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order 27; Employer's Brief 4-5.

Dr. Oesterling conducted an autopsy report and reviewed twelve slides taken from the Miner's lungs. SC Employer's Exhibit 4 at 1. He concluded the "limited structural

[18] We further reject Employer's argument that the ALJ committed a reversible error in discrediting Dr. Basheda for failing to address the Miner's arterial blood gas study. Decision and Order at 16; Employer's Brief at 4-5. Although the ALJ incorrectly found Dr. Basheda did not address the Miner's arterial blood gas study, this error is harmless as the ALJ permissibly discredited Dr. Basheda's invalidation of the Miner's pulmonary function study for the same reason (i.e., that the test was conducted during a time the Miner was suffering from an acute illness). *See Larioni*, 6 BLR at 1-1278.

change due to coal dust is insufficient to have altered [the Miner's] pulmonary function." *Id.* at 5. Dr. Swedarsky also reviewed the twelve slides taken from the Miner's lungs as part of his autopsy report and noted the Miner "may have [thirty-four] years of coal mine employment." SC Employer's Exhibit 14 at 1, 2. He diagnosed mild emphysema. *Id.* at 19-20. He did not, however, provide an opinion on the etiology of the Miner's emphysema. *Id.* at 20.

Contrary to Employer's argument, the ALJ permissibly found Dr. Oesterling did not adequately explain why he eliminated the Miner's twenty-six years of exposure to coal dust in coal mine employment as a contributing or aggravating factor to his totally disabling lung impairment. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his impairment is not in fact significantly related to his years of coal mine employment"); Decision and Order at 23; Employer's Brief at 7. Moreover, in light of Drs. Perper's and Swedarsky's observation of emphysema on several slides, the ALJ permissibly found Dr. Oesterling's opinion unpersuasive because it lacked similar findings of emphysema.[19] *Owens*, 724 F.3d at 557; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 23. As it is unchallenged, we affirm this finding. *Skrack*, 6 BLR at 1-711.

We further reject Employer's argument that the ALJ erred in discrediting Dr. Swedarsky's opinion.[20] Employer's Brief at 9-10. The ALJ found Dr. Swedarsky's

[19] We also reject Employer's argument that the ALJ erred in discrediting Dr. Oesterling's opinion regarding the presence of black pigmentation. Decision and Order at 23; Employer's Brief at 7-8. Dr. Oesterling noted that all the photographs he took of each of the slides "have a fairly solid appearance and none demonstrate obvious evidence of black pigment in these images." SC Employer's Exhibit 4 at 1. Conversely, Drs. Perper and Swedarsky found black pigments, coal macules, anthracotic macules, and macules on all the slides. *Id.* at 3-17; Claimant's Exhibit 1 at 5-16. As substantial evidence supports it, we affirm the ALJ's weighing of Dr. Oesterling's opinion. Decision and Order at 23.

[20] Employer argues the ALJ erred in rejecting Dr. Swedarsky's opinion for failing to render an opinion on legal pneumoconiosis despite being in possession of the Miner's medical records. Employer's Brief at 9; Decision and Order at 23-24. Because Dr. Swedarsky's opinion is insufficient to carry Employer's burden because he did not render an opinion on whether the Miner's emphysema was related to his coal mine dust exposure, any error the ALJ made in weighing his opinion is harmless. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015); *Larioni*, 6 BLR at 1-1278; Decision and Order at 24, 28; SC Employer's Exhibit 14; Employer's Brief at 9.

observation that the emphysematous changes seen on the slides are "not geographically associated with coal nodules" insufficient to rebut the presumption that the Miner's emphysema was due to his coal mine dust exposure. *See Minich*, 25 BLR at 1-155 n.8 ("Employer must show that the miner does not have legal pneumoconiosis, i.e., a chronic lung disease or impairment and its sequelae that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); Decision and order at 23-24; SC Employer's Exhibit 14 at 24.

Employer generally argues the ALJ should have found the opinions of Drs. Tuteur, Basheda, Oesterling, and Swedarsky well-reasoned and documented. Employer's Brief at 4-5, 7-15. We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in rejecting the opinions of Drs. Tuteur, Basheda, Oesterling, and Swedarsky, we affirm his finding that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[21] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered 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); Decision and Order at 29-31. Contrary to Employer's contention, the ALJ permissibly discredited Drs. Tuteur's and Basheda's disability causation opinions because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. Decision and Order at 29-31; *Epling*, 783 F.3d at 504-05 (explaining a physician who fails to diagnose

[21] Employer contends the ALJ is biased against it because he inaccurately stated "Dr. Tuteur and Dr. Basheda did not find simple pneumoconiosis even after reviewing the autopsy and biopsy reports, both of which were positive for simple coal workers' pneumoconiosis." Employer's Brief at 10. It argues the ALJ's "statement demonstrates how far [he] would go to find against [it] by making findings that are simply not supported by the record at all." *Id*. It maintains "[b]oth Dr. Tuteur and Dr. Basheda *did* find the presence of simple pneumoconiosis." *Id*. (emphasis in original). A charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). Here, Employer points to no concrete evidence establishing the ALJ exhibited a bias due to his mischaracterization of Drs. Tuteur's and Basheda's opinions. Thus we reject Employer's claim.

pneumoconiosis, contrary to the ALJ's finding, cannot be credited on rebuttal of disability causation absent specific and persuasive reasons); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995). Further, Employer has not identified any aspect of Drs. Tuteur's and Basheda's opinions that suggest their disability causation findings were independent of their mistaken belief that the Miner did not have legal pneumoconiosis. Consequently, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 154-56.

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

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge 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 Decision and Order Awarding Benefits on May 11, 2021, Decision and Order Awarding Benefits on March 31, 2021, and Order Granting Director's Motion to Strike Employer's Exhibits and Order Denying Dismissal of Employer As Responsible Operator on March 30, 2021 are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge