U.S. Department of Labor

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

BRB No. 21-0526 BLA

N.J. CANTRELL (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHAPPERAL COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/16/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (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) Larry A. Temin's Decision and Order Awarding Benefits (2019-BLA-05927) rendered 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[1] filed on March 13, 2017.[2]

The ALJ found Employer is the responsible operator. He determined the Miner had 10.5 years of coal mine employment and therefore Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Next, he considered whether Claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718[4] without the presumption. He found Claimant established the Miner was totally disabled by a respiratory or pulmonary impairment due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). Thus, he found Claimant established a change in an applicable condition of entitlement and awarded benefits.[5] 20 C.F.R. §725.309.

[1] The Miner died on November 15, 2021; his wife is pursuing his claim on his behalf. *See Cantrell V. Chapperal Coal Corp.*, BRB No. 21-0526 BLA (April 18, 2022) (unpub. Order).

[2] The Miner filed a prior claim for benefits on October 25, 1994, but the record for that claim is unavailable. Director's Exhibit 1. Because the Miner's prior claim record is unavailable, the ALJ assumed the claim was denied for failure to establish any element of entitlement. Decision and Order at 14.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] The ALJ found no evidence of complicated pneumoconiosis; therefore, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 14-19.

[5] Where a claimant 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(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of

On appeal, Employer asserts that the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[6] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. Furthermore, it challenges its designation as the responsible operator. On the merits, Employer argues the ALJ erred in finding the Miner had legal pneumoconiosis. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response arguing Employer forfeited its Appointments Clause challenge by failing to raise it before the ALJ and urging rejection of its constitutional challenges to the ALJ's appointment and removal protections. The Director also urges the Benefits Review Board to affirm the ALJ's determination that Employer is the responsible operator. Employer filed a reply brief reiterating its arguments.[7]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance

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entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because the ALJ assumed the Miner's prior claim was denied for failure to establish any element of entitlement, he found Claimant had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *Id.*; Decision and Order at 14.

[6] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[7] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had 10.5 years of coal mine employment and was totally disabled by a respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 4.

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).

Appointments Clause

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 10-16; Employer's Reply Brief 4-7 (unpaginated). It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but maintains ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[10] Employer's Brief at 12-16; Employer's Reply Brief 7-8 (unpaginated).

[8] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript 22-23.

[9] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[10] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

We agree with the Director's argument that Employer forfeited its Appointments Clause challenge by failing to raise it when the case was before the ALJ.[11] Director's Response at 5-6. Appointments Clause issues are "non-jurisdictional" and, thus, subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. 2044, 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202 , 207 (4th Cir. 2022).

Lucia was decided two years before the hearing in this case and three years before the ALJ issued his Decision and Order. Employer, however, failed to raise its argument while the case was before the ALJ. *See* Hearing transcript at 17-19, 43-45; Employer's Brief to the ALJ. Had Employer timely raised the argument before the ALJ, he could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision.

Employer identifies no basis for excusing its forfeiture of the issue beyond stating it was not required to raise it to the ALJ, which we have rejected. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Davis*, 987 F.3d at 588; *Kiyuna*, 53 BRBS at 11 (citing *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (upholding the ALJ's determination that the Appointments Clause argument is an "as-applied" challenge that the ALJ can address and thus can be waived or forfeited)); *see* Employer's Reply Brief at 1-3 (unpaginated). Because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its forfeited argument. *See Davis*, 937 F.3d at 591-92; *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11. Consequently, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

Removal Protections

Employer also challenges the constitutionality of the removal protections afforded to DOL ALJs. Employer's Brief at 16-21; Employer's Reply Brief at 8-12 (unpaginated). Employer generally argues the removal provisions in the Administrative Procedure Act, 5

[11] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. , 138 S. Ct. 13, 17 n.1 (2017), (quoting *United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 17-20; Employer's Reply at 8-9 (unpaginated). Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the holding of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 16-20; Employer's Reply Brief at 9-10 (unpaginated).

As the Director argues, however, the removal argument is subject to issue preservation requirements and Employer likewise forfeited this issue by not raising it before the ALJ. *Davis*, 987 F.3d at 588; *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion). Because Employer has not identified any basis for excusing its forfeiture of the issue, we see no reason to further entertain its arguments. *See Davis*, 987 F.3d at 588; *Jones Bros.*, 898 F.3d at 677. Even had Employer preserved its argument, we would reject it 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).

Responsible Operator

The responsible operator is the potentially liable operator[12] that most recently employed the miner. 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or 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)(2).

[12] 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).

The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 4-5. We affirm this finding as Employer does not challenge it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Nor does it allege it is financially incapable of assuming liability for benefits. Thus, it can avoid liability only by establishing that another financially capable operator employed the Miner more recently for at least one year.

The ALJ considered whether the Miner worked for Robert Coal Company for at least one year after working for Employer. Decision and Order at 4-5. He noted the Miner earned $21,822.84 between 1982 and 1983 with this operator as set forth in his Social Security Administration (SSA) earnings records. *Id*.; *see* Director's Exhibit 8. He also credited the Miner's deposition testimony that he earned $180 a day at Robert Coal because this is "direct evidence from the [Miner] regarding the specific circumstances of his coal mine employment, namely how much he was paid each day." Decision and Order at 4-5; *see* Director's Exhibit 55 at 10. Dividing the Miner's total earnings by his daily earnings, the ALJ found the Miner only had 120 working days with Robert Coal and thus did not work for the company for at least one year.[13] *Id*.

Employer argues the ALJ should have discredited the Miner's testimony as equivocal[14] and inconsistent with the Miner's SSA earnings records. Employer's Brief at 21-22. Its argument lacks merit as it is simply a request to reweigh the Miner's testimony. The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus.*,

[13] Under the regulatory definition of "year," "[i]f a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125." 20 C.F.R. §725.101(32)(i). Thus, based on his finding that the Miner had only 120 working days with Robert Coal, he appropriately found less than one year of employment with that operator.

[14] Employer speculates that the Miner may have been more precise about his earnings with Robert Coal in his prior claim and the record of that claim has been destroyed. Employer's Brief at 23-24; Employer's Reply at 12-13. Thus it argues its due process rights have been violated. *Id*. We disagree. "The basic elements of procedural due process are notice and opportunity to be heard." *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009). Employer has not explained how it was deprived of notice and an opportunity to be heard insofar as it had the opportunity to cross-examine the Miner at the hearing in this case. *See* Hearing Transcript at 21-44.

Inc., 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Thus we reject this argument.[15] As Employer raises no other argument, we affirm the ALJ's responsible operator finding.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, 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. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *See 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 (1986) (en banc).

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis. Employer's Brief at 24-30. We disagree.

To establish legal pneumoconiosis, Claimant must prove 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). The United States Court of Appeals for the Sixth Circuit has held that a Claimant can establish a Miner's lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Forehand, Crum, Seaman, Tuteur, and Vuskovich. Decision and Order at 23-28. Dr. Forehand diagnosed the Miner with legal pneumoconiosis in the form of obstructive lung disease due to his cigarette smoking history and coal dust exposure. Director's Exhibit 13 at 5. Dr. Crum diagnosed the Miner with emphysema in his upper lobes possibly due to coal mine dust exposure and cigarette

[15] Employer argues for the first time on appeal that Blair Coal employed the Miner for at least one year. Employer's Brief at 22-23. Employer waived this argument when it conceded to the ALJ that operators that employed the Miner subsequent to Robert Coal did so for less than 125 days. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); Employer's Brief to the ALJ at 13.

smoke. Claimant's Exhibit 7 at 3. Dr. Seaman did not offer an opinion on whether the Miner had legal pneumoconiosis. Employer's Exhibit 6. Dr. Tuteur excluded legal pneumoconiosis, opining the Miner's chronic obstructive pulmonary disease (COPD) and emphysema are due to his smoking history alone and are unrelated to coal mine dust exposure. Claimant's Exhibit 4 at 3-5. Dr. Vuskovich also excluded legal pneumoconiosis, opining that the Miner's emphysema, obstructive ventilatory impairment, and degraded pulmonary oxygen transfer were due to his alpha-1 antitrypsin (A1A) deficiency. Employer's Exhibit 13 at 23.

The ALJ found the opinions of Drs. Forehand and Crum well-reasoned and documented. Decision and Order at 24-26. He found Dr. Seaman's opinion of no value on the issue of legal pneumoconiosis as she did not opine on the subject. *Id.* at 26. Further, he found the opinions of Drs. Tuteur and Vuskovich neither well-reasoned nor documented and Dr. Tuteur's opinion inconsistent with the preamble to the revised 2001 regulations. *Id.* at 26-27.

Employer argues Dr. Forehand's opinion should be given less weight given his overstatement of the Miner's length of coal mine employment and understatement of the Miner's smoking history. Employer's Brief at 24-27. Employer further argues the ALJ erred in finding Dr. Forehand's opinion established the Miner had legal pneumoconiosis. *Id.* We are unpersuaded.

Dr. Forehand diagnosed obstructive lung disease based on the Miner's symptoms and pulmonary function test results. Director's Exhibit 13 at 4. He opined the Miner's "[twelve] years working at the face of underground coal mines" where he was exposed to coal and rock dust and twenty-eight years of smoking exposure both caused his obstructive lung disease "because the effects of cigarette smoke and coal mine dust are additive." Director's Exhibit 13 at 5-6. The ALJ referenced the discussion in the preamble to the 2001 revised regulations of the additive nature of coal mine dust exposure and smoking. Decision and Order at 24-25. He permissibly found Dr. Forehand's opinion reasoned and documented because it is "based on his physical exam, the objective test results he obtained, and the [the Miner's] reported symptoms," and is consistent with the preamble's discussion of the additive nature of coal mine dust exposure and cigarette smoking.[16]

[16] Contrary to Employer's argument, the ALJ did not err in relying on the preamble when resolving the conflict in the medical opinion evidence. The preamble sets forth the DOL's resolution of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-16 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650

Decision and Order at 24-25; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *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"); 65 Fed. Reg. 79,940, 79,941, 79,943 (Dec. 20, 2000); Decision and Order at 26; Employer's Brief at 25-27.

We further reject Employer's contentions regarding Dr. Forehand's reliance on an inaccurate smoking and coal mine employment history. Employer's Brief at 24. The effect of an inaccurate smoking history on the credibility of a medical opinion is for the ALJ to determine. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The ALJ acknowledged Dr. Forehand's consideration of a twenty-eight year cigarette smoking history.[17] Decision and Order at 24. Viewing Dr. Forehand's report in light of the ALJ's finding "the record is mostly consistent in documenting that the Miner smoked about one pack of cigarettes per day for 30 years," substantial evidence supports the ALJ's finding that Dr. Forehand's opinion is credible. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick*, 13 BLR 1-52, 1-54; *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 and the effect of an inaccurate smoking history on the credibility of a medical opinion); Decision and Order at 24-26; Employer's Brief at 24.

Furthermore, the ALJ also found Dr. Forehand's reliance on a twelve-year coal mine employment history "sufficiently similar to the parties' stipulation that the [Miner] had 10.5 years of coal mine employment." Decision and Order at 25-26. The ALJ took the discrepancy in the length of the Miner's coal mine employment history that Dr. Forehand considered into account and the ALJ acted within his discretion in explaining that the discrepancy was not so great as to detract from the medical opinion's probative value. *See Rowe*, 710 F.2d at 255; *Sellards*, 17 BLR at 1-80-81. We therefore reject Employer's argument that the ALJ erred in finding Dr. Forehand's opinion reasoned and documented, and sufficient to establish legal pneumoconiosis.[18] *See Rowe*, 710 F.2d at 255.

F.3d 248 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000).

[17] The ALJ found "the record is mostly consistent in documenting that the [Miner] smoked about one pack of cigarettes per day for 30 years from the mid-1960s to around 1993." Decision and Order at 24. Acknowledging that there were some inconsistencies in the record, he found the record "shows the[Miner] has a substantial smoking history of approximately 30 to 40 pack-years." *Id.*

[18] As Claimant established legal pneumoconiosis based on Dr. Forehand's opinion, we need not address Employer's argument that the ALJ erred in crediting Dr. Crum's

Employer also argues the ALJ erred in discrediting the opinions of Drs. Tuteur and Vuskovich. Employer's Brief at 28. We remain unpersuaded. Dr. Tuteur opined the Miner's "COPD [was] due to the chronic inhalation of tobacco smoke, not coal mine dust" based on the fact "that never smoking coal miners develop COPD phenotype about 1% of the time or less[, which] is in contrast to never mining cigarette smokers that develop the COPD phenotype about 20% of the time." Claimant's Exhibit 4 at 3. Dr. Vuskovich opined the Miner's multiple lung infections accelerated his lung destruction and loss of pulmonary function. Employer's Exhibit 13 at 23. He explained the Miner's inherited alpha-1 antitrypsin (A1A) deficiency[19] caused "clinical pulmonary emphysema, his progressively worsening obstructive ventilatory impairment, and his substantially degraded pulmonary oxygen transfer." Employer's Exhibit 13 at 23. The ALJ permissibly found that, even if the Miner's impairment was caused by cigarette smoking or lung infections, neither doctor "provide[d] an explanation for how he determined that the [Miner's] years of coal mine dust exposure did not aggravate or contribute to his obstructive impairment." Decision and Order at 26-27; s*ee Adams*, 694 F.3d at 801-02; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (ALJ permissibly rejected physician's opinion where physician failed to adequately explain why coal mine dust exposure did not exacerbate a miner's smoking-related impairment); 65 Fed. Reg. at 79,940. We therefore affirm the ALJ's finding that the opinions of Drs. Tuteur and Vuskovich are not well reasoned. *See Rowe*, 710 F.2d 251, 255; Decision and Order at 26-28.

Employer generally argues the ALJ should have found the opinions of Drs. Tuteur and Vuskovich well reasoned and documented. Employer's Brief at 28-30. We consider Employer's argument to be a request that the Board reweigh the evidence, which we are

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opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 27-28.

[19] Dr. Vuskovich explained the following:

> Alpha-1 antitrypsin is a protein produced by liver cells. This protein is excreted by liver cells and travels to lungs to protect lungs from elastase. Elastase is a destructive, protein-dissolving (protease) enzyme produced by a human white blood cells (leukocytes). As a component of the innate immune system elastase protects lungs from infectious organisms by dissolving their cell walls and disrupting their internal structure. But elastase can harm lung tissue. To prevent lung tissue auto-digestion and consequent emphysema, pulmonary elastase levels must be controlled. Alpha 1-antitrypsin regulates pulmonary elastase to safe levels.

Employer's Exhibit 13 at 22.

not empowered to do. *Anderson*, 12 BLR 1-111, 1-113. Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant satisfied her burden of establishing legal pneumoconiosis with Dr. Forehand's opinion.[20] *See Barrett*, 478 F.3d at 356; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987).

As Employer raises no specific allegations of error regarding disability causation, we affirm the ALJ's finding that Claimant established the Miner's total respiratory disability is due to legal pneumoconiosis. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(c); Decision and Order at 30-31.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[20] Because the ALJ found Dr. Forehand's well-reasoned and documented opinion outweighs the contrary evidence, we reject Employer's argument that the ALJ shifted the burden of proof. Employer's Brief at 24.